These hypotheses are offered primarily as a device for clarifying the issues. It is also observed, however, that hypothesis 3, above, seems to be the one most compatible with the legislative history.

As already stated, this memorandum will be limited to an exposition of the legislative history which is relevant to the Fairness Doctrine. In effect, this involves a review of the history of section 315 since that section is the only apparent specific statutory mandate for the doctrine.

Section 315 had its inception in section 18 of the Radio Act of 1927 (44 Stat. 1170).

III. Section 18 of the Radio Act of 1927

The Radio Act of 1927 was passed by the 69th Congress. Section 18 of this Act, the forerunner of section 315 of the present Communications Act, read, in pertinent part:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station * * *.

It is noted that this section makes no requirement for fairness in the discussion of controversial or public issues. The legislative history indicates that this omission was intentional.

A. COMMITTEE REPORT AND DEBATES—HOUSE

The Radio Act derived from H.R. 9971 of the 69th Congress. The bill, as passed by the House, did not contain any comparable provision to section 18 of the Radio Act. This fact was noted in the minority views (signed by only one member) contained in the committee report on H.R. 9971:

> The broadcasting field holds untold potentialities in a political and propaganda way; its future use in this respect will undoubtedly be extensive and effective. There is nothing in this bill [H.R. 9971] to prevent a broadcasting station from permitting one party or one candidate or the advocate of a measure or a program or the opponent thereof, to employ its service and refusing to accord the same right to the opposing side; the broadcasting station might even contract to permit one candidate or one side of a controversy to broadcast exclusively upon the agreement that the opposing side should not be accorded a like privilege.[33]

When the bill was debated in the House some concern was expressed regarding freedom of speech over the radio:

> Mr. LaGuardia. The gentleman stated the recommendations, among which was a guarantee of free speech over the radio. What provision does the bill make to carry that out?
>
> Mr. White of Maine. It does not touch that matter specifically. Personally, I felt that we could go no further than the Federal Constitution goes in that respect. The pending bill gives the Secretary no power of interfering with freedom of speech in any degree.
>
> Mr. LaGuardia. It is the belief of the gentleman and the intent of Congress in passing this bill not to give the Secretary any power whatever in that respect in considering a license or the revocation of a license.
>
> Mr. White of Maine. No power at all.[34]

[33] House Rept. No. 464, 69th Cong., first sess. (1926); Minority views of Representative Davis, p. 16.

[34] 67 Cong. Rec. 5480 (1926).

Concern also was expressed by some members over the possibility of private, as opposed to Government, censorship, and discrimination.[35] An amendment was offered to provide that "equal facilities and rates, without discrimination shall be accorded to all political parties and all candidates for office, and to both the proponents and opponents of all political questions or issues." [36] This amendment, insofar as it would have prohibited unequal treatment of partisans of political questions, was similar in effect to the present Fairness Doctrine. This amendment was not put to a vote as it was ruled not germane to the section to which it was offered [37] and was not subsequently reoffered.

Another amendment was offered which would have made it a criminal offense to broadcast any personal attack into a State wherein such language would constitute libel or slander under the law of that State. This amendment was ultimately rejected by the House 287 to 57.[38]

The radio bill, H.R. 9971, was passed by the House 218 to 123, and sent to the Senate.[39]

Summary of House action

Any conclusions drawn from the House debates on the original Radio Act with respect to the Fairness Doctrine must be drawn by negative inference. H.R. 9971 did not attempt to impose any requirement of "fairness" on broadcasters. This omission was pointed out both in the minority views contained in the committee report on the bill, and during the floor debates. The amendment which would have prohibited discrimination among the proponents and opponents of "political questions or issues" was not adopted. Nor was an amendment making it a crime to broadcast personal attacks which constituted libel or slander.

The significance of the failure of the House to adopt either of these two amendments is debatable. The personal attack amendment aroused objections because of its provision for criminal penalties. The amendment prohibiting discrimination among proponents and opponents on political questions did not come to a vote since it was ruled not germane when offered, and was not subsequently reoffered.

B. COMMITTEE REPORT AND DEBATES—SENATE

In the Senate the bill was referred to the Committee on Interstate Commerce where it was enlarged considerably. HR 9971, as passed by the House, did not contain any "fairness" requirements, either as to political candidates or public issues. A substitute was reported by the Senate committee,[40] section 4 of which provided in pertinent part:

> If any licensee shall permit a broadcasting station to be used as aforesaid, or by a candidate or candidates for public office, *or for the discusison of any question affecting the public*, he shall make no discrimination as to the use of such broadcasting station, and with respect to said matters the licensee shall be deemed a common carrier in Interstate commerce: *Provided*, that such licensee shall have no power to censor the material broadcast. [Italics supplied.]

This provision was the subject of extensive debate on the Senate floor, and was subsequently amended to eliminate the references to common

[35] 67 Cong. Rec. 5483, 5489, 5491, 5501 (1926).
[36] 67 Cong. Rec. 5560 (1926).
[37] *Id.*, p. 5561.
[38] *Id.*, p. 5646.
[39] *Ibid.*
[40] S. Rept. No. 772, 69th Cong., 1st sess. (1926).

carrier status and to "question affecting the public."[41] Some of the discussion on this provision follows:

Mr. DILL. I have consulted with members of the committee regarding that provision [i.e., above quoted language], and I think I am entitled to say that at least most of the committee are agreed that lines 10 to 17 should be stricken out and an amendment inserted. * * *

I may say that this is a provision that has caused more objection to the bill than probably all the other provisions combined. It is a provision to which the committee gave more consideration and on which the committee spent more time, than on probably any other provision. We finally agreed to it in order, I think, to get the bill out of the committee. After we got it out we realized that the "common carrier" phrase was an unwise phrase, to say the least, at this time.

* * * * * * *

So that we [will] take out the objectionable feature. * * *

Mr. WILLIS. I think that remedies one serious objection I had in mind, as to line 12, particularly, which is proposed to be stricken out, where it says "or for the discussion of any question affecting the public."

Mr. DILL. That is a rather broad statement.

Mr. WILLIS. Yes.[42]

The amendment proposed as a substitute for the language of the reported bill read as follows:

If any licensee shall permit a broadcasting station to be used by a candidate or candidates for any public office, he shall afford equal opportunities to all candidates for such public office in the use of such broadcasting station: *Provided*, That such licensee shall have no power to censor the material broadcast under the provisions of this paragraph and shall not be liable to criminal or civil action by reason of any uncensored utterances thus broadcast.

As can be seen, this amendment differed from the original language in three major respects:

(1) It deleted the provision making broadcasters common carriers with respect to political broadcasts and public issues,

(2) It deleted the ban on discrimination with respect to discussing "any question affecting the public," and

(3) It added the stipulation that the licensee should not be liable to civil or criminal action by reason of any uncensored utterances broadcast pursuant to this section.

Senator Howell argued against this amendment. Excerpts from his remarks are set forth below. It is noted that they express essentially the same views as were later contained in the FCC's 1949 *Editorializing Report*:[43]

Mr. HOWELL. Mr. President, radio affords such a unique facility of publicity that one has to think very carefully lest he go astray, thinking of newspapers and reasoning by analogy. * * * We have tens of thousands of newspapers, magazines, and other publications, but there is now from necessity, and will be hereafter, only a limited number of radio stations. As the Senator from Washington stated yesterday, the total number of stations that are now authorized for broadcasting is about 500 * * * and there are certain great interests in this country that have radio stations which practically cover the United States.

We are all familiar with the results of propaganda, its dangers and its advantages; and the question which we are called upon to settle now is how the public may enjoy the advantages of broadcasting and avoid the dangers that may result therefrom. It must be recognized that, so far as principles and policies are concerned, they are major in political life; candidates are merely subsidiary. We recognized that fact when this bill was formulated and provided that if a

[41] 67 Cong. Rec. 12502, 12505 (1926).
[42] *Id.*, p. 12358.
[43] *Editorializing by Broadcast Licensees*, 25 R.R. 1901 (1949).

radio station allowed the discussion of a public question it must afford, if requested, an opportunity to present the other side.

I think it was the view of the committee that if any subject was to be presented to the public by any of the limited number of stations, the other side should have the right to use the same forum; and if such privilege were not to be granted, then there should be no such forum whatever. * * *

Mr. President, to perpetuate in the hands of a comparatively few interests the opportunity of reaching the public by radio and allowing them alone to determine what the public shall and shall not hear is a tremendously dangerous course for Congress to pursue. * * * Are we to consent to the building up of a great publicity vehicle and allow it to be controlled by a few men, and empower those few men to determine what the public shall hear?

It may be urged that we do that with the newspapers. Yes, that is true; but anyone is at liberty to start a newspaper and reply. Not so with a broadcasting station. However, there are only about 500 who are allowed the privilege of conducting broadacsting stations, and there are not as many broadcasting stations as there are fingers on one of my hands—not more than that—that have the privilege of covering the entire United States. * * *

* * * * * * *

The Senator from Washington has left in the bill a provision respecting candidates. It is important, but it has not anything like the importance of the provision he has stricken out—the discussion of public questions.[44]

Senator Dill, the sponsor of the radio bill and the proponent of the amendment to delete the reference to discussions of public questions, replied as follows:

Mr. DILL. I sympathize with a great deal of what the Senator is saying, but I want to remind the Senator of the danger of having the words "public questions" in the bill.

That is such a general term that there is probably no question of any interest whatsoever that could be discussed but that the other side of it could demand time; and thus a radio station would be placed in the position that the Senator from Iowa mentions about candidates, namely, that they would have to give all their time to that kind of discussion, or no public question could be discussed.

As I say, I sympathize with the Senator's position; but the opposition to that was so strong in the minds of many that it seemed to me wise not to put it in the bill at this time, but to await developments, and get this organization to functioning, and the bill can be amended in the future.

I just wanted to leave that idea with the Senator as to my reasons for taking the view I do.[45]

As stated above, the amendment was adopted.[46] The amended bill passed the Senate, and conferees were appointed.[47]

Summary of Senate action

The substitute version of H.R. 9971 which was reported by the Senate Interstate Commerce Committee enlarged the House version of the bill by incorporating two prohibitions against discrimination in the area of political broadcasting: (*a*) with respect to candidates, and (*b*) with respect to "any question affecting the public." As related above, the latter prohibition was eliminated by Senator Dill's amendment on the floor of the Senate.

C. HOUSE-SENATE CONFERENCE

In conference, the radio bill was rewritten to read as follows; this is the wording enacted as section 18 of the Radio Act of 1927:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities

[44] 67 Cong. Rec. 12503–04 (1926).
[45] *Ibid.*
[46] *Id.*, p. 12505.
[47] *Id.*, p. 12618.

to all other such candidates for that office in the use of such broadcasting station, and the Commission shall make rules and regulations to carry this provision into effect; Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

The conference report summarized, but did not explain the section.[48]

D. SUMMARY OF CONGRESSIONAL ACTION ON THE RADIO ACT OF 1927

Since section 18 of the Radio Act was later carried forward verbatim as section 315 of the Communications Act of 1934,[49] its legislative history is relevant to an analysis of the present law. As enacted by the 69th Congress, the Radio Act contained no provision similar to the Fairness Doctrine. This omission seems to have been specifically intended. As indicated above, the question of whether licensees ought to be under a legal obligation to be nondiscriminatory in their discussion of public questions was taken up during the consideration of the Radio Act. Moves to incorporate such a requirement into the law were rejected in both the House and Senate. This rejection was much more sharply defined in the Senate debates than in the House.

These legislative events would appear to cast serious doubt on the proposition that the Fairness Doctrine, at least in substance, is a necessary corollary of the "public interest" standard contained in the Radio Act, and carried forward into the 1934 Communications Act. Had this been the intention or understanding of the members of the 69th Congress the debate between Senators Dill and Howell, summarized above, would have been moot, since the language which Senator Howell sought to preserve would have been essentially surplusage. There is no suggestion in the legislative history that this was the case.

IV. Action in the 72nd Congress to Amend the Radio Act

H.R. 7716, introduced during the first session of the 72nd Congress, was the most important transitional step between the 1927 Radio Act and the 1934 Communications Act. The bill sought to amend 12 different sections of the Radio Act. Section 14 of H.R. 7716 sought to strike out section 18 of the Radio Act with respect to the treatment of political candidates, and substitute an amended section. The purpose of the amendment, among other things, was to extend the requirements of equality of treatment of political candidates to supporters and opponents of candidates, and to "public questions" before the people, a legislature, or city council for a vote.[50]

This bill passed both Houses of Congress, but was subjected to a pocket veto by President Hoover.[51] The same "fairness" type provision was reintroduced in the Senate during the 73d Congress (S. 3285) for incorporation into the 1934 Communications Act, but was not adopted (see below).

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[48] H. Rept. No. 1886, 69th Cong., 2d sess. (1927).
[49] 48 Stat. 1088.
[50] H. Rept. 2106, 72d Cong., 2d sess. (conference report), at p. 6.
[51] See generally, McMahon, *"Regulation of Broadcasting—Half a Century of Government Regulation of Broadcasting and the Need for Further Legislative Action."* A study for the House Committee on Interstate and Foreign Commerce, 85th Cong., second sess. (1958), pp. 21–39.

V. The Communications Act of 1934

Section 18 of the Radio Act was carried forward as section 315 of the Communications Act of 1934. The bill passed by the Senate, S. 3285, sought to enlarge the requirements of section 18, imposing a fairness standard on the discussion of public questions to be voted upon at an election:

> Sec. 315. (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such station; and if any licensee shall permit any person to use a broadcasting station in support of or in opposition to any candidate for public office, or in the presentation of views on a public question to be voted upon at an election, he shall afford equal opportunity to an equal number of other persons to use such station in support of an opposing candidate for such public office, or to reply to a person who has used such broadcasting station in support of or in opposition to a candidate, or for the presentation of opposite views on such public questions. Furthermore, it shall be considered in the public interest for a licensee, so far as possible, to permit equal opportunity for the presentation of both sides of public questions.
>
> (b) The Commission shall make rules and regulations to carry this provision into effect. No such licensee shall exercise censorship over any material broadcast in accordance with the provisions of this section. No obligation is imposed upon any licensee to allow the use of his station by any candidate, or in support of or in opposition to any candidate, or for the presentation of views on any side of a public question.
>
> (c) The rates charged for the use of any station for any of the purposes set forth in this section shall not exceed the regular rates charged for the use of said station to advertisers furnishing regular programs, and shall not be discriminatory as between persons using the station for such purposes.

This section was described as follows in the report of the Senate Committee on Interstate Commerce:[52]

> Section 315 on facilities for candidates for public office is a considerable enlargement of section 18 of the Radio Act. It is identical with a provision in H.R. 7716, 72d Congress, which was passed by both Houses.
>
> This section extends the requirement of equality of treatment of political candidates to supporters and opponents of candidates, and public questions before the people for a vote. It also prohibits any increased charge for political speeches. No station owner is required to permit the use of his station for any of these purposes but if a station permits one candidate or the supporters or opponents of a candidate, or of a public question upon which the people are to vote, to use its facilities, then there is the requirement of equality of treatment and that no higher rates than ordinary advertising rates shall be charged.

The House Committee on Interstate and Foreign Commerce reported a substitute bill which omitted the above provisions concerning fairness in the discussion of public questions.[53]

The Conference Committee incorporated section 18 verbatim as section 315 of the Communications Act of 1934.[54] The enactment of the Communications Act in the 73d Congress provided another instance wherein language similar to the present Fairness Doctrine was unsuccessfully proposed for incorporation into the law.

It might appropriately be noted at this point that the Fairness Doctrine as presently enunciated by the Federal Communications Commission applies to all "controversial issues of public importance." The Communications Act of 1934 as originally enacted contained no such provision. The 73d Congress, which voted the Communications

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[52] S. Rept. No. 781, 73d Cong., 2d sess. (1934), at p. 8.
[53] H. Rept. No. 1850, 73d Cong. (1934).
[54] H. Rept. No. 1918, 73d Cong. (1934), p. 49.

Act into law, rejected a much more limited version of the Fairness Doctrine in that it eliminated from the bill as passed by the Senate a provision that would have applied only to a "public question to be voted upon at an election." It should also be noted, however, that in its requirement for "equal opportunity" the rejected language was more rigorous than the present doctrine which asserts a standard of reasonableness rather than strict equality.

The wording of section 315 remained unchanged until amended by the Communications Act Amendments of 1952. These amendments, as discussed below, did not change the language of section 315 with respect to its Fairness Doctrine implications.

VI. 1952 Amendments to the Communications Act

The 1952 amendments to section 315 added a new subsection (b) the purpose of which was to prevent licensees from charging more for political time than was charged for other types of programs. It derived from subsection (d) of an amendment offered on the floor of the House to S. 658, 82d Congress,[55] which read:

> Sec. 11. That section 315 of the Communications Act of 1934 (47 U.S.C. 315) is amended to read as follows:
>
> "Facilities for candidates for public office
>
> "Sec. 315 (a) If any licensee shall permit any legally qualified candidate for any public office in a primary, general, or other election, or any person authorized in writing by such candidate to speak on his behalf, to use a broadcasting station, such licensee shall afford equal opportunities in the use of such broadcasting station to all other such candidates for that office or to persons authorized in writing by such other candidates to speak on their behalf.
>
> "(b) The licensee shall have no power to censor the material broadcast by any person who is permitted to use its station in any of the cases enumerated in subsection (a) or who uses such station by reason of any requirement specified in such subsection; and the licensee shall not be liable in any civil or criminal action in any local, State, or Federal court because of any material in such broadcast, except in case said licensee shall willfully, knowingly, and with intent to defame participate in such broadcast.
>
> "(c) Except to the extent expressly provided in subsection (a), nothing in this section shall impose upon any licensee any obligation to allow the use of its broadcasting station by any person.
>
> "(d) The changes made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the minimum charges made for comparable use of such station for other purposes.
>
> "(e) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section."

It is noted that, had this amendment to section 315 been enacted, it would have enlarged the "equal opportunity" provisions to include statements made by authorized spokesmen of candidates. The conference report recommended an amendment in the nature of a substitute which added the present subsection (b).[56] The report discussed this change as follows:

> Section 11 of the House amendment would have amended section 315 of the Communications Act which relates to the utilization of broadcasting facilities by candidates for public office. The Senate bill did not propose to amend section 315.

[55] 98 Cong. Rec. 7415 (1952).
[56] H. Rept. No. 2426, 82d Cong. (1952).

Under the present law section 315 provides that if any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, the licensee must afford equal opportunities to all other candidates for that office in the use of such broadcasting station; and it is further provided that the licensee shall have no power of censorship over the material broadcast under the section. The House amendment would have provided that equal opportunity must be afforded to all other candidates or their authorized spokesmen also in those cases in which a spokesman for a candidate for public office has been permitted to use a broadcasting station. * * * The section as modified by the House amendment also provided that the charges made for the use of any broadcasting station for any of the purposes set forth in the section should not exceed the minimum charges made for comparable use of such station for other purposes. The conference substitute omits the provisions contained in the House amendment with respect to equal opportunity on account of broadcasts made by spokesmen for candidates. * * *

The provision with respect to charges made by broadcasters for political broadcasts has been retained but has been modified by striking out the word "minimum." The committee of conference agreed to omit the provision with respect to * * * the extension of the present law to include spokesmen for candidates because these subjects have not been adequately studied by the Committees on Interstate and Foreign Commerce of the Senate and the House of Representatives.[57]

The 1952 amendments did not alter the language of section 315 concerning equal opportunities for candidates for public office. These amendments did involve a regrouping of the section into three subsections. The new subsection 315(b), which has just been described, was followed, in subsection (c) by a provision that the FCC: "shall prescribe appropriate rules and regulations to carry out the provisions of this section."

This is essentially the language which, prior to the 1952 amendments, was found in the first sentence of section 315: "* * * and the Commission shall make rules and regulations to carry this provision into effect." Prior to the 1952 amendments, section 315 embodied only one provision, that of equal opportunities for competing candidates. Since the 1952 amendments imposed another provision—that of uniformity of charges for political *vis-a-vis* other uses—the regrouping and minor language changes noted merely preserved the internal consistency of section 315.

The "equal opportunity" language of section 315 remained unaltered from its initial inclusion as Section 18 of the Radio Act until the Communications Act Amendments of 1959. This was despite the various attempts, described above, to enlarge the underlying equality of treatment requirement to embrace more than candidates for office. As has been seen, unsuccessful proposals had been made to include "political questions or issues"; "any question affecting the public"; and "public questions to be voted upon at an election." The conference report accompanying the 1952 amendments rejected the House version that would have extended the "equal opportunities" requirement to cover statements by spokesmen of candidates.

Prior to proceeding to a discussion of the 1959 amendments, it would be useful to review briefly the actions of the Federal Radio Commission and Federal Communications Commission, and the judicial decisions which took place up to the time of the 1959 amendments.

[57] *Id.*, pp. 20–21.

VII. Action by the Courts, the Federal Radio Commission, and the Federal Communications Commission Relevant to the Fairness Doctrine—1927–1959

Comprehensive accounts of the circumstances which necessitated the Radio Act of 1927 may readily be found elsewhere.[58] The purpose of the following brief description is to review quickly the considerations which motivated this legislation since these historical facts have had their part in the formation of the Fairness Doctrine.

The first domestic law for the control of radio in general was the Radio Act of 1912. Under this Act, the then Secretary of Commerce and Labor was made responsible for licensing radio stations and operators. The enforcement of the first Radio Act presented no serious problems prior to the First World War since there were at that time more than enough frequencies for all the stations in existence, and questions of interference arose only rarely.

By 1925, however, the rapid increase in the number of AM stations caused problems which could not be met under the Radio Act of 1912. The courts had interpreted that Act as not providing authority to the Secretary of Commerce to impose restrictions as to frequency, power, and hours of operation.[59]

The Secretary of Commerce finally issued a statement abandoning his futile efforts to regulate radio under the Radio Act of 1912, and urging that the stations undertake self-regulation. This plea went unheeded. Many broadcasters jumped their frequencies and increased their power and operating hours at will, regardless of the effect on other stations. The result was bedlam on the air.

President Coolidge, in his message of December 7, 1926, appealed to Congress to enact a comprehensive radio law to end the confusion.[60] The result was the Dill-White Radio Act of 1927.

The Radio Act of 1927 created a five-member Federal Radio Commission with regulatory powers to issue station licenses, allocate frequency bands to various services, and specify frequencies and power for individual stations.

As a result of new rules and regulations promulgated by the FRC, about 150 of the 732 operating broadcast stations surrendered their licenses.[61]

The Communications Act of 1934, the present law, was an extension of the Radio Act of 1927. The 1934 Act was intended to place under one regulatory agency all interstate and foreign communication by wire and radio.

The Fairness Doctrine is generally supposed to have received its first enunciation in the FCC's 1949 *Editorializing Report*.[62] Although the term itself seems to have originated in reference to this document, the underlying rationale for the Doctrine appears to have evolved from a much earlier period in the regulation of radio.

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[58] See *Regulation of Broadcasting*, supra note 51, pp. 1–7; National Broadcasting Co., Inc. v. U.S., 319 U.S. 190 (1942) pp. 210–12.

[59] U.S. v. Zenith Radio Corp., 12 F.2d 614 (N.D. Ill. 1926); see also the opinion of the Attorney General to the same effect, 35 Ops. Atty. Gen. 126 (1926).

[60] H. Doc. 483, 69th Cong., second sess., p. 10.

[61] FCC *Broadcast Primer*, Inf. Bulletin No. 2–B (Feb. 1964).

[62] *Editorializing by Broadcast Licensees*, 25 R.R. 1901 (1949).

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The premise of the doctrine is that the broadcaster—conceding that his communications are protected by the first amendment [63]—is under a legal obligation to make a reasonable presentation of conflicting views of controversial issues of public importance. This concept is related to, but distinct from, the "equal opportunities" requirement with respect to political candidates. The term "equal opportunities" in this context has been interpreted as being synonymous with "equal time". It is, therefore, susceptible to reasonably precise application. It does require an appearance or "use" by a legally qualified candidate on the licensee's facilities. Once this event takes place, the licensee is required, upon request, to extend the same amount of equally desirable time, at the same cost (if any) to all other legally qualified candidates for the same office. Initially, the licensee need not make his facilities available to any specific candidate. Once having done so, however, he incurs duties to all rival candidates similar in nature to those of a common carrier, although that term is avoided in the statute.

The Fairness Doctrine, however, is much less precise in both its definition and its application. It does not require the licensee to expend equal time in presenting conflicting views on public issues. Rather, a standard of reasonableness is asserted; the licensee must afford a reasonable opportunity for the presentation of contrasting viewpoints. Moreover, the equal time obligation arises only when a candidate demands it. But, the licensee may not discharge his obligations under the Fairness Doctrine by merely being willing to respond to requests for the presentation of contrasting viewpoints; he must affirmatively present them regardless of any request or lack thereof.

It is also noted that the term "controversial issue of public importance," which seems clearly amendable to a variety of interpretations, has not been defined in the statute or in any FCC regulation.

There has been a discernible evolution leading up to the present Fairness Doctrine. This process was buttressed by court decisions upholding the right of the Radio Commission, and later the FCC, to inquire into a licensee's programing practices in determining whether a grant or renewal of license would be in the public interest.[64] In the landmark case of *National Broadcasting Co.* v. *United States*,[65] decided in 1943, the Supreme Court stated that the function of the FCC was more than that of a mere "traffic officer," policing the airwaves to prevent interference. The court stated that the Commission has "* * * the burden of determining the composition of that traffic." [66] This case concerned the FCC's "chain broadcasting" rules, and did not specifically involve a question of program content.

The Federal Radio Commission showed an early hostility to one-sided, or non-objective broadcasting. This was based on the scarcity of the available broadcast frequencies. In *Great Lakes Broadcasting Co.*,[67] the Radio Commission said:

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[63] The applicability of the first amendment to broadcasting is clearly established. Superior Films, Inc. v. Department of Education, 346 U.S. 587, 589 (1954) (Douglas, J., concurring); U.S. v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948); American Broadcasting Co. v. U.S., 110 F. Supp. 374, 389 (S.D. N.Y. 1953), aff'd on other grounds, 347 U.S. 284 (1954).

[64] KFKB Broadcasting Ass'n v. Fed. Radio Comm'n, 47 F. 2d 670 (D.C. Cir. 1931); Trinity Methodist Church, South v. Fed. Radio Comm'n, 62 F. 2d 850 (D.C. Cir. 1932), *cert. den.* 288 U.S. 599 (1932); Simmons v. FCC, 169 F. 2d 670 (D.C. Cir. 1948), *cert. den.* 335 U.S. 846; Henry v. FCC, 302 F. 2d 191 (D.C. Cir. 1962), *cert. den.* 371 U.S. 821.

[65] 319 U.S. 190 (1943).

[66] Id., page 213, 215–216.

[67] 3 Fed. Radio Comm. Ann. Report, p. 32 (1929); reversed on other grounds, 37 F. 2d 993 (1930), *cert. dismissed*, 281 U.S. 706 (1930). See also, *Chicago Federation of Labor* v. *Fed. Radio Comm.*, 3 F.R.C. Ann. Rep. 36 (1929) *aff'd* 41 F. 2d 422 (1930).

There is no room for the operation of broadcasting stations exclusively by or in the private interests of individuals or groups so far as the nature of the programs is concerned. There is not room in the broadcast band for every school of thought, religious, political, social, and economic, each to have its separate broadcasting station, its mouthpiece in the ether.

This policy was adhered to in *KFKB Broadcasting Association* v. *Federal Radio Commission*.[68] In that case, the court upheld the FRC's denial of renewal of a station license partially on the ground that the facility had been run for the sole benefit of the owner, (the licensee had devoted a large percentage of his total broadcast time to the promotion of his "goat gland" remedy).

The 1929 Annual Report of the Radio Commission states:

It would not be fair, indeed, it would not be good service to the public, to allow a one-sided presentation of political issues of a campaign. Insofar as the program consists of discussion of public questions, public interest requires ample play for the fair and free competition of opposing views, and the Commission believes that the principle applies not only to addresses of political candidates but to discussion of issues of importance to the public (p. 33).

The Federal Communications Commission carried on this policy of the Radio Commission. In *Young Peoples Association for the Propagation of the Gospel*,[69] it denied application for a construction permit partly because of the applicant's policy of refusing to permit use of its broadcast facilities for the presenting of any religious viewpoint differing from its own.

The FCC's policy against one-sided or nonobjective programing culminated in 1941 with its decision in the case of *Mayflower Broadcasting Corporation*.[70] At issue was the renewal of a broadcast license for station WAAB in Boston. The FCC expressed disapproval of the licensee's recent programing practices:

The record shows without contradiction that beginning early in 1937 and continuing through September 1938, it was the policy of Station WAAB to broadcast so-called editorials from time to time urging the election of various candidates for political office or supporting one side or another of various questions in public controversy. In these editorials, which were delivered by the editor-in-chief of the stations' news service, no pretense was made at objective, impartial reporting. It is clear—indeed the station seems to have taken pride in the fact—that the purpose of these editorials was to win public support for some person or view favored by those in control of the station.[71]

The FCC felt that this type of activity indicated that the licensee had been under "a serious misconception of its duties and functions under the law." The Commission then went on to enunciate what came to be known as the "Mayflower Doctrine:"

[W]ith the limitations in frequencies inherent in the nature of radio, the public interest can never be served by a dedication of any broadcast facility to the support of [the licensee's] own partisan ends. Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented. A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.[72]

[68] 47 F. 2d 670 (D.C. Cir. 1931).
[69] 6 FCC 178 (1938).
[70] 8 FCC 333 (1941).
[71] *Id.*, p. 339.
[72] *Id.*, p. 340.

The Mayflower Doctrine remained in effect for almost 10 years. Since the Commission had actually renewed the station's license, relying on the licensee's sworn statement that he had desisted from editorializing, there was no appeal from the decision.

In 1948 the Commission held public hearings designed to clarify and reappraise its policies in this area. The result was the FCC's 1949 *Report on Editorializing by Licensees.*[73] This is still the definitive statement of the Fairness Doctrine. In the report, the FCC receded from its previous ban on editorializing. It now held that editorializing was permissible so long as the licensee maintained an overall balance in its broadcasting by affording opportunities for the presentation of conflicting points of view.

The Editorializing Report noted that the American system of broadcasting leaves to the individual licensee the responsibility for determining the specific program material to be broadcast. But, said the Commission, this choice must be exercised in a manner consistent with the basic policy of the Congress that radio be maintained as a medium of free speech for the general public as a whole rather than as an outlet for the purely personal interests of the licensee. The Commission held that this requires that the licensee devote a reasonable percentage of his broadcasting time to t he discussion of public issues of interest to the community served, and that such programs be designed so as to give the public a reasonable opportunity to hear different or opposing views on such issues. To protests that such a policy constituted a form of censorship and violated the broadcasters' rights of free speech, the Commission answered:

> There remains for consideration the allegation made * * * that any action by the Commission in this field enforcing a basic standard of fairness upon broadcast licensees necessarily constitutes an "abridgement of the right of free speech" in violation of the first amendment of the United States Constitution. We can see no sound basis for any such conclusion. The freedom of speech protected against governmental abridgement by the first amendment does not extend any privilege to government licensees of means of public communications to exclude the expression of opinions and ideas with which they are in disagreement. We believe, on the contrary, that a requirement that broadcast licensees utilize their franchises in a manner in which the listening public may be assured of hearing varying opinions on the paramount issues facing the American people is within both the spirit and letter of the first amendment.[74]

In his dissenting statement to the *Editorializing Report*, Commissioner Jones stated:

> I agree that radio station licensees may editorialize over their own facilities. I believe that any document establishing this policy requires a reversal of the Mayflower Broadcasting Company decision, 8 FCC 333, which fully and completely suppressed and prohibited the licensee from speaking in the future over his facilities in behalf of any cause. * * * I believe that the Commission thus violated that first amendment and that the Commission should acknowledge the unconstitutionality of the *Mayflower* decision and rule that the licensee may speak.[75]

Commissioner Jones also questioned the FCC's application of the Fairness Doctrine as a prior restraint on the licensee's right to speak:

> I cannot subscribe to the action of the Commission in expressly imposing prospective conditions on the exercise of the licensee's right to use the facilities of a station for purposes of editorialization. I would not say to the licensee as

[73] 25 R.R. 1901 (1949).
[74] *Id.*, p. 1911.
[75] *Id.*, p. 1914.

does the Commission's decision, "You may speak but only on the prospective conditions that are laid down in our report." For my part, I would merely say to the licensee, "You may speak." [76]

Since the 1949 Report, the policy of the FCC has been not only to permit, but to encourage, station editorializing. In the 1960 *Commission En Banc Programing Enquiry* [77] editorializing by licensees is listed as one of the "major elements usually necessary to meet the public interest needs and desires."

In effect, the 1949 *Editorializing Report* is a vindication of the views expressed by Senator Howell as he argued against Senator Dill's amendment which removed the statutory ban on discrimination in the discussion of "questions affecting the public." [78] Indeed, some of the language in the Editorializing Report is quite similar to that used by Senator Howell. While these statements of position are mutually consistent, it is worthy of note that Senator Howell's views were not actually embodied in the original legislation.

VIII. Communications Act Amendments of 1959

The 1959 amendments added the last two sentences presently appearing in section 315(a). The first of these sentences excludes appearance by candidates on certain news programs from being considered a "use" of broadcast facilities such as would entitle competing candidates to equal time:

> Appearance by a legally qualified candidate on any—
> (1) bona fide newscast,
> (2) bona fide news interview,
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
> shall not be deemed to be a use of a broadcasting station within the meaning of this subsection.

The second sentence added to section 315(a) reads as follows:

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

The proper construction to be placed on this last quoted language is still a matter of controversy. The effect of the two sentences added by the 1959 amendments is to commingle the separate concepts of equal time for candidates and fair treatment in discussing public issues.

A. Events Leading Up to the 1959 Amendments to Section 315

The 1959 amendments were in response to the action of the FCC in the famous *Lar Daly* case.[79] Lar Daly, a colorful and perennial candidate for elective office in the State of Illinois, complained to the FCC that Station WBBM–TV in Chicago had allowed Chicago Mayor

[76] *Id.*, p. 1918–19.
[77] 20 R.R. 1901 (1960).
[78] See pp. 11–12, this memorandum.
[79] 18 R.R. 238 (1959).

Richard Daley to use its facilities without affording him equal time. Both Mayor Daley and Lar Daly were legally qualified candidates for the Democratic party's nomination for Mayor of Chicago. One of the alleged uses of the station by Mayor Daley was a newsreel showing him greeting the President of Argentina at the Chicago airport. This, the Commission decided was a "use" of the broadcast facilities as contemplated by Section 315, and required the station to afford Lar Daly equal time.

This interpretation of the law surprised many who recalled that two years previously in the 1957 case of *Allen H. Blondy* [80] the Commission held that news coverage by a television station of a ceremony in which a number of judges were sworn into office, one of them being a candidate, was held not to constitute a "use" of the station such as to require the licensee to extend equal time to other candidates.

The consequences of the *Lar Daly* decision, if not neutralized by legislative action, could have been a serious impairment of the ability of the broadcast industry to present the news. The ability of the networks to cover the national Democratic and Republican conventions seemed in doubt.

Hearings on amendments to 315 began 3 days after the decision was released.[81]

B. SENATE ACTION: S. 2424

To resolve the difficulties created by the *Lar Daly* decision, the Senate Commerce Committee reported S. 2424 [82] which would have amended Section 315(a) by inserting the following language at the end thereof:

> Appearance by a legally qualified candidate on any newscast, news interview, news documentary, on-the-spot coverage of news events or panel discussion, shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

In its report, the committee stated the purpose of the bill as follows:

> This bill is designed to amend the Communications Act of 1934 so as to provide that the appearance by a legally qualified candidate on any news, news interview, news documentary, on-the-spot coverage of news events, or panel discussion shall not be deemed to be use of a broadcast station within the meaning of Section 315(a). In other words, it would exempt any news, news interview, news documentary, on-the-spot coverage of news events, or panel discussion from the equal opportunity provisions of section 315(a).[83]

Despite this statement of a limited purpose, much of the debate in the Senate, and later in the House as well, may be read to assume *sub silentio* that the Communications Act, as it then read, already imposed a standard of impartiality, or fair treatment, for the discussion of all public issues.

The following excerpts indicate the development of the final Senate version of the 1959 amendments to section 315. This version was later subject to modification in conference (see below).

The manager of the bill, Senator Pastore, stated:

> Fear has also been expressed that the adoption of legislation creating special categories of exemptions from section 315 would tend to weaken the present re-

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[80] 14 R.R. 1199 (1957).
[81] *Hearings on Political Broadcasting Before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, 86th Cong., first sess. (1959).
[82] Rept. No. 562 86th Cong., 1st sess. (1959).
[83] *Id.*, p. 2.

quirements of fair treatment of public issues. The committee desires to make it crystal clear that the discretion provided by this legislation shall not exempt licensees who broadcast such news, news interviews, news documentaries, on-the-spot coverage of news events, or panel discussion programs from objective presentations thereof in the public interest.

In recommending this legislation, the committee does not diminish or affect in any way Federal Communications Commission policy or existing law which holds that a licensee's statutory obligation to serve the public interest is to include the broad encompassing duty of providing a fair cross-section of opinion in the station's coverage of public affairs and matters of public controversy. This standard of fairness applies to political broadcasts not coming within the coverage of section 315 such as speeches by spokesmen for candidates as distinguished from the candidates themselves.

* * * * * * *

Under existing law and policy it is absolutely mandatory that [licensees] shall serve the public interest because these media are in the public domain, and therefore they should be fair in their treatment in all events.[84]

On the floor of the Senate the words "or panel discussion," which appeared in S. 2424 as reported (see above), were stricken,[85] and the following language was added:[86]

* * * but nothing in this sentence shall be construed as changing the basic intent of Congress with respect to the provisions of this Act, which recognizes that television and radio frequencies are in the public domain, that the license to operate in such frequencies requires operation in the public interest, and that in newscasts, news interviews, news documentaries, on-the-spot coverage of news events, all sides of public controversies shall be given as fair an opportunity to be heard as is practically possible.

This amendment was offered by Senator Proxmire and was discussed in the following colloquy:

Mr. PASTORE. I think I know the intent of the amendment of the Senator from Wisconsin. He is merely reiterating what we are trying to do by section 2 and also what we have done in the report, namely, that we abide by the philosophy, so far as standard of fairness is concerned.

But I do not like the use of the words "as equal an opportunity" in the last part of the Senator's amendment. I am afraid that that might be considered a repudiation of what we are trying to do by the exemptions. If the Senator will change the wording to "as fair an opportunity," with a clear understanding that this does not substantially defeat the purpose of the exemption, but merely expresses the philosophy that the media of radio and television are in the public domain and that they must render under the law public service and that wherever it is practical and possible the situations must bring to light all sides of a controversy in the public interest, I will accept the Senator's amendment and take it to conference.

In my opinion, the amendment is surplusage. I think we have already accomplished the purpose of the Senator's amendment. We have expressed it in the report. But if it will make the Senator happy to have the language in the bill, I will accept the amendment and take it to conference.

Mr. PROXMIRE. I appreciate the Senator's support in saying that he will accept the amendment under the circumstances. I am trying to protect all viewpoints in public controversies by providing them an equal opportunity.

Mr. PASTORE. A fair opportunity.[87]

In response to a question from Senator Hartke, Senator Proximire further explained the purpose behind his amendment to S. 2424:

* * * The whole purpose of the bill is aimed at the situation which arose with the case of Lar Daly. If lines 5 to 9 in the bill have any meaning at all, they mean that a broadcaster is not required to give an opportunity to each legally qualified candidate. What the broadcaster should do is to consider all sides

[84] 105 Cong. Rec. 14439–41 (1959).
[85] *Id.*, pp. 14450, 14453.
[86] *Id.*, p. 14462.
[87] *Id.*, p. 14457.

of public controversies, and make certain that not only the conservative, or not only the liberal viewpoints or ideas are expressed, but that the public has a chance to hear both sides, in fact all sides, and to be more specific so that this bill cannot be construed in any way to limit the responsibility of broadcasters to present all viewpoints, including the responsibility upon the appearances of qualified candidates on TV or radio.[88]

The Proxmire amendment was agreed to and appeared in the final version of S. 2424 passed by the Senate.

C. HOUSE ACTION: H.R. 7985

The House of Representatives substituted the provisions of H.R. 7985, 86th Congress, for those of S. 2424. As reported by the House Committee on Interstate and Foreign Commerce,[89] and passed by the House, this bill added the following new sentence at the end of section 315(a):

> Appearance by a legally qualified candidate on any bona fide newscast (including news interviews) or on any on-the-spot coverage of news events (including but not limited to political conventions and activities incidental thereto), where the appearance of the candidate on such newscast, interview, or in connection with such coverage is incidental to the presentation of news, shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

The purpose of the change as stated in the House report, was this:

> It seems to the committee that the principle of substantial (as distinguished from absolute) equality of opportunity for qualified political candidates, with respect to appearances on radio and television broadcasts, is a sound principle bearing in mind (1) the importance of radio and television in connection with our political processes and (2) the fact that broadcasting facilities, and particularly television broadcasting facilities, are limited in number and subject to Government licensing. Therefore, in the opinion of this committee, an outright repeal of section 315 would not be in the public interest.
>
> However, the committee recognizes that there is another principle which is important to the proper functioning of our political processes, namely, that the public interest is served if the people of our country are well informed with respect to political events and public issues, particularly in order to make an informed choice among competing political candidates.[90]

During the House debate on the bill, Chairman Harris of the House Commerce Committee presented the following views:[91]

> I believe most of the Members are generally familiar with the background of this legislation. On June 15, 1959, the Federal Communications Commission adopted an "interpretive opinion" in the so-called Lar Daly case * * * to the effect that the appearance by a legally qualified candidate in the course of a newscast must be considered use of a broadcasting station within the meaning of section 315 entitling other legally qualified candidates for the same office to equal time.
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> * * * * * * *
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> [After referring to the *Blondy* decision, described above] The *Blondy* decision confirmed the traditional concept held by broadcasters throughout the country and candidates alike of considering the equal time requirement inapplicable to appearances of candidates on newscasts. The *Lar Daly* decision abandoned this traditional concept and it is the primary purpose—listen to me—it is the primary purpose of this legislation to write back into section 315 this traditional exemption from the equal time requirement and to deal with other things that always have been thought to be exempted from the equal time requirement.
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[88] *Ibid.*
[89] H. Rept. No. 802, 86th Cong., first sess. (1959).
[90] *Id.*, p. 4.
[91] 105 Cong. Rec. 16229–30 (1959).

Mr. Chairman, in bringing this legislation to the floor of the House, I would like it clearly understood that the committee was almost unanimous in rejecting proposals to repeal section 315 outright. The legislation reported by our committee and the action of the other body on substantially similar legislation amount to a reaffirmation of the principle of equal time; and it is my sincere hope that broadcasters as well as the Commission will make diligent efforts to observe this provision of law the way Congress intends it to be observed.

* * * * * * *

As I see it, both proposals exempt appearances of candidates on newscasts (including news interviews) and on-the-spot coverage of news events. That is the crucial thing in this legislation—to overrule the *Lar Daly* decision and to make it clear that important news events involving the appearance of a candidate may be covered on-the-spot without giving the right of equal time to other candidates.

The ensuing discussion on the floor of the House indicates the great majority of the Members thought of the proposed legislation solely as a measure relating to appearance by political candidates. The House voted down an amendment which would have expanded section 315(a) by requiring equal opportunities for opposing "representatives of any political or legislative philosophy" as well as for opposing candidates.[92]

D. CONFERENCE COMMITTEE REPORT AND DEBATES

The present language of the statute was recommended by the Conference Committee.[93] The House and Senate versions of the amendment differed in several technical respects which have no special relevance to the Fairness Doctrine. The Senate bill, however, contained what has been described above as the Proxmire amendment. This language read as follows:

* * * but nothing in this sentence shall be construed as changing the basic intent of Congress with respect to the provisions of this Act, which recognize that television and radio frequencies are in the public domain, that the license to operate in such frequencies requires operation in the public interest, and that in newscasts, news interviews, news documentaries, on-the-spot coverage of news events, all sides of public controversies shall be given as fair an opportunity to be heard as is practically possible.

The House substitute contained no similar language. The conference report states:

With certain modifications this language has been included in the conference substitute as a sentence reading as follows:

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

The conferees feel that there is nothing in this language which is inconsistent with the House substitute. It is a restatement of the basic policy of the "standard of fairness" which is imposed on broadcasters under the Communication Act of 1934.[94]

There are significant differences in the language of the Proxmire amendment and the revised language which is presently part of Section 315(a). The former refers to the "basic intent of Congress" whereas the present statutory language refers to "the obligations imposed

[92] *Id.*, pp. 16245–6.
[93] H. Rept. No. 1069, 86th Cong., 1st sess. (1959).
[94] *Id.*, pp. 4–5.

upon them under this Act." The conference evidently felt that the inclusion of this language was not inconsistent with the House substitute, which contained no such statement. This would indicate that the language was regarded as being in the nature of surplusage, or a mere restatement of existing law. The language of the conference report is somewhat less definitive than this, however:

> It is a restatement of the basic policy of the "standard of fairness" which is imposed on broadcasters under the Communications Act of 1934.

The policy of a "standard of fairness", referred to by the conferees as being "imposed * * * under the Communications Act." evidently has reference to the FCC's Fairness Doctrine. But the language of the Conference Report, and the debates which took place in both houses of Congress prior to the conference, do not seem to establish an intention to ratify the Fairness Doctrine in all of its applications.[95] Moreover, the *Lar Daly* decision, which it was the purpose of this legislation to overrule, did not involve the Fairness Doctrine. Even with respect to political matters, the language actually settled upon by the conferees (i.e., the last sentence now appearing in Section 315(a)) may be read as no more than a statement of the sense of Congress. This was more apparent in the original "Proxmire Amendment" than in the final language adopted. Nevertheless, the conferees regarded this final language as no more than a "modification" of the original Proxmire amendment.

In submitting the conference report to the House, Chairman Harris stated:

> Now, just in case anybody in the broadcasting industry or in the Federal Communications Commission, or even a candidate himself, should get the idea that "the reins are off; you can do what you want to," we have accepted in the conference substitute a provision similar to what was referred to as the Proxmire amendment in the other body.
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> * * * * * * *
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> Furthermore, in the statement of managers on page 4 you will find that it is the intention of the conferees that in order to be considered bona fide, a news interview must be a regularly scheduled program. * * * The great problem is that on the local level a broadcaster might set up a panel discussion or news interviews that are not regularly scheduled programs but which constitute an effort of some political candidate. This is not intended to be exempted. * * * Then we went further than that to be sure that there was no advantage taken by the broadcasting industry or anyone else and reaffirmed the "standard of fairness" established under the Communications Act. Anyone trying to take advantage will be held accountable to the Federal Communications Commission for his action.
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> * * * * * * *
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> Mr. AVERY. * * * I wondered, while the gentleman was in the well * * * if he would not address himself to the proposition that the test of the standard of fairness still prevails in the basic act irrespective of any changes that we have made in section 315; and it applies not only to political candidates, but issues and editorializing by licensees as well.
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> Mr. HARRIS. The gentleman is eminently correct. He will remember as he was one of the conferees, that we discussed this particular item and everyone agreed that the standard of fairness must prevail, and applies to the programs which will be exempted from the equal-time requirement of section 315.[96]

With one exception, to be noted below, there was no discussion of any specific application of the standard of fairness other than in relation to political candidates. Nevertheless, statements made by some

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[95] *Cf.* note 32, *supra.*
[96] 105 Cong. Rec. 17778–79.

Members indicate an assent to the idea of a standard of fairness in other unspecified areas.

Senators Pastore and Scott expressed the following views as to the meaning of the conference bill: [97]

Mr. PASTORE. [W]hile the House conferees found some fault with the so-called Proxmire amendment, we insisted it be retained in the bill, if with some slight modifications, because it was the one condition we could write into the law to make sure the Federal Communications Commission would give the matter the right interpretation.

* * * * * * * *

We insisted that the provision remain in the bill, to be a continuing reminder and admonition to the Federal Communications Commission and to the broadcasters alike, that we were not abandoning the philosophy that gave birth to section 315, in giving the people the right to have a full and complete disclosure of conflicting views on news of interest to the people of the country.

* * * * * * * *

I wish to say to all Members of the Senate that section 315 was written in the law not to promote any one candidate nor for the benefit of one candidate as against another, or for candidates themselves generally, but was written into the law to give the public the advantage of a full, complete and exhaustive discussion, on a fair opportunity basis, to all legally qualified candidates but for the benefit of the public at large.

Up to this point in the discussion of the conference report, the concern seemed substantially limited to insuring that the elimination of the "equal time" requirements of section 315(a) was not used by the broadcast industry as an excuse to engage in favoritism among political candidates. Senator Scott, however, made the following statement: [98]

Mr. SCOTT. * * * I am very much concerned that in this limited area of the airwaves if we in Congress attempt to restrict too closely the freedom of the press, which already is more limited in that area than in any other of the media * * * in my judgment, the time will come when the Supreme Court will strike down whatever we have done in an attempt to bail out the Federal Communications Commission for some future unfortunate decision. Therefore, I think we ought to be exceptionally careful to provide as much freedom of expression on radio and television as we possibly can.

If the decision were left to me alone * * * I should repeal section 315 entirely, but that is a minority point of view, and it arises entirely from my respect for the right of the people to be absolutely free in the expression of their point of view, subject only to the protection of the criminal and the civil statutes against misuse and abuse of privileges.

* * * * * * * *

We have maintained very carefully the spirit of the Proxmire amendment, and I ought to point out what I do not think has yet been explained, that the phrase "To afford reasonable opportunity for the discussion of conflicting views on issues of public importance" does not refer merely to political discussions as such or to opposing views of political parties or of candidates. It is intended to encompass all legitimate areas of public importance which are controversial, and there are many, as we know, which pertain to medicine, to education, and to other areas than political discussion, and it is intended that no one point of view shall gain control over the airwaves to the exclusion of another legitimate point of view.

* * * * * * * *

In other words, this amendment is designed to establish for future reference certain criteria as to equal time and a fair discussion of controversy * * * I believe that we have not in any sense dangerously or critically expanded the law. On the contrary, I think we have expanded the freedom of individuals and the freedom of this particular medium as contemplated in the first amendment to the Constitution.

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[97] *Id.*, p. 17830–31.
[98] 105 Cong. Rec. 17831–32.

The conference report makes no mention of other than political applications of the amendment to section 315(a).

Congress suspended the equal time provision of section 315(a) with respect to nominees for President and Vice President of the United States for the period of the 1960 campaign, with the stipulation that its action should not be construed as relieving broadcasters from the obligation to operate in the public interest.[99]

IX. FCC Interpretation of Communications Act Amendments of 1959

The interpretation of the FCC is that the 1959 amendments had the effect of incorporating the Fairness Doctrine into the Act. In its letter to Chairman Harris [100] the Commission stated:

> * * * [S]ince 1959 the Communications Act imposes the specific obligation of fairness upon the broadcast licensee who permits use of his facilities for the presentation of programming dealing with controversial issues of public importance.
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> * * * * * * *
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> In short, just as there is a specific statutory obligation upon the licensee to afford "equal opportunities" to legally qualified candidates, so also there is one "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance"—to be fair in treating controversial issues.

This determination that the 1959 amendments constituted a statutory enactment of the previously enunciated Fairness Doctrine would seem to make Section 315(c) of the Act applicable to the Fairness Doctrine. That section reads as follows:

> The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

The Commission promulgated no rules or regulations concerning the Fairness Doctrine until 1967. The rules promulgated in 1967 deal only with personal attacks and political editorials, both considered subdivisions of the Fairness Doctrine. No overall rules have been adopted and the Commission's application of the Fairness Doctrine has been in the form of *ad hoc* decisions related to the specific complaint before it.

X. Conclusions

A review of the legislative history of the Communications Act with respect to the Fairness Doctrine does not establish whether the doctrine should properly be considered a part of the statute.[101] It does not appear, however, that any legal obligation on the part of broadcast licensees to present conflicting sides on controversial issues of public importance was contained in section 18 of the Radio Act of 1927, the forerunner of the present section 315. This fact was noted by critics of the original Section 18, such as Senator Howell and Representative Davis.[102] Despite several attempts to broaden the original wording of the statute, it remained substantially intact until the amendments of 1959.

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[99] P.L. 86–677; 74 Stat. 554.

[100] 3 R.R. 2d 163 (1963).

[101] *But see,* Coons, *Freedom and Responsibility in Broadcasting,* 61–18455 (1961) (Appendix 1. Rosenbloom. "Authority of the Federal Communications Commission"); Barron, *The Federal Communications Commission's Fairness Doctrine: An Evaluation,* 30 Geo. Wash. L.R. 1 (1961).

[102] See pp. 9 and 11, this memorandum.

In the view of the FCC, the 1959 amendments codified the Fairness Doctrine in all its ramifications into the Communications Act. This conclusion can easily be supported from certain general statements in the committee reports and the floor debates, but not from any specific statement of legislative intent. The circumstances under which the Communications Amendments of 1959 became necessary, however, were not such as to raise the issue of the entire Fairness Doctrine before the Congress. At issue was only the question of exempting news programs from the "equal time" provisions of section 315. The addition of the Proxmire amendment, which in modified form is now considered to be the enactment of the Fairness Doctrine, seems to have been motivated by a desire to insure that the lifting of the "equal time" requirements would not be used as a means of favoring particular candidates by means of slanted news presentations. The repeatedly stated purpose of the 1959 amendments was to overrule the FCC's *Lar Daly* decision. This decision was released by the Commission on June 15, 1959; the 1959 amendments became law 90 days later.

It has been suggested that Congress, in its enactment of the 1959 amendments, intended neither approval nor disapproval of the Fairness Doctrine, but intended to insure that section 315 would not interfere with it.[103] This appears to be a more accurate reading of the legislative history than the alternative one that Congress intended a complete codification of the doctrine. As demonstrated by the FCC's "cigarette" decision, subjects far removed from political questions, and not specifically contemplated by the Congress in the 1959 amendments, can fall within the doctrine.

On the other hand, Senator Scott's statement, quoted above, does not appear to be reconcilable with such a limited interpretation. This, however, must be weighed against the absence in the House, Senate, or conference reports of any specific discussion of nonpolitical applications.

Again, while much of the language in the debates and reports on the 1959 Amendments seems to indicate that the Fairness Doctrine was assumed to already be a part of the Communications Act, the Commission seems to date the inclusion of the Fairness Doctrine into the Act as having been accomplished with the 1959 Amendments.

The recent case of *Red Lion Broadcasting Co., Inc.* v. *FCC*,[104] concludes that Congress adopted the Commission's Fairness Doctrine in the 1959 amendments. This conclusion is reached, however, without any specific discussion of the legislative history. Moreover, the factual situation in the *Red Lion* case is a limited one involving the right of an individual to reply time in which to answer a personal attack carried over a radio station. *Certiorari* has been granted by the Supreme Court. The decision by the Court on this case may well conclusively define the extent to which the Fairness Doctrine is the implementation of a statutory requirement.

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[103] Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 Minn. L. Rev. 67, 134 (1967); *Cf.* Dean, *Political Broadcasting: The Communications Act of 1934 Reviewed*; 20 Fed. Comm. B.J. 16, 29–31 (1966); Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma* 32 Geo. Wash. Law Rev. 719 (1964).

[104] 381 F. 2d 908 (D.C. Cir. 1967).

APPENDIX B

[Federal Register, Vol. 32, No. 179, Sept. 15, 1967]

FEDERAL COMMUNICATIONS COMMISSION

[FCC 67–1029]

APPLICABILITY OF THE FAIRNESS DOCTRINE TO CIGARETTE ADVERTISING

MEMORANDUM OPINION AND ORDER

In the matter of Television Station WCBS–TV, New York, N.Y., RM–1170; FCC 67–1029.

1. The Commission has before it for consideration: A "Petition for Rule-making" and a "Petition for Stay of Effectiveness of Application of Fairness Doctrine to Cigarette Advertising," filed on June 20, 1967, by the law firm of Smith, Pepper, Shack and L'Heureux on behalf of various broadcast clients; a letter dated June 23, 1967, from Columbia Broadcasting System, Inc. (CBS), requesting reconsideration of a ruling in the Commission's letter of June 2, 1967, to television station WCBS–TV; a "Petition for Reconsideration" and a "Petition for Reconsideration" and a "Petition for Immediate Stay of Effectiveness Pending Reconsideration by the Commission," filed on July 3, 1967, by the National Association of Broadcasters (NAB); a letter from Association of National Advertisers, Inc., dated June 29, 1967, requesting reconsideration of the ruling; petitions for reconsideration incorporating requests for stay, filed by the Tobacco Institute, Inc., et al., and WGN Continental Broadcasting Co., et al., on June 30, 1967, and July 3, 1967, respectively; and petitions or requests for reconsideration filed on July 3 and 5, 1967, by American Broadcasting Co., Inc., (ABC), National Broadcasting Co., Inc. (NBC), Stover Broadcasting Co., Griffin-Leake TV, Inc., et al., the law firm of Dow, Lohnes and Albertson on behalf of 17 broadcast licensees, and the law firm of Pierson, Ball and Dowd on behalf of the licensees of 61 radio and television stations. A petition for reconsideration was filed on August 1, 1967, by the Maryland/District of Columbia/Delaware Broadcasters' Association; and a "Statement of Position by Federal Communications Bar Association" on July 27, 1967.[1] Requests for reconsideration have also been received from several Congressional sources. A pleading in support of the Commission's ruling has been filed by the complainant, John F. Banzhaf III; his pleading challenges the standing of the petitioners and many of the arguments advanced, and urges denial of the relief sought.[2] Petitioners seek rule making on, and reconsideration and recission of, a ruling in the Commission's letter of June 2, 1967, to television Station WCBS–TV, New York City, that the Fairness Doctrine is applicable to cigarette advertising (FCC 67–641), and a stay of the effectiveness of the ruling pending action on their petitions.

2. Our ruling (FCC 67–641) was made on a complaint against Station WCBS–TV, New York, by Mr. John F. Banzhaf III, who asserted that his station, after having aired numerous commercial advertisements for cigarette manufacturers, had not afforded him or some other responsible spokesman an opportunity "to present contrasting views on the issue of the benefits and advisability of smoking." Specifically, he noted three cigarette advertisements broadcast on November 24, 1966, over WCBS–TV which presented smoking as "socially acceptable and desirable, manly, and a necessary part of a rich full life." Attached to the complaint was a letter by Mr. Banzhaf to the station requesting that free time be made available to "responsible groups" roughly approximate to that spent on the

[1] In addition, the Commission has received various resolutions from State associations of broadcasters and numerous letters from the public.

[2] We do not find the arguments raised as to petitioners' standing persuasive.

promotion of the "virtues and values of smoking." There was also attached a reply to Mr. Banzhaf by WCBS–TV setting forth the programs which it had broadcast on the effect of smoking on health, taking the position that these programs provided contrasting viewpoints on this issue, and stating its view that the Fairness Doctrine may be inapplicable to commercial announcements solely aimed at selling products. In Mr. Banzhaf's complaint, he asserted that the WCBS–TV showing a compliance with the Fairness Doctrine was insufficient to offset the effects of advertisements broadcast daily for a total of 5 to 10 minutes each broadcast day.

3. The Commission ruled that the Fairness Doctrine is applicable to cigarette advertisements, but rejected Mr. Banzhaf's claim that the time to be afforded roughly approximate that devoted to cigarette commercials. We held that a station which carries commercials promoting the use of a particular cigarette as attractive and enjoyable is required to provide a significant amount of time to the other side of this controversial issue of public importance—i.e., that however enjoyable, such smoking may be a hazard to the smoker's health. We stated that here, as in other areas under the Fairness Doctrine, the type of programing and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee, upon the facts of his situation; and that accordingly the initial judgment as to whether sufficient time is being allocated each week in this area by WCBS–TV is one for the licensee.

4. By a letter to the Commission dated June 23, 1967, CBS requests that the contents of its letter be treated as the comments of WCBS–TV on the complaint and that the Commission reconsider its ruling on the basis of these comments. CBS does not request a stay of the effectiveness of the ruling, but does challenge the merits of the ruling.

5. In support of their requests for relief, other petitioners urge that the ruling has broad implications and will affect all licensees carrying cigarette advertising though they did not have an opportunity to be heard prior to its adoption. It is asserted that substantial doubts as to the validity of the ruling are presented by the various requests for reconsideration and other relief, and that licensees will not dare risk noncompliance pending action on these pleadings lest their noncompliance be raised at license renewal time. It is further asserted that licensees would suffer irreparable damage in the interim by temporarily adhering to the ruling because they would risk loss of substantial amounts of advertising revenue and compliance would disrupt station advertising policies as well as give rise to scheduling and production problems. Consequently, petitioners state, fairness and an equitable administration of the Fairness Doctrine call for a suspension of the effectiveness of the ruling pending action on the petitions for reconsideration and rule making.

6. We agree that the ruling constitutes a precedent on an important issue which will affect licensees other than WCBS–TV and may necessitate a change in the operations of some. In view of the widespread interest in the ruling by persons who have not hitherto been heard, and since stay relief has been requested, we have decided to give expenditious consideration to the arguments made in all of the pleadings before us to determine whether anything has been advanced on the merits which would warrant reconsideration of our ruling, a stay of its effectiveness, or rule making in this area. The positions of the parties appear to be amply set forth in the pleadings on file, and we have given thorough consideration to the arguments made in reaching our decision. For the reasons set forth below, it is the conclusion of this Commission that nothing has been advanced which would warrant reconsideration or a stay of our ruling or rule making. However, in the circumstances, we have decided for reasons of equity that the conduct of licensees (including WCBS–TV) in applying the Fairness Doctrine to cigarette advertising prior to the publication date of this memorandum opinion and order (which we shall also mail to all broadcast licensees) will not be considered in connection with their applications for renewal of license; conduct subsequent to that date will receive consideration, in specific rulings where appropriate or at license renewal time.

I. Petitioners' Arguments on the Merits

7. The principal contentions presented on the merits of the ruling are: (A) That the Fairness Doctrine is itself violative of the First and Fifth Amendments to the U.S. Constitution and hence cannot properly serve as a basis for delineating licensee responsibilities under the Communications Act; (B) that the Fairness Doctrine, even if constitutional, applies only to programing in the nature of

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.

public interest in broadcasting in the 1959 amendment of section 315(a) of the Communications Act, 73 Stat. 557, 47 U.S.C. 315(a), limited the scope of the doctrine to programing of that nature since it did not amend section 317 of the Act to incorporate a similar provision. It follows, the parties state, that the present ruling is an unprecedented extension of the Fairness Doctrine which is beyond the Commission's discretion or statutory authority.

10. We do not find these arguments persuasive. The Fairness Doctrine has its foundation in the obligation imposed on licensees by the Communications Act to operate in the public interest (see discussion, infra, par. 64), which includes the "basic policy of the 'standard of fairness'" and the "broad encompassing duty of providing a fair cross section of opinion in the station's coverage of public affairs and matters of public controversy." H. Rept. No. 1069, 86th Cong., 1st sess., p. 5; S. Rept. No. 562, 86th Cong., 1st sess., p. 13; section 315(a); 1949 Report on Editorializing, 13 F.C.C. 1246, 1248–1249. That "one of the basic elements of any such operation" (13 F.C.C. at 1248) is a recognition by the licensee of "the right of the public to be informed" (13 F.C.C. at 1249) as to "opposing positions on the public issues of interest and importance in the community" (13 F.C.C. at 1258) when the licensee is presenting programing in the nature of news, commentary on public issues, or editorial opinion, does not mean that the licensee is relieved of his statutory responsibility for advertising broadcast over his facilities or his overall duty to operate in the public interest and to make a fair presentation of controversial issues of public importance in whatever context they may arise. Section 315(a); 1949 Report on Editorializing, 13 F.C.C. at 1257–1258. Moreover, the circumstance that Congress specifically incorporated in the Fairness Doctrine into the 1959 amendment to section 315 to make it "crystal clear" that the programing exemptions from the equal time requirement of that section did not exempt licensees "from objective presentation thereof in the public interest" does "not diminish or affect in any way Federal Communications Commission policy or existing law which holds that a licensee's statutory obligation to serve the public interest is to include the broad encompassing duty of providing a fair cross section of opinion in the station's coverage of public affairs and matters of public controversy." S. Rept. No. 562, 86th Cong., 1st sess., p. 13; 705 Cong. Rec. 14439.[6] Most important, the amendment refers to the obligation imposed upon broadcast licensees" * * * *under this Act* to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance" (emphasis supplied).

11. The Commission's present ruling that advertising falls within the public interest responsibilities of a licensee is not a novel or unprecedented policy determination. See concurring opinion of Mr. Justice Brennan in Head v. Board of Examiners, 374 U.S. 424, 437–441. This opinion sets out in detail the administrative and other pertinent history establishing the pattern of Commission regulation in this area. See paragraph 13, infra.

12. The Commission has always directed itself particularly to programing and advertising which bears upon public health and safety. The Federal Radio Commission denied a renewal of license to a station which broadcast a "medical question box" devoted to diagnosing and prescribing treatment of illnesses from symptoms given in letters from listeners, and which received a rebate on each prescription sold. KFKB Broadcasting Association v. Federal Radio Commission, 47 F. 2d 670, 671 (C.A.D.C.). The Radio Commission held, with judicial approval, that "the practice of a physician's prescribing treatment for a patient whom he has never seen, and bases his diagnosis upon what symptoms may be recited by the patient in a letter addressed to him, is inimical to the public health and safety, and for that reason is not in the public interest." Id., at 671–672. The Communications Commission has similarly condemned advertising of alleged medical prescriptions and quack remedies which were deemed inimical to health, and granted renewal only upon assurances that such broadcasting would be discontinued. Farmers and Bankers Life Insurance Co., 2 F.C.C. 455, 457–459. The Commission stated that "[a] broadcast station carrying such programs should be held to a high degree of responsibility, affecting as they may the health and welfare of the listeners, and careful investigation of such products,

[6] Given the background to the 1959 amendments (see Red Lion Broadcasting Company v. Federal Communications Commission, supra), we are unable to see any significance in the fact that Congress did not also amend sec. 317 to incorporate the Fairness Doctrine expressly. In any event, as stated, the absence of a specific reference to the Fairness Doctrine in sec. 317 does not show a lack of Commission authority under the general provisions of the Act.

and of the claims made therefor, should be made before they are advertised over a broadcast station." 2 F.C.C. at 458. See also WSBC, Inc., 2 F.C.C. 293, 294–296, and Oak Leaves Broadcasting Station, Inc., 2 F.C.C. 298 (both involving advertising of quack medicines by one not licensed to practice medicine). The Commission has also applied the Fairness Doctrine to products such as Krebiozen and to the health issues involved in Carlton Fredericks program, "Living Should be Fun." See 33 F.C.C. 101, 107 (1962).[7]

13. Mr. Justice Brennan, in his concurring opinion in the Head case, 374 U.S at 439, noted that:

"* * * As early as 1928, for example, the General Counsel of the Radio Commission held that abuses in network cigarette advertising—while not a sufficient basis for revocation proceedings against an individual licensee—might on renewal militate against the requisite finding of broadcasting in the 'public interest.'"

The opinion also notes (n. 15) that:

"Shortly after the issuance of the General Counsel's opinion the Chairman of the Federal Radio Commission was asked by Senator Dill during his appearance before the Senate Commerce Committee whether he thought the Commission had sufficient power "through its power of regulation and its determination of public interest to handle objectionable advertising?" The Chairman replied, "I think so, Senator Dill, because we have had little trouble about it, even without direct power. * * *." Hearings. before Senate Committee on Interstate Commerce on S. 6, 71st Cong., 1st sess., pt. 6, p. 230."

See also Hearings before Senate Committee on Interstate Commerce on S. 6, 71st Cong., 1st and 2d sess., pp. 88–89. The particular complaint leading to the General Counsel's opinion charged, inter alia, that "the object of this broadcasting is to transform 20 million adolescent boys and girls into confirmed cigarette addicts by creating a vast child market for cigarettes in the United States," that "10 million boys throughout the country are being viciously and deliberately misled by paid testimonials, secured from professional athletes, football coaches and others, definitely suggesting the use of cigarettes as an aid to physical prowess," that "the medical opinion of the country is being continuously misrepresented to support the health and medical claims made for cigarettes," that the specific claims made for a particular brand of cigarette advertised on the air are overwhelmingly opposed by established health and medical facts," and that "Such radio activities, the petitioner maintains, are clearly contrary to public interest, public welfare and public health." Opinion No. 32, 1928–1929 Opinions of the General Counsel, Federal Radio Commission 77, at 78 (Apr. 15, 1929). General Counsel Bethuel M. Webster, Jr. concluded that the "Commission may find, in view of this showing, that public interest, convenience, and necessity will not be served by further renewal of the licenses in question, in which case the matter will be set for hearing pursuant to section 11, and petitioner's prayer for general relief will be granted." Id., at 82.

14. In short, we believe that the licensee's statutory obligation to operate in the public interest includes the duty to make a fair presentation of opposing viewpoints on the controversial issue of public importance posed by cigarette advertising (i.e., the desirability of smoking), that this duty extends to cigarette advertising which encourages the public to use a product that is habit forming and, as found by the Congress and Governmental reports, may in normal use be hazardous to health, and that the licensee's compliance with this duty may be examined at license renewal time (see 1960 Programing Policy Statement, 20 Pike and Fischer, Radio Regulation 1901, 1912–1913). It is our belief that the public interest standard and Fairness Doctrine embodied this principle from their inception. In any event, even assuming the contrary, we think that the Commission clearly has the statutory authority to make this public interest ruling and to extend the Fairness Doctrine to cigarette advertising at this time. While the agency's position as to what the obligation to operate in the public interest requires for cigarette advertising may have fluctuated over the years since 1929, the exercise of such authority in the present circumstances is plainly reasonable. Considering the 1964 Report of the Surgeon General's Advisory Committee, the establishment of the National Interagency Council on Smoking and Health and the enactment of Cigarette Labeling and Advertising Act (Public Law 89–92, 15 U.S.C. 1331 et seq.) in 1965, and the recent Reports to Congress by the Federal

[7] As further administrative background in this area, see In re petition of Sam Morris, 11 FCC 197 (1946), where the Commission indicated the applicability of the Fairness Doctrine to advertising in certain situations.

Trade Commission and the Department of Health, Education, and Welfare pursuant to that Act it is not an abuse of discretion for the Commission to decide now that a licensee who presents programing and advertising which encourages the public to form this habit potentially hazardous to health has, at the very least, an obligation adequately to inform the public as to the possible hazard.[8] See infra, paragraphs 30–32. Nothing that is presented in the extensive pleadings filed in this matter convinces us that petitioners should prevail on their position to the contrary.

C. COMPATIBILITY WITH THE CIGARETTE LABELING ACT

15. Petitioners further urge that Congress in the Cigarette Labeling and Advertising Act of 1965 (Public Law 89–92, 15 U.S.C. 1331 et. seq.) preempted Federal, State, and local activity to compel health warnings in cigarette advertising, and that the Commission's ruling is not only inconsistent with that policy but lies also in an area where Congress has withdrawn authority. On the basis of our analysis of the provisions of the Labeling Act and its legislative history, we agree that no Federal or State body could legally adopt regulatory measures which would require either a cessation of cigarette advertising or the inclusion of a health warning in the advertisement itself. We nevertheless believe, for the reasons set forth below, that our ruling that broadcast licensees presenting cigarette advertising must otherwise inform the public as to the potential health hazard, is not precluded by the Labeling Act and is entirely consistent with the Congressional decision to promote extensive smoking education campaigns.

16. The Cigarette Labeling Act states that:

"It is the policy of the Congress, and the purpose of this Act, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

"(1) The public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

"(2) Commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health."

The Act thus requires the labeling of cigarette packages with the statement: "Caution: Cigarette Smoking May Be Hazardous to Your Health." The Act also does the following: (1) Makes it unlawful for any person to manufacture, import, or package for sale within the United States any cigarettes which do not bear the above-mentioned statement on the package. Violation of this requirement is made a misdemeanor subject to a fine of not more than $10,000 (sec. 4, 6); (2) prohibits the requirement of any other cautionary statement on the labeling of cigarettes under laws administered by any Federal, State, or local authority (sec. 5(a)), and prohibits, for 3 years, any requirement by any Federal, State, or local authority that cigarette advertising include a statement relating to smoking and health (sec. 5(b)); (3) states that the Federal Trade Commission has no authority to require any cautionary statement in any advertisement of cigarettes labeled in conformity with the Act, but otherwise neither limits nor expands the authority of the FTC with respect to the dissemination of false or misleading advertisements of cigarettes (sec. 5(c)); (4) permits injunctions to be obtained to restrain violations of the Act. and provides an exemption for cigarettes manufactured for export from the United States (sec. 7 and 8); and (5) requires two Federal agencies to transmit reports to Congress before July 1, 1967, and annually thereafter: (a) The Secretary of Health, Education, and Welfare concerning current information on the health consequences of smoking and recommendations for legislation and (b) the Federal Trade Commission concerning the effectiveness of cigarette advertising, current practices and methods of cigarette advertising and promotion, and recommendations for legislation.

16a. Section 5—the portion preempting Federal, State and local activity to compel health warnings in cigarette labeling and advertising—provides in subsection (b):

[8] It has long been recognized, of course, that "the Commission's view of what is best in the public interest may change from time tot time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes." Pinellas Broadcasting Co. v. Federal Communications Commission, 230 F. 2d 204, 206 (C.A.D.C.), cert. den., 350 U.S. 1007.

"No statement relating to smoking and health shall be required in the advertising of any cigarette the packages of which are labeled in conformity with the provisions of this Act."

It is clear from the wording of this section that neither the FCC nor the FTC could require cigarette advertisements to contain statements of health warnings. However, this does not mean that the FCC or the FTC cannot regulate in other respects concerning smoking and health. The section does not read, as petitioners would have it, that no statement by others interested in informing the public of the potential hazard from smoking may be required "because of the advertising of any cigarette"—i.e., not in or adjacent to the advertising but at some other time period, by others or the licensee, because the advertising has presented but one face of this important issue to the public. Moreover, although the Senate debate on the Labeling Act is not wholly clear in this respect,[9] the House debate indicates that the FTC is still free to regulate with respect to misleading or deceptive advertising concerning smoking and health under section 5 of the Federal Trade Commission Act.[10] For example, if an advertisement said that cigarette smoking was not a health hazard, the FTC could act to prevent such advertising. The Chairman of the House Commerce Committee explained that the Labeling Act did not purport to change the present authority of the FTC, only to limit that authority with respect to compulsory inclusion of statements concerning smoking and health in cigarette labels and advertising.[11] See section 5(c) of the Act. The FCC's regulatory authority was not discussed in the committee reports on the proposed legislation or in the legislative debates. Nevertheless the background and legislative history of the Labeling Act furnish some basis for judging what impact, if any, that Act has on the FCC's authority in this field, particularly under the Fairness Doctrine.

LEGISLATIVE HISTORY

17. The pertinent background to the 1965 Act is set out in Appendix A. We turn here to the relevant legislative history. Prior to 1964 a number of bills had been introduced without enactment by Congress in an effort to compel cigarette manufacturers to acquaint the public in various fashions with the health hazards of smoking. With the Advisory Committee's Report as a catalyst, many bills were introduced during the second session of the 88th Congress embodying several approaches to acquaint the public with the hazards of smoking: (1) To require that cigarettes sold in interstate commerce be labeled with a health warning; and/or with a disclosure of nicotine and tar content (H.R. 4168; H.R. 7476; H.R. 9693); (2) to confer on the FTC the power and duty to regulate advertising and labeling of cigarettes (H.R. 9655; H.R. 9657; H.R. 9808; S. 2429); (3) to amend the Federal Food, Drug and Cosmetic Act so as to make that Act applicable to smoking (H.R. 5973; H.R. 9512); (4) to provide for informational and educational campaigns by HEW to acquaint the public with the health hazards involved in the use of cigarettes and to provide for continued research in this field (H.R. 9668; S. 2430); and (5) to enjoin all Government agencies, etc., from taking any action or pursuing any policy which encourages or promotes the public to buy or use cigarettes (S. 2430).

18. As a result of the submission of these bills, Chairman Harris conducted hearings from June 23, 1964, through July 1, 1964, before the House Commerce Committee concerning possible action by Congress. The purposes of the hearings were to review the scientific evidence of the causal link between smoking and cancer and, if Federal action was found to be required in the interest of public health, to determine what approach would be most desirable. Chairman Harris commented later that the closing days of that session of Congress had not permitted sufficient time mor further hearings and for the preparation and consideration of carefully drawn legislation in this field. These hearings before the House Commerce Committee were the only hearings conducted on the subject of cigarette labeling and advertising by either side of Congress during the second session of the 88th Congress.

19. Legislative activity resumed in the first session of the 89th Congress with consideration of bills taking three basic approaches to the smoking health hazard problem: (1) To amend the Federal Food, Drug and Cosmetic Act to regulate smoking products (H.R. 2248); (2) to provide for a health warning and/or

[9] 111 Cong. Rec. 15597–15598 (1965).
[10] 111 Cong. Rec. 16541–16544 (1965).
[11] Remarks of Chairman Harris, 111 Cong. Rec., p. 16544 (1965).

nicotine and tar content on the label of cigarette packages (S. 559; H.R. 3014; H.R. 4007; H.R. 7051; H.R. 4244); and (3) to give the FTC the power and duty to regulate advertising and labeling of cigarettes (S. 547). Both the Senate and the House Commerce Committees undertook hearings to determine the state of the medical evidence for and against the causal link between smoking and disease and to determine what Federal action, if any, should be required in the public interest. With regard to these questions, the Senate Committee concluded (S. Rept. No. 195, 89th Cong., 1st sess., p. 3):

"While there remain a substantial number of individual physicians and scientists—the Commerce Committee received testimony from 39 of them—who do not believe that it has been demonstrated scientifically that smoking causes lung cancer or other diseases, no prominent medical or scientific body undertaking a systematic review of the evidence has reached conclusions opposed to those of the Surgeon General's Advisory Committee.

"The Commerce Committee, therefore, concurs in the judgment that "appropriate remedial action" is warranted."

The House Committee was unwilling to conclude for or against the medical opinions embodied in the Advisory Committee's Report or the medical evidence elicited by its own hearings. However, it did conclude that Congressional action should be taken with regard to the relationship of smoking and health (H. Rept. No. 449, 89th Cong., 1st sess., p. 3).

20. As petitioners point out, Congress in enacting the Cigarette Labeling Act was concerned about possible economic imapct on the tobacco and broadcasting industries, as well as the potential health hazard to the public. The House Report states (id., at p. 3):

"The determination of appropriate remedial action in this area, as recommended by the Surgeon General's Advisory Committee, is a responsibility which should be exercised by Congress after considering all facets of the problem. The problem has broad implications in the field of public health and health research, and involves potentially far-reaching consequences for a number of sectors of our economy. The entire tobacco raising and manufacturing industry, and the numerous businesses which market tobacco products are involved. Some proposals have been made in this area which might lead to severe curtailing or the possible elimination of cigarette advertising. This could have a serious economic impact on the television, radio, and publishing industries in the United States."

21. The compromise evolved by Congress was to require a health warning in labeling, but not in advertising, for an interim period pending a further Congressional determination as to whether extensive smoking education campaigns and industry self-discipline would render such a drastic step unnecessary. The Senate Report states (S. Rept. No. 195, 89th Cong., 1st sess., p. 5):

"Considering the combined impact of voluntary limitations on advertising under the Cigarette Advertising Code, the extensive smoking education campaigns now underway, and the compulsory warning on the package, which will be required under the provisions of this bill, it was the Committee's unanimous judgment that no warning in cigarette advertising should be required pending the showing that these vigorous, but less drastic, steps have not adequately alerted the public to the potential hazard from smoking."

The House Report similarly states that the Cigarette Advertising Code and the educational and informational programs of HEW in combination with the Labeling Act made it unnecessary to insert health warnings in cigarette advertising as proposed by the FTC (H. Rept. No. 449, 89th Cong., 1st sess., pp. 4, 5). The Labeling Act provides that the provisions which affect the regulation of advertising shall terminate on July 1, 1969 (sec. 10). The reason for specifying this termination date was the expectation of Congress that before that date, on the basis of all available information, including that contained in the reports to be submitted by HEW and FTC, it would reexamine the subject matter of the Labeling Act.

CONCLUSION

22. In light of the foregoing, it is our view that section 5 of the Labeling Act was meant to preclude any requirement of a health warning in the advertising itself, as proposed by the FTC rule (see par. 7, App. A), but there was no legislative intent otherwise to foreclose the use of radio along with other educational media, as an effective means of informing the public to the potential hazard of smoking. The Fairness Doctrine has its reason for being in (1949 Report on Editorializing, 13 F.C.C. at 1249):

" * * * the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community. It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting. (Footnote omitted.)"

We also cannot believe that Congress would have overturned so basic a tenet of communications law and policy in this area or that it would have withdrawn so fundamental a responsibility of the Commission without some express indication and explanation. See paragraph 30, infra. On the contrary we believe that for reasons developed below, our action is entirely consistent with the "comprehensive Federal program * * *" (sec. 2, Cigarette Labeling Act), since it will promote the "extensive education campaigns," which Congress noted and relied upon in reaching the policy judgment embodied in the Act (see par. 21, supra).

23. As stated, our ruling accords with and is tailored to the legislative policy embodied in the Labeling Act. In the first place, the ruling does not require a health warning in or adjacent to cigarette advertising—a matter coming within section 5(b) of the "preemption" portions of the Act. Rather it leaves to the good faith, reasonable judgment of the licensee—upon the facts of his situation—the matters of the type of programing, the nature of the time to be afforded for the opposing viewpoint, and the amount of time to be allocated on a regular basis.

24. Second, our ruling does not preclude or curtail presentation by stations of cigarette advertising which they choose to carry (see also, pars. 48–54, infra). We rejected Mr. Banzhaf's claim that the time afforded for the opposing viewpoint should "roughly approximate" that devoted to cigarette advertising, not only because the Fairness Doctrine does not require "equal time" but also in the belief that this would be inconsistent with the Congressional direction in this field provided in the Labeling Act. For, we recognized that the "practical result of any roughly one-to-one correlation would probably be either the elimination or substantial curtailment of broadcast cigarette advertising." We stressed that our action would be tailored so as to carry out the Congressional purpose, and we shall of course adhere to that guideline in implementation of the ruling.

25. Most important, we think that our ruling implements the smoking education campaigns referred to as a basis for Congressional action in the Labeling Act (supra, par. 21). Congress itself has affirmatively promoted such educational efforts by appropriating $2 million for use by HEW in this direction. P.L. 89–156, Title II, Public Health Services, Chronic Diseases and Health of the Aged. As a consequence, HEW has established the National Clearinghouse for Smoking and Health. Its purposes are to collect, organize, and disseminate information on smoking and health, to provide encouragement and support for State and local educational activities, and to conduct research into the behavioral nature of the smoking habit. The Public Health Service and others have acted to inform the public on smoking and health directly by sending lecturers across the United States to address local groups, distributing printed information to the public, and furnishing the broadcast media with spot announcements on smoking and health.The Public Health Service reported in January 1967 that it has distributed spot announcements to over 900 radio stations and is at present approaching individual television stations to obtain furher coverage for its messages. The American Cancer Society reports that it has received favorable responses from all the networks and many independent stations concerning the promotion of its spots on smoking and health.

26. The Public Health Service has also worked through local organizations to warn the public of the health hazards of smoking. It is in direct contact with a number of regional, State, or local interagency advisory committees on smoking and health, which have worked to stimulate community interest in 35 States. As a result of this stimulus and others, the medical societies of at least 18 States have made statements linking cigarette smoking with lung cancer and other health hazards and, in some cases, have undertaken organized activity to publicize the relationship of smoking and health, for example, the California Medical Association has recently undertaken a program urging individual doctors to acquaint their patients with the health hazards of smoking. Local and state-wide civic groups have also started public education efforts.

27. The Public Health Service and the U.S. Children 's Bureau have directed a special education campaign aimed at school age children. To date, school

programs on smoking and health reach about 70 percent of the school children in the United States. Forty States have developed materials on smoking and health for children or plan to do so, and 27 States have either held conferences on smoking and health or intend to do so. In September 1966 a nationwide program to discourage smoking among seventh and eighth graders was launched by the National Congress of Parents and Teachers. This plan is being supported by the Public Health Service and is operating in 21 States.

28. The affected industries have renewed their efforts at self-regulation since the enactment of the Labeling Act. While there has been no change in the Cigarette Advertising Code of the cigarette manufacturers, they have sought and obtained FTC approval to make factual advertising statements about tar and nicotine content. On March 25, 1966, the FTC determined that a factual statement of the tar and nicotine content of the mainstream smoke from a cigarette would not be in violation of that Commission's 1955 Cigarette Advertising Guides or of any provision of the law administer by the Commission. However, no collateral statements (other than the factual statement of tar and nicotine content of cigarettes) suggesting the reduction or elimination of health hazards in smoking are allowed, and all these factual statements must be based upon a standardized testing techniques.[12]

29. In October 1966 the Code Authority for the NAB issued the Cigarette Advertising Guideline which they had announced during the 1965 Senate hearings would be forthcoming.[13] The main objectives of the guidelines are to restrict advertising appeals to youth and statements concerning the health benefits of smoking. In January 1967, the Code Authority announced in a news release a slight change in the Television Code to strengthen its position as to appeals to youth. The Television Code, section IX, General Advertising Standards, paragraph 7, now reads:

"The advertising of cigarettes shall not state or imply claims regarding health and shall not be presented in such a manner as to indicate to youth that the use of cigarettes contributes to individual achievement, personal acceptance or is a habit worthy of imitation.

30. Considering these affirmative efforts by Congress, Federal, State and local public and private agencies, and the affected industries to educate the public as to the smoking health hazard and, particularly, to discourage youth from forming the habit, we are not persuaded by petitioners' argument that HEW and FTC have primary jurisdiction in this matter and that this Commission alone is precluded from following its traditional method of assuring that the public is adequately informed as to both sides of this controversial issue of public importance. Significantly, Congress was at pains to spell out what was preempted (secs. 5 (a) and (b)), and specifically stated that except as is otherwise provided in subsections (a) and (b), "nothing in this Act shall be construed to limit, restrict, expand, or otherwise affect, the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes * * *." Similarly, we believe that there was no preclusion of FCC action, so long as such action is consonant with the "comprehensive Federal program * * *" (sec. 2). As set forth in the prior discussion, we think that our responsibilities and policies under the Communications Act and our ruling herein are entirely consonant with the Congressional objectives in this area. Indeed, it is our belief that the Commission could not properly follow any other course in this matter. For this Commission, like other administrative agencies, was "not commissioned to effectuate the policies" of the Communica-

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[12] New York Times, Mar. 29, 1966, 53 :6.

[13] *Text of the New Cigarette Advertising Guidelines:*

Athletic activity. A person who is or has been a prominent athlete shall not be used in a cigarette commercial. Cigarette commercials shall not depict persons participating in, or appearing to be participants in, sports or athletic activity requiring physical exertion.

Tar and nicotine statements. Factual statements of tar and nicotine content of cigarettes are subject to proper documentation. No statements or claims regarding benefits to health and well-being are acceptable.

Filters. Cigarette advertising shall not state that because of the presence of the filter or its construction the cigarette is beneficial to the health or well-being of the smoker.

Uniformed individuals. Individuals in certain types of uniforms have a special appeal to youth. Therefore, such uniformed individuals as commercial pilots, firemen, the military and police officers shall not be used in cigarette advertising.

Premiums. Cigarette advertising shall not include references to offers of premiums which are primarily designed for youth.

Portrayal of youth. Children or youth shall not appear in cigarette commercials in any manner, even though they are merely bystanders or part of the background. Cigarette advertising shall use individuals who both are and appear to be adults and who are shown in settings associated with adults.

tions Act "so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." Southern S.S. Co. v. Labor Board, 316 U.S. 31, 47.

31. One further contention of petitioners on this aspect warrants discussion. It is asserted that we are precluded from issuing our ruling because the Commission declined to make any recommendation to Congress in connection with the Labeling Act legislation on the ground that it had not yet studied the matter, and because the Commission still has not conducted any study or proceeding on the smoking hazard issue. The circumstances giving rise to the contention are as follows: Prior to the issuance of the Advisory Committee Report, the Commission stated in a "by direction" letter, concerning possible rule making with regard to advertising, promoting, or encouraging cigarette smoking among young people, that action would be inappropriate before the Advisory Committee's Report was available and (letter to Senator Magnuson, FCC 63–1033): "The Commission's concern is limited, of course, to advertising in the broadcast field. Other agencies may have authority to take comprehensive and effective action, if necessary or appropriate. It is, we think, obviously more desirable to treat such an important matter, if possible, on a broad, across-the-board basis rather than in piecemeal fashion." When the Advisory Committee's Report was issued and the FTC had announced its rule making proceeding concerning cigarette labeling and advertising (see App. A), the Commission on January 1964 initiated plans to coordinate its efforts with the comprehensive regulation which the FTC had proposed and with activities of other interested agencies. FCC Letter to FTC Chairman Dixon, FCC 64–29 (Jan. 15, 1964). On February 7, 1964, in "by direction" letters to Congressman Leonard Farbstein (FCC 64–100) and his constituent, Mr. Sidney Katz (FCC 64–99), then Chairman Henry answered a request to institute rule making proceedings to ban cigarette advertising by reiterating the policy statement quoted above and noting that the Commission would await the results of the FTC rule making proceeding before acting in this area. When asked to comment on S. 2429, 88th Cong., and S. 547 and S. 559, 89th Cong., the Commission reiterated its policy that it favored "across-the-board" treatment of the matter of regulating cigarette advertising and that since the FTC had undertaken a comprehensive remedial regulatory plan, the FCC had not held proceedings or undertaken studies to evaluate the various factors and considerations in this area. Comments on S. 2429, 88th Cong., FCC 64–730; comments on S. 559 and S. 547, FCC 65–96.

32. We do not believe that these facts preclude us, as a matter of law or of policy, from issuing our ruling in the present circumstances. First, as shown above, circumstances have changed. The FTC, while proceeding in other respects consistent with the 1965 Act, is not, of course, undertaking its comprehensive regulatory plan to require a health hazard announcement to accompany each cigarette commercial. Second, as also shown above, our ruling is consistent with and particularly suited to promoting the "across-the-board" objective of Congress to treat this matter through extensive campaigns to educate the public as to the hazards of smoking. Third, we did not defer to the FTC as a matter of legal authority but rather of policy. The Commission is not precluded from changing its policies so long as any new policy adopted is, like our ruling, reasonable in the circumstances. See supra, paragraph 14 and footnote 8. And, finally, studies by this Commission are clearly not required to evaluate the various factors and public interest considerations posed by the issue of smoking and health, particularly since Congress declared and pursued its policy of promoting smoking education campaigns. In this connection, see also the discussion below (pars. 33–34 and 60–62).

33. On July 12, 1967, HEW submitted its Report to Congress, which includes the Surgeon General's Report on Current Information on the Health Consequences of Smoking. Upon the basis of more than 2,000 research studies that have been completed and reported in the biomedical literature throughout the world in the intervening 3½ years since the Advisory Committee's Report, the Surgeon General states that there is no evidence calling into question the conclusions of the 1964 Report and, on the contrary, the research studies published since 1964 have strengthened those conclusions. The Surgeon General summarizes the present state of knowledge of these health consequences, in the judgment of the Public Health Service, as follows (Surgeon General's Report on the Health Consequences of Smoking—1967, p. 2):

1. Cigarette smokers have substantially higher death rates and disability than their nonsmoking counterparts in the population. This means that cigarette smokers tend to die at earlier ages and experience more days of disability than comparable nonsmokers.

2. A substantial portion of earlier deaths and excess disability would not have occurred if those affected had never smoked.

3. If it were not for cigarette smoking, practically none of the earlier deaths from lung cancer would have occurred; nor a substantial portion of the earlier deaths from chronic bronchopulmonary diseases (commonly diagnosed as chronic bronchitis or pulmonary emphysema or both); nor a portion of the earlier deaths of cardiovascular origin. Excess disability from chronic pulmonary and cardiovascular diseases would also be less.

4. Cessation or appreciable reduction of cigarette smoking could delay or avert a substantial portion of deaths which occur from lung cancer, a substantial portion of the earlier deaths and excess disability from chronic bronchopulmonary diseases, and a portion of the earlier deaths and excess disability of cardiovascular origin.

In releasing the Report, HEW Secretary John W. Gardner stated (HEW Press Release for July 13, 1967):

"The relationship between smoking and health has obvious and serious implications for individuals who now smoke and for young people who may be thinking of starting to smoke. From the standpoint of public policy and social concern, this association constitutes one of the most critical health problems today.

"It is perfectly obvious that if we are going to reduce the unnecessary death and illness now caused by cigarette smoking, three things must take place: There must be a reduction in the number of people who smoke, a number which now constitutes 42 percent of our population. We must do everything we can to encourage young people not to start smoking; at present, half of our young people are cigarette smokers by the time they are 18. And finally, we must work toward the development of a less hazardous cigarette and, concurrently, help develop a climate of opinion which will encourage acceptance if such a cigarette is developed."

34. The June 30, 1967 Report of the FTC to Congress pursuant to the Labeling Act stressed the importance of educating teenagers before they start smoking since the use of cigarettes is so strongly habit forming (Report, p. 8). The FTC Report states (p. 13) that whether intentional or fortuitous, teenagers appear to be a prime target for televised cigarette advertising and that the "average American teenager sees more cigarette commercials on network television than does the average American" (p. 25); "'87.9 percent of teenage boys' and '89.5 percent of teenage girls hear radio on the average day'" (p. 13).

The Report comments (p. 24):

"In making a decision on whether to start smoking, youngsters especially have a right to know that once they start, they may never be able to stop. A viewer of cigarette commercials and advertisements would never hear of this aspect of smoking."

The concluding paragraph of the FTC Report states (p. 29):

"Cigarette commercials continue to appeal to youth and continue to blot out any consciousness of the health hazards. Cigarette advertisements continue to appear on programs watched and heard repeatedly by million (sic) of teenagers. Today, teenagers are constantly exposed to an endless barrage of subtle messages that cigarette smoking increases popularity, makes one more masculine or attractive to the opposite sex, enhances one's social poise, etc. To allow the American people, and especially teenagers, the opportunity to make an informed and deliberate choice of whether or not to start smoking, they must be freed from constant exposure to such one-sided blandishments and told the whole story."

35. This Commission agrees. Considering all of the foregoing, we believe that our ruling is within our statutory authority and not precluded by the Congressional policy embodied in the Labeling Act—that rather it implements that policy. We also think it is imperative in the public interest that we exercise our discretion now without delay for further studies.

D. THE ARGUMENT AS TO BLANKET RULING

36. Petitioners further contend 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. But this argument misconceives the nature of the controversial issue. Mr. Banzhaf's complaint was that the cigarette commercials over WCBS–TV presented the point of view that smoking is "socially acceptable and desirable, manly, and a necessary part of a rich full life." Our ruling points out that:

The advertisements in question clearly promote the use of the particular cigarette as attractive and enjoyable. Indeed, they understandably have no other purpose. But we believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health.

Petitioners point to no example of a cigarette commercial that does not portray the use of the particular cigarette as attractive and enjoyable as well as encourage people to smoke, and we find it difficult to conceive of one.

37. Further, we are unable to accept the argument that in the absence of any express health claim in the commercial or affirmative discussion of the health issue, there is no viewpoint to oppose. The June 30, 1967 FTC Report amply documents its conclusion that cigarette commercials today still contain the two principal elements if found to exist in 1964—a portrayal of the desirability of smoking and assurances of the relative safety of smoking (pp. 15–16). The FTC states that desirability is portrayed in terms of the satisfaction engendered by smoking and by associating smoking with attractive people and enjoyable events and experiences, and that by so doing the impression is conveyed that smoking carries relatively little risk (ibid.).[14] The Report supports this conclusion, more than adequately in our view, by a comprehensive review and analysis of the advertising submitted by a large number of cigarette companies and monitored by the Commission (FTC Report, pp. 15–23). Numerous examples are given of the "satisfaction" theme (pp. 15–16);[15] the "associative" theme (pp. 16–17);[16] "appeals directed to vanity" (pp. 17–18);[17] subtle methods of "assuaging anxiety" about any health hazard (pp. 19–21);[18] the "loyalty"

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[14] The FTC Report states (p. 17) that an estimated 58 percent of the public feel that current cigarette advertising leaves the impression that smoking is a healthy thing to do.

[15] The Report states that portrayal of satisfaction, particularly oral satisfaction, continues to be an important element of cigarette advertising. Taste or flavor of cigarettes is most often described in terms of "mildness" (Tareyton filters, Montclair menthols, Camel regulars, Carlton filters, Lucky Strike filters, Pall Mall filters, and Chesterfield kings); "smoothness" (Tareyton filters, Pall Mall kings, Newport menthols, and Lucky Strike menthols); "real," "true," "rich," or "great" tobacco flavor or taste (Raleigh filters, Newport menthols, Viceroy filters, Salem menthols, and Philip Morris filters). Invariably, the taste of menthol cigarettes is either cool, fresh and/or refreshing ("coolest flavor," Lucky Strike Green; "forest-fresh taste * * * cooler tasting," Pall Mall; "as fresh as you like it," Philip Morris; "most refreshing coolness," Kool; "fresher," Newport; "fresh menthol flavor," Camel; "Springtime fresh" and "refreshes your taste," Salem; "a full, fresh taste," Chesterfield). The FTC comments (p. 16); "The impression forms that 'menthol taste' relieves smoking irritation, albeit 'smoking irritation' is never expressly stated."

[16] The Report states (p. 16) that associating cigarette smoking with persons, activities, places, and things likely to be admired, respected, or emulated, i.e., endowing cigarette smoking with a positive associative image, continues unabated in current advertising. For example, outdoor activity of an athletic nature such as sailboating "suggests that the smoking depicted in the foreground, is not conducive to rousingly good health, is certainly not incompatible with it" (FTC Rept., p. 17). In addition, social events should in which the viewer is brought into the "wholesome, jolly company of cigarette smokers" (ibid.). E.g., "singing aboard the old paddle wheel steamer (with Pall Mall kings); * * * picnicking (with Camel filters); and coffee klatching (with Winston filters)."

[17] The Report gives as examples of appeals to vanity (pp. 17–18):

"Be discriminating: 'Particular about taste * * * I'm particular' (Pall Mall kings); 'They like the style of this cigarette' (Parliament filters). Be exclusive: * * * 'exclusive plastic pack' (Philip Morris filters and menthols); 'There's no other cigarette' (Lark filters), * * * 'the smokers who know' (Camel filters). Be a success: 'taste rich, good, rewarding' (Viceroy filters); 'This man was born rich' (Camel filters). Be a social success: 'Come up to the taste of Kool' (Kool menthols); 'find something better' (Old Gold filters). Be independent: 'break away from the crowd * * * the cigarette for independent people' (Old Gold filters); 'stands out from the crowd' (Salem menthols). Associate with important people: 'Chairmen are never bored with them' (Benson & Hedges filter); the charter boat skipper who has 'got a good ship, a good crew and a good breeze' (Camel regulars)."

[18] The Report states that as a result of extensive promotion during 1957–59, the belief appears to be widely held that filter cigarettes are less hazardous to health than regular cigarettes (p. 19). Comparatively overt attempts to allay health anxieties have been made by manufacturers of charcoal filter cigarettes by pictorial details of filters creating the impression that they prevent passage of tars and gaseous effusions (Tareyton. Lucky Strike, Tennyson, Cold Harbor, King Sano, Tempo, Duke, and Lark). Rept., p. 20. Other "very low key" advertising enhances the impression of relative safety by adding suitable adjectives to the word "filter"; "recessed filters" (Benson & Hedges and Parliaments), "white filters" (Yorks), "menthol filters" (Springs) and "filters with coconut shell charcoal" (Philip Morris). Ibid.

theme (pp. 15–16);[19] and the "bonus" theme, which includes promoting longer cigarettes at popular prices as well as coupon promotions (pp. 22–23).[20] We note also the FTC's comment[21] (Report, p. 18):

"There is in all of the array of positive images an element of escape from actuality. Some cigarette advertising transcends mere image association and projects its own separate and unique world. Examples include "Salem Country," a land in which romantic couples romp and preen through shifting, sylvan settings; the "Night People," whose post evening encounters can lead to smoking Parliament filters; and "Marlboro Country," where there daily unfolds the simple male heroic virtues of the "Old West." Worry over health has been vanished from these Shangri-las."

38. It comes down, we think, to a simple controversial issue: the cigarette commercials are conveying any number of reasons why it appears desirable to smoke but understandably do not set forth the reasons why it is not desirable to commence or continue smoking. It is the affirmative presentation of smoking as a desirable habit which constitutes the viewpoint others desire to oppose. We see no inequity in the circumstances that cigarette advertisers are precluded by various codes from making affirmative health claims in the advertising programming.[22] The Fairness Doctrine affords an avenue for presenting in regular program time the viewpoint of responsible spokesmen for the cigarette advertisers in rebuttal to any health hazard claims made in opposition to cigarette commercials. And, finally, we fail to see any merit in the argument that no controversial issue of public importance can be presented where a lawful business is advertising a lawful product.[23] While an unlawful business advertising an unlawful product over the air waves might well raise some controversial issue of public importance, we do not regard that element as essential. The claim that no controversial issue of public importance is presented by cigarette advertising is neither realistic nor persuasive.

E. THE CONTENTION AS TO A SUBSTITUTION OF "COMMISSION FIAT" FOR LICENSEE JUDGMENT

39. Petitioners also argue that the ruling, by requiring that a significant amount of time be allocated each week to cover the viewpoint of the health hazard posed by cigarette smoking and by suggesting that a licensee might, among other things, present a number of public service announcements of the

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[19] See Report (p. 22). Underlying these "loyalty" theme examples is, of course, the promise that the particular cigarette gives great satisfaction (e.g., "Change to Winston and change for good").

[20] The Report states (p. 23): "The purchase of Raleigh cigarettes has long been rewarded with coupons redeemable for goods. Today, Belair menthols, Old Gold filters, York filters, Spring menthols, and Domino filters also carry coupons redeemable for goods. Menthol and filter Chesterfields and Philip Morrises carry coupons redeemable for more cigarettes." The report also gives examples of 100 millimeter cigarette advertising (Benson & Hedges, Lucky Strike, Winston, and Pall Mall), and states (ibid.): "With a definite relationship having been established between amount of cigarette smoking and incidence of lung cancer and other diseases, a fitting motto for the 100 millimeter cigarette campaign might be 'extra health hazard at no extra cost'" (footnotes omitted).

[21] While we have, as petitioners point out, distinguished between explicit and implicit raising of controversial issues in broadcast material where health was not involved (e.g., atheists and agnostics versus the broadcast of religious services), we do not regard those cases as pertinent here in view of the nature of the controversial issue.

[22] We recognize also (as set forth in par. 29 above and Appendix A) that the tobacco and broadcasting industries have endeavored in their codes to prescribe cigarette advertising standards aimed at reducing the appeal to youth. But the conclusions of the FTC Report (par. 37 above) and the statistics and other matters set forth in pars. 33–34 and 60–61 would seem to indicate that the standards are either not being followed or are not effective in discouraging new teenage smoking. Moreover, it occurs to us that teenagers on the verge of adulthood may be more influenced by a portrayal of the attractiveness and desirability of adult conduct than by one connoting childhood or youthful behavior. As the FTC Report notes (p. 8): "They tend to view cigarette smoking as a visible mark of maturity, a passport to adulthood. Because the health dangers of cigarette smoking are not brought home to them in an effective and meaningful way, many teenagers take up the smoking habit."

[23] NBC, in urging that licensees could reasonably and in good faith conclude that no controversial issue of public importance is presented by cigarette advertising, notes that the FTC advertising guides permit presentation of enjoyment since they state:

"Nothing contained in these guides is intended to prohibit the use of any representation, claim or illustration relating solely to taste, flavor, aroma, or enjoyment."

Our ruling is consistent. It, too, does not in any way prohibit the presentation of enjoyment in cigarette commercials. It merely requires the licensee adequately to inform the public of the potential hazard, as found by Congress and Government reports, entailed in commencing or continuing this habit.

American Cancer Society or HEW, will cause a debasement of the Fairness Doctrine generally, and a substitution of Commission fiat for licensee judgment. CBS in particular noting that commercials are by nature repetitive and continuous, urges that treating all cigarette commercials as presentations of one side of a controversial issue will raise a question as to whether any one program or program series—however enlightening and informative as to all points of view—can constitute an adequate opportunity for response. Asserting that inevitably the licensee's only recourse will be a series of health hazard spot announcements, CBS states that broadcast treatment of cigarette health issues should not be reduced to a contest of opposing spot announcements endlessly repeated long after any member of the public has understood and acted if he wished. It further asserts that such an approach makes no sense in the area of news and public affairs programing and that the net result of our ruling will be to convert licensee responsibility in such areas to presentations very similar to product advertising.

40. Like CBS, we recognize that the presentation of one side of a controversial issue of public importance in advertising programing poses a situation which differs from that usually pertaining to the presentation of controversial issues in news and public affairs programing. In the latter instance, the issue may arise only once, or a few times, or several times in a relatively short time period because of factors such as timeliness. But as CBS points out, commercials are by nature "repetitive and continuous"; the complaint here went to advertisements broadcast daily for a total of 5 to 10 minutes each broadcast day. We think that the frequency of the presentation of one side of the controversy is a factor appropriately to be considered in our administration of the Fairness Doctrine under the Act's basic policy of the "standard of fairness" (supra, par. 10). For, while the Fairness Doctrine does not contemplate "equal time", if the presentation of one side of the issue is on a regular continual basis, fairness and the right of the public adequately to be informed compels the conclusion that there must be some regularity in the presentation of the other side of the issue. This consideration is not limited to advertising. For example, if one side of a controversial issue of public importance were regularly presented in a daily network program, compliance with the Fairness Doctrine would require something more than an occasional presentation of the other side of the issue during the course of the year.

41. Moreover, here the controversial issue posed is one of health hazard and the repeated and continuous broadcasts of the advertisement may be a contributing factor to the adoption of a habit which may lead to untimely death. In the circumstances, we think that the licensee is under a higher duty than in the case of other controversial issues to ameliorate the possible harmful effect of the broadcasts by sufficiently informing the public as to the hazard. As indicated in our ruling, and in light of the considerations set forth in paragraphs 33–34 and 60–61, we believe that the frequency of the presentation of the one side and the nature of the potential hazard to the public here necessitates presentation of the opposing viewpoint on a regular basis (e.g., each week).

42. We note that, contrary to CBS' position, the repetition of short communications has apparently been regarded by the broadcasting and advertising industries and other interested organizations as an effective means of reaching the listener or viewer. But in any event, there is nothing in our ruling which compels a licensee to treat the issue through presentation of spot messages. In our ruling we stated: "A station might, for example, reasonably determine that the above-noted responsibility would be discharged by presenting each week, in addition to appropriate news reports or other programing dealing with the subject, a number of the public service announcements of the Cancer Society or HEW in this field." This example does not on its face indicate that the opposing viewpoint should be presented solely or principally through spot announcements, as it was not intended as a "Commission fiat" as to the manner of compliance with the Fairness Doctrine.[24] We stressed in the ruling, and here strongly emphasize again,

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[24] As set forth in par. 25, prior to our ruling the American Cancer Society received favorable responses from all the networks and many independent stations concerning the promotion of its spots on smoking and health. Moreover, the Public Health Service reported in January 1967 that it had distributed spot announcements to over 900 radio stations and was then approaching individual television stations to obtain further coverage for its messages. The example we gave merely took cognizance of the fact that such material is available to licensees if, in their judgment, its use would facilitate compliance with their obligations under the Fairness Doctrine. We thought it desirable to note its availability particularly for the small station with limited resources, which might have difficulty in preparing its own program material dealing with this issue.

that "in this, as in other areas under the fairness doctrine, the type of programing and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee, upon the particular facts of his situation. See Cullman Broadcasting Co., F.C.C. 63–849 (Sept. 18, 1963)."

43. In other words, we agree with CBS that the "question of whether a licensee is responsibly complying with the fairness doctrine cannot be resolved by per se guidelines, ratios or other rigid rules." A licensee which has just presented a very lengthy program on this issue obviously might reach a different judgment as to what his obligation was in this respect for the next week or so. But as stated, the carriage of the normally substantial amount of weekly commercials raises a concomitant responsibility ot be met over relatively the same period of time. Further, in these circumstances, while a 1 to 1 ratio is ruled out by considerations of the legislative history of the Cigarette Labeling Act, the licensee's obligation is just as clearly not met by an occasional program a few times a year or by some appropriate announcements once or twice a week. We stress again that what is called for is the allocation of a significant amount of time each week, absent unusual circumstances, to the presentation of the opposing viewpoint in the case of cigarette commercials. We do not see why licensees, proceeding in good faith, should experience any real difficulty in reasonably discharging that responsibility nor why, in view of the nature of the issue—the public's health, they would seek to fulfill that obligation in a niggardly fashion, designed to raise problems or complaints. In sum, we have not usurped licensee judgment as to the type of graming or the amount or nature of the time to be afforded, but rather have left these matters to the good faith, reasonable judgment of the licensee based on his evaluation of the facts of his particular case.[25]

F. EFFECT OF THE RULING ON THE ADVERTISING OF PRODUCTS OTHER THAN CIGARETTES

44. Petitioners further assert that the ruling cannot logically be limited to cigarette advertising alone, and hence will have broad-scale effect on broadcast operations and the presentation of advertising by radio generally. They state that very little in society is uncontroversial and, since many products are subject to one form of controversy or other, an appeal to the Commission by a vocal minority is all that is needed to classify a subject as controversial and of public importance. They further claim that if governmental and private reports on the possible hazard of a product are a sufficient basis for the cigarette ruling, the ruling would apply to a host of other products, such as: automobiles, food with high cholesterol count, alcoholic beverages, fluoride in toothpaste, pesticide residue in food, aspirin, detergents, candy, gum, soft drinks, girdles, and even common table salt. We do not find this "parade of horribles" argument impressive.

45. We stressed in our ruling that it was "limited to this product—cigarettes," stating further in this connection:

"Governmental and private reports (e.g., the 1964 Report of the Surgeon General's Committee) and Congressional action (e.g., the Federal Cigarette Labeling and Advertising Act of 1965) assert that the normal use of this product can be a hazard to the health of millions of persons. The advertisements in question clearly promote the use of a particular product as attractive and enjoyable. Indeed, they understandably have no other purpose. We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health."

Our ruling does not state, and was in no way meant to imply, that any appeal to the Commission by a vocal minority will suffice to classify advertising of a product as controversial and of public importance. Rather, the key factors here were twofold: (1) Governmental and private reports and Congressional action with respect to cigarettes, and (2) their assertion in common that "normal use of this product can be a hazard to the health of millions of persons."

46. The products to which petitioners refer do not present a comparable situa-

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[25] It is also argued that the licensees may simply substitute cigarette health messages for other public service announcements now being carried. The duty of a station carrying cigarette commercials to inform the public as to the hazards of smoking stems directly from the fact that its facilities have been used to promote the use of this product found by the Congress and governmental reports to be so potentially hazardous to health; its responsibility is therefore the same as in the case of any other fairness situation. It thus has a duty to present the other side over and beyond what a licensee decides in other respects to present in order to serve the best interests of his area. We therefore do not believe that a licensee would or should adopt a pattern of operation which he does not adjudge to serve fully the needs and interests of his public.

tion. The example most uniformly cited is auto safety. But the governmental and private reports on this matter do not urge the public to refrain from "normal use" of automobiles in the interest of public safety; rather, the emphasis is on increased safety features in the manufacture of automobiles and increased care by drivers. Moreover, we know of no widespread contention by governmental or private authorities that the "normal use" of any of the other products cited by petitioners poses a serious health hazard to millions of persons who otherwise enjoy good health.

47. We adhere to our view that cigarette advertising presents a unique situation. As to whether there are other comparable products whose normal use has been found by Congressional and other Government action to pose such a serious threat to general public health that advertising promoting such use would raise a substantial controversial issue of public importance, bringing into play the Fairness Doctrine, we can only state that we do not now know of such an advertised product, and that we do not find such circumstances present in petitioners' contentions about the advertised products upon which they rely. Thus, to say the least, instances of extension of the ruling to other products upon consideration of future complaints would be rare, if indeed they ever occurred. In short, our ruling applies only to cigarette advertising, and imposes no Fairness Doctrine obligation upon petitioners with respect to other product advertising.

G. THE CLAIM AS TO ADVERSE FINANCIAL IMPACT UPON THE BROADCASTING AND TOBACCO INDUSTRIES

48. Petitioners further assert that the ruling will seriously undermine the commercial structure of broadcasting, cause a substantial reduction in or the elimination of cigarette advertising to the severe detriment of these stations and their ability to serve the public interest, require a major change in the operation of broadcast stations by necessitating the acquisition and presentation of new program material and the keeping of additional records to document compliance with the Fairness Doctrine, limit the ability of cigarette manufacturers and advertisers to obtain advertising time on broadcast media, and adversely affect the sale of cigarettes, all of which will impose an unlawful burden on interstate commerce and conflict with the Congressional intent underlying the Cigarette Labeling Act.

49. The contention that our ruling will seriously undermine the commercial structure of broadcasting is pressed principally by the Association of National Advertisers, Inc., an association composed of leading manufacturers and service concerns that use advertising, seven of whom market cigarettes. Their concern appears to rest principally on the fear that the ruling will be extended to many other products which are subject to controversy in one form or another. However, as set forth in the preceding section of this opinion (supra. pars. 44–47), we believe that this fear is groundless. The only real question here is the impact of our ruling on cigarette advertising on broadcast media and the sale of cigarettes.

50. We have no reason to think, and petitioners have proferred nothing concrete in support of their claim, that the ruling will cause any substantial reduction in or the elimination of cigarette advertising on broadcast media or adversely affect the ability of broadcast licensees to serve the public interest. As we have stated, we shall tailor the requirement that a station which carries cigarette commercials provide a significant amount of time for the other viewpoint, so as not to preclude or curtail presentation by stations of cigarette advertising that they choose to carry.

51. Nor do we think it realistic to assume that the requirement will cause cigarette advertisers and manufacturers to turn to other advertising media. The attractiveness of the broadcast media, particularly television, as a means of effectively reaching the vast majority of the American public with advertising, as well as other, messages is without equal.[26] We find it difficult to believe that cigarette manufacturers and advertisers would abandon or make substantially less use of a medium of this nature merely because our ruling may require an increase in the programing on the smoking-health issue which broadcast licensees are already presenting in the exercise of their judgment under the Fairness Doctrine and pursuant to their obligation to operate in the public interest.[27]

[26] The FTC Report states (p. 10) that more of the money spent for cigarette advertising in the year 1966 was spent on television advertising than on all other media combined (66.6 percent in 1966). The Report also states (ibid.) that "in 1966, cigarette advertising accounted for approximately 7.2 percent of total television advertising expenditures."

[27] In this connection, we note that many stations and the television networks (e.g., CBS's efforts as detailed in this case) have given coverage to the smoking-health issue and that they also continue to air numerous cigarette commercials.

Rather, particularly in light of the consideration set forth above (par. 50), we are not persuaded that the effect of our ruling on the amount of cigarette advertising presented on broadcast media will be significant.[28]

52. We also fail to see how the ruling would require any major change in the operation of broadcast stations. In complying generally with the Fairness Doctrine in their overall broadcast operations, broadcast licensees are required to afford reasonable opportunity for the presentation of the other side of controversial issues of public importance when they choose to present one side, and to document their efforts upon complaint. Our rules require the keeping of program logs (see, e.g., §§ 73.111 and 73.112; see also sec. 303(j) of the Communications Act), and we are sure that licensees in the conduct of their business affairs presently keep full accounts as to advertising matters. Thus, we think that this particular controversial issue can be handled by licensees in a manner similar to their established practices in this area.[29]

53. There is nothing in our ruling which would preclude or curtail the ability of cigarette manufactures to obtain advertising time on broadcast media. Licensees remain free to present such cigarette advertising as they choose. Conceivably, some licensees, in view of the mounting public concern as to the potential health hazard of cigarette smoking, might voluntarily decide to curtail or refrain from cigarette advertising broadcasts in the public interest. But that is appropriately a matter for licensee judgment as to how to conduct broadcast operations to serve the public interest, and not a requirement of our ruling. Under section 3(h) of the Communications Act, broadcasters are not common carriers and they cannot be compelled to present advertising which they do not wish to present. Moreover, cigarette manufacturers clearly have no right to insist that a broadcast licensee, who is willing to present cigarette advertising, present it in a manner that does not comport with his statutory obligation to operate in the public interest. Nor does a cigarete manufacurer have any legal right to complain that the use of radio to inform the public as to the potential health hazard of cigarette smoking may lead to some decline in cigarette sales or slow down the present trend of rising cigarette sales (FTC Report, pp. 4–7). Indeed, that is the very purpose of the educational efforts which Congress has directed HEW to undertake.

54. In sum, we see no merit to the contention that our ruling will lead to severe curtailment or possible elimination of cigarette advertising, or have a serious economic impact on the broadcasting industry, contrary to the intent of Congress in the Labeling Act. The ruling properly effectuates the responsibilities of broadcast licensees and this Commission under the Communications Act. There is no unlawful burden on interstate commerce nor conflict with Congressional intent in, or the provisions of, the Labeling Act.

H. THE PROCEDURAL CONTENTION

55. Finally, petitioners urge that the ruling is procedurally invalid because it effects an important and unprecedented change of policy which will affect all licensees and it was adopted without affording WCBS–TV, broadcast licensees generally and other interested persons an opportunity to be heard. CBS, in particular, asserts that this was a departure from the Commission's procedure of advising a licensee of a fairness complaint and requesting its comments (Fairness Primer, F.C.C. Public Notice of July 1, 1964, 29 F.R. 10415, 10416, cited with approval in the Red Lion case, supra, par. 8). CBS requests that the contents of its letter be treated as its comments on Mr. Banzhaf's complaint, and that we reconsider the ruling on the basis of such comments.[30]

56. We have granted this request of CBS and have carefully considered its comments in determining that reconsideration is not warranted by the arguments contained in its letter. Our omission to seek the comments of WCBS–TV initially

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[28] Certainly, there is no reason to anticipate that any such minimal impact could have any substantial adverse effect upon the ability of broacast stations to serve the public interest. Cf. also FTC Report of June 30, 1967 at p. 10.

[29] We note that WCBS–TV apparently had no difficulty in ascertaining what programs that station had broadcast on this issue in response to Mr. Banzhaf's complaint.

[30] NBC notes that the Commission did not have before it the text of the three commercials Mr. Banzhaf referred to as examples. It has attached to its comments the texts of three advertisements and states that two of them appear to be those mentioned in the complaint and the third is probably the other. NBC further states: "They may show 'attractive' people 'enjoying' themselves while smoking cigarettes, but surely that does not constitute the expression of a viewpoint on whether smoking is a hazard to the smoker's health." For the reasons stated in par. 38 above, we do not think that the text of the particular advertisements was necessary to our ruling or to our decision on the requests for reconsideration.

was occasioned by our view that Mr. Branzhaf's complaint, which enclosed his request to WCBS–TV and the reply of that station, adequately set forth the facts of the case and the positions of the parties. Since WCBS–TV has a continuing policy of presenting the smoking-health hazard controversy and asserted only its position that the Fairness Doctrine does not apply to advertising, our letter of June 2, 1967 to that station had two purposes: One, to apprise WCBS–TV of the Commission's view that the Fairness Doctrine does apply to cigarette advertising, as a matter of law and policy, and second, to bring to the station's attention our view that a sufficient amount of time must be allocated, usually each week, for the opposing viewpoint so that WCBS–TV could appropriately exercise its licensee judgment in connection with its continuing program. As stated in paragraph 6, supra, the effectiveness of the June 2d ruling will not be the basis for action against any licensee, including WCBS–TV, until publication of this memorandum opinion and order in the FEDERAL REGISTER. In the circumstances, and particularly the fact that we have fully considered the comments submitted by CBS on reconsideration, we conclude that WCBS–TV has not been prejudiced by the procedures followed in this matter.

57. It is true that other interested persons were not accorded an opportunity to be heard prior to the ruling. It is not the Commission's normal procedure or usual practice to accord the public in general an opportunity to be heard with respect to fairness complaints against a particular licensee, even though the complaint may involve an important issue of policy (see e.g., Cullman Broadcasting Company, FCC 63–849; Times Mirror Broadcasting Co., 24 R.R. 404 and 407 (1962)). We thus followed long established procedures in this respect. In any event, we have now heard at length from the three television networks, numerous individual broadcast licensees, the NAB, and representatives of the advertising and tobacco industries. We have given extensive consideration to the arguments raised in support of their positions, and have found them without merit. Moreover, the ruling is not effective as to any broadcast licensee until publication of this opinion in the FEDERAL REGISTER. In the circumstances, we conclude that petitioners have been adequately heard and have suffered no prejudice.

58. Further, we are unable to conclude that any useful purpose would be served by affording petitioners a further opportunity for written comment or oral argument. The viewpoints of petitioners on the legal and policy issues are fully and amply set forth in the pleadings already filed, and nothing has been presented which would indicate the need or desirability of further study or proceedings; thus we are not persuaded that any public purpose would be served by initiating rule making in this area, as requested by the law firm of Smith, Pepper, Shack and L'Heureux. We note that the petition for rule making does not propose the adoption of any rules, but only the provision of a forum for consideration of the legal and policy arguments urged by petitioners and discussed herein. We do not think that a rule making proceeding is either needed or appropriate for their resolution.[31]

59. And, finally, we point out that we could not in any event conclude that stay relief would be warranted pending any such further proceedings. This is not only because we believe that petitioners have not shown any substantial likelihood of ultimately prevailing on the merits of their position, either before this Commission or the courts, but also because the public interest would require denial of such relief on injury grounds. We have already set forth the basis for our belief that compliance with the ruling will not cause any substantial adverse impact on the broadcasting or advertising industries. We have not been shown that any irreparable injury will flow to petitioners. In any event, in view of the strong public interest in adequately informing the public, and particularly teenagers, as to the health hazard involved in the cigarette habit which broadcast facilities are encouraging them to adopt and continue, we think, that any injury to the affected industries is outweighed by the danger of irreparable injury to the public. Indeed, if our ruling will contribute to the avoidance of one untimely death, the public interest would not be served by any delay in its effectiveness.

60. In connection with this latter point, we have taken into account the further studies which have been undertaken since the Advisory Committee Report by persons competent in this field. Most important, of course, is the recent HEW

[31] As set forth in par. 43 above, we agree with the CBS position that licensee responsibilities under the Fairness Doctrine, in this as in other areas, should not be subject to per se guidelines, ratios or other rigid rules prescribed by the Commission. Accordingly, we would not undertake rulemaking to prescribe such standards in the absence of some compelling showing leading us to revise our present judgment (see par. 43) and to conclude that rulemaking in this particular area would be appropriate and would serve a useful purpose.

Report of July 12, 1967 (already discussed in paragraph 33 and since confirmed and amplified in its Report of August 1967). We shall therefore note here other pertinent studies. In February 1966 Dr. E. Cuyler Hammond's study for the National Cancer Institute made the first large scale survey of women cigarette smokers. His study showed that such women's death rate from heart disease and lung cancer were twice that of nonsmokers.[32] In May 1966 Dr. Green of Harvard University reported experiments with rabbits proving cigarette smoking can cause many lung and throat ailments.[33] Roswell Memorial Institute announced in August 1966 a report finding filter tips of several cigarette brands ineffective in screening out harmful tars and nicotine. This report acknowledged that some filters were better than others, but asserts that none protects smokers.[34] A study by the Public Health Service and the American Cancer Society reported in October 1966 that a 5-year study of Seventh Day Adventists in California, comparing death rates of 11,071 male Adventists who do not smoke and the general male California population, showed one-sixth as many lung cancer deaths and one-third as many deaths from all respiratory diseases among Adventists as among the total male population.[35] Also in October 1966, a Louisiana State University 5-year study, financed partly by the Tobacco Research Council, reported findings of a relationship between cigarette smoking and hardening of the arteries in the heart.[36] Just recently, in a formal report to the President, it was stated by Dr. Kenneth M. Endicott, Chief of the National Cancer Institute, that "lung cancer—which will kill more than 50,000 Americans this year—can be brought under control because it is clearly caused by environmental factors—chiefly cigarettes." The President was also advised that "lung cancer has reached epidemic levels in men and may soon do so in women."[37]

61. As stated in our ruling, of most serious concern to the Commission are statistics as to the correlative rise in cigarette consumption and teenage smoking. In January 1966 the Department of Agriculture in a public report entitled, "Tobacco Situation", announced that 1965 had been a record year for cigarette consumption.[38] The reason given by the Surgeon General for the increase was new smokers, not the increased use of tobacco by the then-current smokers.[39] In July 1966 Surgeon General Stewart reported, based on American Cancer Society and Public Health Service surveys, that one-half of American teenagers are regular smokers by age 18, despite 2½ years of intensive educational efforts.[40] In October 1966 the Rand Youth Poll, conducted by the Youth Research Institute, released findings that teenagers smoke 10 million cigaretts per week, that 53 percent of all 16–19 year olds are smokers, and that this represents a rise of 4 percent in this age group during the almost 3-year period since the Advisory Committee's Report.[41] In November 1966 the American Cancer Society noted a 6-year study by Dr. E. Cuyler Hammond showing a marked drop in cigarette smoking among older people and a rise in consumption by young people.[42] In December 1966 the Agriculture Department announced that Americans had once again set a new record for total consumption of cigarettes per year.[43] In light of the statistics concerning teenage smoking, this increase in consumption appears correlated to the increase in population which occurs through the increase in youthful persons.

62. We wish to make it clear that this Commission is not the proper arbiter of the scientific and medical issue here involved and of course has not sought to resolve that issue. We have cited the reports in question because they establish (i) that here is a most substantial controversial issue of public importance, which must be fairly aired to the American people, and (ii) that because of the seriousness of the issue to the health of the people, a stay is patently inconsistent with the public interest. We recognize that there are countering efforts and arguments put forth particularly by the tobacco industry; there are also new and continuing developments in this field. See Hearings before the Consumer Subcommittee of the Senate Commerce Committee to review progress being made toward de-

[32] New York Times, Feb. 23, 1966, 41 : 8.
[33] New York Times, May 2, 1966, 39 : 1.
[34] New York Times, Aug. 30, 1966, 1 : 7.
[35] New York Times, Oct. 12, 1966, 54 : 1.
[36] New York Times, Oct. 22, 1966, 20 : 2.
[37] The Washington Post, July 22, 1967, 2 : 1.
[38] New York Times, Jan. 2, 1966, IV, 7 : 1.
[39] New York Times, Jan. 11, 1966, 9 : 1.
[40] New York Times, July 17, 1966, IV, 10 : 1.
[41] Advertising Age, Oct. 31, 1966.
[42] New York Times, Nov. 3, 1966, 41 : 1.
[43] New York Times, Dec. 31, 1966, 4 : 6.

velopment and marketing of a less hazardous cigarette. We have not gone into detail on these matters, because they do not alter the two crucial findings set forth above.

63. As stated, this Commission agrees with the crucial point set forth in the concluding paragraph of the recent FTC Report (see par. 34). In view of the Congressional action, the Government and private reports, we conclude that a stay of our action would be contrary to the public interest. Licensees must therefore abide by the ruling, or seek judicial review of it (see Red Lion Broadcasting Company v. F.C.C. supra). (Even in the event of such review, the ruling remains effective, absent entry of a Court stay.)

II. Conclusions

64. There is, we believe, some tendency to miss the main point at issue by concentration on labels such as the specifics of the Fairness Doctrine or by conjuring up a parade of "horrible" extensions of the ruling. The ruling is really a simple and practical one, required by the public interest. The licensee, who has a duty "to operate in the public interest" (§ 315 (a)), is presenting commercials urging the consumption of a product whose normal use has been found by the Congress and the Government to represent a serious potential hazard to public health. Ordinarily the question presented would be how the carriage of such commercials is consistent with the obligation to operate in the public interest. In view of the Legislative history of the Cigarette Labeling Act, that question is one reserved for judgment of the Congress upon the basis of the studies and reports submitted to it (except, of course, for whatever voluntary judgment the boardcasting industry might now make). But there is, we think, no question of the continuing obligation of a licensee who presents such commercials to devote a significant amount of time to informing his listeners of the other side of the matter—that however enjoyable smoking may be, it represents a habit which may cause or contribute to the earlier death of the user. This obligation stems not from any esoteric requirements of a particular doctrine but from the simple fact that the public interest means nothing if it does not include such a responsibility.

65. In light of all the foregoing, we conclude and find:

a. The ruling as to the applicability of the Fairness Doctrine to cigarette advertising is within the Commission's legal authority and discretion, and is in the public interest.

b. Petitioners have made no showing which warrants reconsideration and withdrawal of the ruling or the institution of rule making in this area.

c. Petitioners have made no showing that relief, except as indicated in paragraph 6 above, is warranted or in the public interest; on the contrary, the grant of stay relief would be likely to cause irreparable harm to the public.

Accordingly, it is ordered,

That the petitions and requests for reconsideration, rule making, and stay listed in paragraph 1 of this memorandum opinion and order are denied, except to the extent that relief is granted herein pending publication of this memorandum opinion and order in the Federal Register.

It is further ordered, That copies of this memorandum opinion and order shall be mailed to all broadcast licensees of the Commission.

Adopted: September 8, 1967.

Released: September 13, 1967.

Federal Communications Commission,[44]

[seal] Ben F. Waple, *Secretary.*

Appendix

Background to 1965 Cigarette Labeling Act

1. On January 11, 1964, the Report of the Surgeon General's Advisory Committee concluded that cigarette smoking contributes substantially to mortality from certain specific diseases and to the overall death rate. The Committee recommended that "cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." After the Report was issued, many groups, private and public, acted to provide this "remedial action."

[44] Statements of Commissioners Loevinger and Johnson filed as part of the original document; Commissioner Wadsworth absent.

(*a*) *The Tobacco and Broadcasting Industries*

2. Soon after the Advisory Committee's Report, the tobacco and broadcasting industries reacted with voluntary measures to control the content of cigarette advertising. In January 1964 the Television Code Review Board and the Television Board of Directors of the NAB recommended and approved specific amendments to the Television Code. The amendments prohibited some types of cigarette advertising directed at young people and health claims in cigarette advertising.[45] In June 1946 similar amendments were approved for the Radio Code.[46] These Code amendments were motivated by the Advisory Committee's Report. In the words of the Television Code Review Board (Hearings, Senate Commerce Committee on S. 559 and S. 547, 89th Cong., 1st sess. pt. 1, p. 591):

> The board recognizes the burden of responsibility the report imposes on all television licensees in the area of cigarette advertising. Specifically, the board is concerned with the potential of cigarette advertising to give the false impression that cigarette smoking promotes health or physical well-being. The Code Authority also made clear that regulation initiated by the cigarette manufacturers was what they envisaged. Thus the Authority provided that it would delay the issuance of general guidelines (interpreting the code amendments) which would assist advertisers and code subscribers in adhering to the television code restrictions, pending its determination of the implementation and effectiveness of the tobacco industry's self-regulation. Id., at p. 592.

3. In April 1964 the major cigarette companies announced their agreement and adherence to a cigarette advertising code to impose standards and enforcement procedures for the self-regulation of cigarette advertising. The code provided advertising standards which would be applied by an independent administrator who would survey the advertising and labeling of cigarettes in the United States, with the power to levy fines for any advertising or labeling which does not conform to the industry code standards. These standards are basically of three types. The first prohibits many types of cigarette advertising specifically directed at persons under 21 years of age. Another prohibits health claims, except in certain limited circumstances. The third type prohibits suggestions that smoking is essential to social prominence, distinction, success, or sexual attraction. Robert B. Meyner, the former Governor of New Jersey, is the first and current administrator for the code. In evaluating the effect of the code on cigarette advertising, Mr. Meyner said in a Senate hearing (id., at p. 568) that the character of cigarette advertising had been altered as a result of his enforcement of the code.[47]

(*b*) *HEW and private health agencies*

4. The Department of Health, Education, and Welfare (HEW) also took action after the Advisory Committee's Report. On February 18, 1964, the Surgeon General, Luther Terry, convened a meeting of four voluntary agencies to discuss with them and other health agencies means of implementing the recommendations contained in the Advisory Committee Report. This meeting eventually resulted in the establishment of the National Interagency Council on Smoking and Health on July 9, 1965. The purposes of the Council are threefold: "(1) To use its professional talents to bring to the nation—particularly the young—an increasing awareness of the health hazards of cigarette smoking, (2) to encourage, support, and assist National, State, and local smoking and health programs, and (3) to

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[45] Television Code, section IV, Program Standards, paragraph 12: Care should be exercised so that cigarette smoking will not be depicted in a manner to impress the youth of our country as a desirable habit worthy of imitation.

Television Code, section IX, General Advertising Standards, paragraph 7: The advertising of cigarettes should not be presented in a manner to convey the impression that cigarette smoking promotes health or is important to personal development of the youth of our country.

[46] Radio Code I, Program Standards, section H. 13: The use of cigarettes shall not be presented in a manner to impress the youth of our country that it is a desirable habit worthy of imitation in that it contributes to health, individual achievement, or social acceptance.

Radio Code, Advertising Standards, section C(g): The advertising of cigarettes shall not state or imply claims regarding health and shall not be presented in such a manner as to indicate to the youth of our country that the use of cigarettes contributes to individual achievement, personal acceptance, or is a habit worthy of imitation.

[47] However, we note the following exchange between Code Administrator Meyner and Senator Bass (id., at p. 581):

"Senator Bass: * * * don't you believe that the industry itself, with you as the administrator, don't you believe that you are capable of protecting the health of the American public as far as advertising of cigarettes is concerned?

"Code Administrator Meyner: I think you describe a rseponsibility that is greater than is set forth in the code. As the code sets it forth, I am trying to accept that responsibility * * *."

generate and coordinate public interest and action related to this area of health." The membership of the Council includes 13 private agencies and three Federal Government agencies (U.S. Public Health Service, U.S. Office of Education, and U.S. Children's Bureau).

5. In 1964, the Public Health Service, which strongly endorsed the conclusions of the Advisory Committee's Report, awarded 10 grants and contracts to support demonstrations and projects to design effective methods of reaching various population groups with the facts about smoking. The comprehensive educational campaigns, however, which the Public Health Service desired to start had to await appropriations forthcoming from the 80th Congress. The President's Commission of Heart Disease, Cancer and Stroke recommended an appropriation of $10 million to educate the public on the health hazards of smoking and to provide a network of control clinics to assist those who desire to give up smoking. Two million dollars were forthcoming in the fall of 1965.

(*c*) *The Federal Trade Commission*

6. As early as September 1955 the Federal Trade Commission (FTC) had promulgated Cigarette Advertising Guides which, among other things, prohibited representations in cigarette advertising or labeling which refer to either the presence or absence of any physical effects from cigarette smoking, or which made unsubtantiated claims respecting nicotine, tars, or other components of cigarette smoke, or which in any other respect contain implications concerning the health consequences of smoking cigarettes or any advertised brand (F.T.C. Ann. Rept., 1960, p. 82). In 1960 the FTC obtained agreement from leading cigarette manufacturers to eliminate unsubstantiated claims of nicotine and tar content (ibid.).

7. Shortly after the issuance of the Advisory Committee's Report. the FTC, on January 18, 1964, initiated a Trade Regulation rule making proceeding concerning the advertising and labeling of cigarettes. On June 22, 1964, after examining the advertising, labeling and other promotional practices in the cigarette industry, the FTC concluded that cigarette manufacturers should be required to make an affirmative disclosure of the potential hazard from smoking in labeling and advertising (29 F.R. 8325). The basis for its conclusion was twofold. First, the FTC found that the consensus of medical and scientific opinion was that cigarette smoking is a significant cause of certain grave diseases and contributes to the overall death rate. Second, the FTC found that the methods by which cigarettes had been and were being sold to the consuming public—by means of labeling and advertising which fails to disclose the health hazards of cigarette smoking—were deceptive and unfair to consumers under settled legal principles governing truth and fairness in advertising. The rule would have required that each cigarette package bear a warning statement by January 1, 1965. Also, if the warning on the package together with such voluntary advertising reforms as the industry might have undertaken in the interim, had failed to change the circumstances leading to the FTC's findings, the rule would have then required, in addition, warnings in all cigarette advertising by July 1, 1965.

8. On September 3, 1964, at the request of Chairman Harris of the House Commerce Committee, the FTC extended the effective date of the rule for both packaging and advertising warnings to July 1, 1965 (29 F.R. 15570). Chairman Harris stated that he had requested such action because testimony which he had received during his Committee's Hearings in June and July 1964 indicated that the validity of the trade regulation rule would be challenged in the courts, that judicial review could delay the enforcement of the labeling requirements for a considerable period of time, and that the enactment of legislation in this area by the Congress could very well eliminate this delay. The FTC rule never went into effect because Congress enacted the Cigarette Labeling Act.

[F.R. Doc. 67–10743 ; Filed, Sept. 14, 1967 ; 8 :45 a.m.]

APPENDIX C

MEREDITH WOW, INC.,
OMAHA, NEBR., *February 28, 1968.*

Hon. GLENN CUNNINGHAM,
New House Office Building,
Washington, D.C.

DEAR GLENN: Thank you for asking for our comments on the Fairness Doctrine. As you will recall we have had correspondence with you in the past regarding this subject, and are most pleased that you will be sitting in on hearings.

In our opinion, the Fairness Doctrine is unconstitutional. Specifically, we think it violates the First Amendment of the U.S. Constitution with respect to freedom of speech and press.

As now interpreted and applied by the Federal Communications Commission, the Fairness Doctrine has never been authorized by Congress.

There has been no showing of a real need for the Doctrine. Most broadcasters practice fairness. Few have been accused of unfairness, and fewer still have been convicted.

The FCC is rapidly extending the Doctrine to new situations, and it is hard to forecast the ultimate. A few years ago, the FCC ruled that when the Doctrine is violated in sponsored time, the licensee must provide free time if the aggrieved party cannot afford to, or does not choose to buy time. In 1967, for the first time, the Commission applied the Doctrine to commercials. It ruled that when a station broadcasts cigarette commercials it must also use its time and facilities to warn the public about the hazards of cigarette smoking. While the Commission says that it considers cigarettes a special case, it is easy to see how this ruling can be applied to any advertised item deemed dangerous by the FCC. Recently a New York City station referred to the DuBois Clubs as "Red" and "Marxist." The FCC pronounced this a personal attack within the meaning of the Fairness Doctrine, and has ordered the station to provide time to the DuBois Clubs for reply.

In its administration of the Fairness Doctrine the Commission is increasingly intruding itself into the programming decisions of broadcasters. This is partly because of the bureaucratic tendency to stretch regulatory power to its maximum. Mainly however, it is because in the application of the Doctrine the Commission must necessarily substitute its judgment for that of the licensee, even though it professes not to do so.

The Fairness Doctrine has the effect of discouraging discussion on broadcasting stations. Rather than risk the severe penalties for violation of the Doctrine, and rather than face the necessity of providing free time, many stations tend to avoid anything smacking of controversial.

Also, Glenn, I am attaching a copy of Resolutions passed by the Nebraska Broadcasters Association during the past several years.

Sincerely,

Howard

HOWARD STALNAKER,
Vice President, General Manager.

RESOLUTION—FAIRNESS DOCTRINE

Passed at 1967 Nebraska Broadcasters Association Convention in Sidney, Nebr. September 19, 1967

Nebraska Broadcasters Association, in annual convocation, renews its vigorous opposition to recent FCC action, in which this agency expanded its interpretation of the Fairness Doctrine. We specifically refer to the application of certain mandatory responsibilities on broadcast licensees, resulting from their presentation of cigarette advertising program material.

Most broadcast authorities, and many competent communications attorneys have labeled this FCC action as representing an unwarranted and dangerous intrusion into American business, by an agency of government. Nebraska Broadcasters support this contention.

Further, Nebraska Broadcasters are not comforted by the comment, attributed to the FCC, that this Agency "does not *intend* to appy the Fairness Doctrine to other advertised products and services". Historically, the immediate "intentions" of current Commission members might be overlooked, or mis-interpreted, by future Commissions. This current action set a dangerous precedent, the implications of which might actually be employed by future Commissions to eliminate, or feasibly nullify, the possible acceptance of advertising from other sources.

Additionally, this action promotes a climate of censorship, whereby business is literally commanded to support, in their public attitudes, a controversial Government position that has not even been unanimously approved by the Congress of the United States—the body that created the agency in question.

Nebraska Broadcasters further aver, that this FCC action represents a confiscation of property, without due process of law.

RESOLUTION

Whereas the Federal Communications Commission in a landmark decision recently ruled that broadcasters who air paid cigarette commercials must provide and even *give* "a significant amount of time" to the presentation of "contrasting views on the issue of the benefits and advisability of smoking", and

Whereas the broadcasting industry has an outstanding record in informing the American people of the contents of the official Surgeon General's report on smoking and the industry has been publicly recognized by both the American Cancer Society and the American Heart Association, two voluntary health organizations vitally concerned with smoking, and

Whereas the ruling of the FCC is broader than the issue on cigarette smoking and is an unwarranted and dangerous intrusion into American business because it erroneously seeks to apply the so-called "Fairness Doctrine" to product advertising which has profound and far-reaching implications for all advertising for the idea that those who disagree with an advertiser's opinion should be provided with free time in which to express their opinions could not only change advertising but end it, and

Whereas the FCC currently stresses that their holding "is limited to this product * * * cigarettes", but what is to prevent its inevitable extention to coffee, many drugs, cosmetics, beer, insect sprays or even automobiles, which can be hazardous if not properly used. Yes, and how long before the FCC would doom broadcasting to progressive enfeeblement by bringing this policy forcefully into politics, granting free time to one candidate to answer paid advertising by his opponent? Or to management or labor in a controversy or to any other adversaries in a public affairs dispute, and

Whereas the so-called "Fairness Doctrine" is an affirmative command to the broadcasting industry to yield a substantial amount of time for propaganda which the Government deems wholesome and we vigorously urge that it is dangerous for a powerful Government commission to take up the lash to compel the broadcasting industry to support a Government position, and that this matter bears constitutional and legal implications touching the very foundation of our theory on government, and

Whereas the ramifications of the Commission's ruling are inestimable—actually shocking, a most frightening assault on the cherished freedom of speech philosophy in this country so: Now therefore be it

Resolved, That the Board of Directors of the Nebraska Broadcasters Association strongly objects to this ruling of the FCC holding that the so-called "Fairness Doctrine" is applicable to cigarette commercials, and be it further

Resolved, That the Nebraska Broadcasters Association urges immediate reconsideration and repudiation by the FCC of the above stated letter ruling or that the FCC make the ruling the subject of a rule making proceeding and that it stay the effectiveness of the application of the ruling until it acts on the rule making petition, and be it further

Resolved, That copies of this resolution be sent by certified mail to President Johnson, all members of the FCC, all members of the U.S. Senate and House Commerce Committees, Senator Roman L. Hruska, Senator Carl T. Curtis, Nebraska Congressmen Cunningham, Martin and Denney, and President Vincent Wasilewski of the National Association of Broadcasters.

Adopted by the Board of Directors of the Nebraska Broadcasters Association, Lincoln, Nebraska, this 28th day of June, 1967.

NEBRASKA BROADCASTERS ASSOCIATION,
JOE DI NATALE, *President.*
CHARLES THONE,
Secretary and Legal Counsel.

ATTEST:

CONVENTION OF THE NEBRASKA BROADCASTERS ASSOCIATION, OCTOBER 6, 1963

Whereas the Federal Communications Commission on June 1, 1949, *In The Matter of Editorializing by Broadcast Licensees* (Docket No. 8516) enunciated and reaffirmed a so-called "Fairness Doctrine" to be observed by broadcast stations in connection with availability of broadcast facilities for expression of contrasting views of responsible elements on issues of public significance and importance, and

Whereas, on July 26, 1963, the Federal Communications Commission issued a Note (FCC 63–734, Public Notice B–38372) announcing, in effect, that in determining compliance with the so-called "Fairness Doctrine" it is immaterial whether the program is, in fact, editorial comment, or whether it is "paid announcement, official speech, editorial or religious broadcast", and

Whereas the Commission by its Notice of July 26, 1963, has apparently extended the "Fairness Doctrine" to every type of programming, irrespective of whether the programming is primarily designed for and intended to be religious, agricultural, or entertainment in nature and irrespective of whether the program deals significantly with an issue of reasonable public controversy, and

Whereas the attempted application by the Federal Communications Commission of its "Fairness Doctrine" to every type of programming of all broadcasts in the United States may and will, in our view, result in a constant morass of problems for the Commission and for the broadcasters involving questions and requiring decisions by the said Commission on day-to-day programming and programs of broadcast stations, including particularly, religious programs, and

Whereas extension by the Federal Communications Commission of the "Fairness Doctrine" to all programming of broadcast stations will be inimical to the freedom from censorship saved for broadcasters by the Communications Act of 1934, as amended, and guaranteed by the Constitution of the United States, and

Whereas the extension of Federal control into all areas of programming would, in our view, be contrary to the best interest of the United States of America and the citizens thereof: Now, therefore, be it

Resolved, That the Nebraska Broadcasters Association go on record as strongly opposing an extension by the Federal Communications Commission of the "Fairness Doctrine" to all phases of programming by broadcast stations and urge the said Commission to restrict the specific application of the "Fairness Doctrine" to editorial broadcasting and to programs which are specifically and primarily designed to and are considered by the broadcaster to be for the purpose of presenting the significant views of responsible and knowledgeable elements on issues of public controversy and significance in the community and areas served; and be it further

Resolved, That the Secretary of the Nebraska Broadcasters Association be and is hereby directed to promptly forward a copy of this Resolution to the President of the United States, to the Secretary, Federal Communications Commission, Washington 25, D.C., and to each individual Commissioner thereof, and to each Senator and Representative from Nebraska in the Congress of the United States.

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