

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

Inquiry into Section 73.1910 of the
Commission's Rules and Regulations
Concerning the General Fairness Doctrine
Obligations of Broadcast Licensees

Gen. Docket
No. 84-282

REPORT
(Proceeding Terminated)

Adopted: August 7, 1985; Released: August 23, 1985

BY THE COMMISSION: *CHAIRMAN FOWLER ISSUING A SEPARATE
STATEMENT; COMMISSIONER QUELLO CONCURRING AND
ISSUING A STATEMENT; COMMISSIONER RIVERA NOT
PARTICIPATING.*

I. Introduction

1. Before the Commission for consideration are the matters raised by the *Notice of Inquiry* in the above-captioned proceeding in which the Commission solicited comments on the statutory, constitutional, and policy implications underlying the fairness doctrine. Specifically, the Commission questioned whether the doctrine is constitutionally permissible under current marketplace conditions and First Amendment jurisprudence. Moreover, as a policy matter, the Commission inquired whether the doctrine remains necessary to further the governmental interest in an informed electorate and solicited comment on whether or not the doctrine, in operation, has an impermissible "chilling" effect on the free expression of ideas. Finally, the Commission queried whether the fairness doctrine is codified either by Sections 315 or by the general public interest standard embodied in the Communications Act.

¹ *Notice of Inquiry* in Gen. Docket No. 84-282, FC 84-140, 49 Fed. Reg. 20317 (May 14, 1984) [hereinafter cited as "*Notice*"].

2. More than one hundred parties submitted formal comments and reply comments in this proceeding.² Many other persons participated in this proceeding through the submission of informal comments. In addition, the Commission, *en banc*, on February 7 and 8, 1985, heard oral presentations on the issues raised by the *Notice*.

3. The fairness doctrine, as developed by the Commission, imposes upon broadcasters a two-pronged obligation. Broadcast licensees are required to provide coverage of vitally important controversial issues of interest in the community served by the licensees and to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues.³ An examination of the genesis of the fairness doctrine reveals an evolutionary process, spanning a considerable period of time, and marked by a considerable uncertainty as to the proper approaches to insure that licensees operate in the public interest.⁴ This inquiry is a further step in a continuing process in evaluating the fairness doctrine.⁵ In undertaking this reexamination, we will first determine the purposes underlying promulgation of the fairness doctrine and then assess, in light of current market place conditions, whether or not its retention is consistent with the public interest.

4. Our past judgment that the fairness doctrine comports with the public interest was predicted upon three factors. First, in light of the limited availability of broadcast frequencies and the resultant need for government licensing, we concluded that the licensee is a public fiduciary, obligated to present diverse view-

² A list of all the parties which filed formal comments and reply comments in this proceeding is contained in the attached Appendix.

³ *Fairness Report* in Docket No. 19260, 48 FCC 2d 1 (1974), *recon. denied*, 58 FCC 2d 691 (1976), *aff'd sub nom. National Citizens Committee for Broadcasting v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978) [“hereinafter cited as “1974 Fairness Report”].

⁴ For a detailed examination of the history of the fairness doctrine, see *Notice*, *supra* n.1.

⁵ In light of the fact that “the weighing of policies under the ‘public interest’ standard is a task that Congress has delegated to the Commission in the first instance” [*FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 810 (1978)], we have an affirmative duty periodically to reassess the wisdom of our rules, even those of long standing, and to determine whether or not they should be altered or even eliminated in light of changed circumstances. See, e.g., *NAACP v. FCC*, 682 F.2d 993 (D.C. Cir. 1982). The Supreme Court has recognized that “[r]egulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation’s needs in a volatile, changing economy.” *American Trucking Association, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 416, *reh. denied*, 389 U.S. 889 (1967). See *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

points representative of the community at large. We determined that the need to effectuate the right of the viewing and listening public to suitable access to the marketplace of ideas justifies restrictions on the rights of broadcasters.⁶ Second, we presumed that a governmentally imposed restriction on the content of programming is a viable mechanism—indeed the best mechanism—by which to vindicate this public interest.⁷ Third, we determined, as a factual matter, that the fairness doctrine, in operation, has the effect of enhancing the flow of diverse viewpoints to the public.⁸

5. On the basis of the voluminous factual record compiled in this proceeding, our experience in administering the doctrine and our general expertise in broadcast regulation, we no longer believe that the fairness doctrine, as a matter of policy, serves the public interest. In making this determination, we do not question the interest of the listening and viewing public in obtaining access to diverse and antagonistic sources of information.⁹ Rather, we conclude that the fairness doctrine is no longer a necessary or appropriate means by which to effectuate this interest. We believe that the interest of the public in viewpoint diversity is fully served by the multiplicity of voices in the marketplace today and that the intrusion by government into the content of programming occasioned by the enforcement of the doctrine unnecessarily restricts the journalistic freedom of broadcasters. Furthermore, we find that the fairness doctrine, in operation, actually inhibits the presentation of controversial issues of public importance to the detriment of the public and in degradation of the editorial prerogatives of broadcast journalists.

6. We believe that the same factors which demonstrate that the

⁶ We stated that it is necessary to vindicate:

... 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.

Report of the Commission in Docket No. 8516, 13 FCC 1246, 1249 (1949) [hereinafter cited as "1949 Fairness Report"]. See *1974 Fairness Report*, 48 FCC 2d at 2-3.

⁷ *1974 Fairness Report*, 48 FCC 2d at 6.

⁸ *Id.* at 7.

⁹ As the Supreme Court has stated, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1966).

fairness doctrine is no longer appropriate as a matter of policy also suggest that the doctrine may no longer be permissible as a matter of constitutional law. We recognize that the United States Supreme Court, in *Red Lion Broadcasting Co. v. FCC*¹⁰ upheld the constitutionality of the fairness doctrine. But in the intervening sixteen years the information services marketplace has expanded markedly, thereby making it unnecessary to rely upon intrusive government regulation in order to assure that the public has access to the marketplace of ideas. In addition, the compelling evidence adduced in this proceeding demonstrates that the fairness doctrine, in operation, inhibits the presentation of controversial issues of public importance; this fact impels the dual conclusion that the doctrine impedes the public's access to the marketplace of ideas and poses an unwarranted intrusion upon the journalistic freedom of broadcasters.

7. While we are firmly convinced that the fairness doctrine, as a matter of policy, disserves the public interest, the issue as to whether or not Congress has empowered us to eliminate the doctrine is not one which is easily resolved. The fairness doctrine evolved as an administrative policy promulgated by the Commission pursuant to congressionally delegated power. While we do not believe that the fairness doctrine is a necessary component of the general "public interest" standard contained in the Communications Act,¹¹ the question of whether or not Congress in amending Section 315 in 1959 codified the doctrine, thereby requiring us to retain it, is more problematic. In any event, the fairness doctrine has been a longstanding administrative policy and central tenet of broadcast regulation that Congress has chosen not to eliminate. Moreover, there are proposals pending before Congress to repeal the doctrine. As a consequence, we believe that it would be inappropriate at this time for us to either eliminate or significantly restrict the scope of the doctrine. Instead, we will afford Congress an opportunity to review the fairness doctrine in light of the evidence adduced in this proceeding.

II. The Constitutionality of the Fairness Doctrine is Suspect

8. As we stated in the *Notice*,¹² the fairness doctrine, as a governmentally imposed regulation affecting the content of

¹⁰ 395 U.S. 367 (1969).

¹¹ 47 U.S.C. § 309 (1982).

¹² See *Notice, supra* n.1 at ¶¶ 81-95.

speech, has significant constitutional ramifications. Because “the ‘public interest’ standard necessarily invites reference to First Amendment principles,”¹³ it is appropriate for us to consider the constitutional implications of the doctrine.

9. The First Amendment reflects “a profound national commitment to the principle that debate on public issues should be inhibited, robust, and wide-open. . . .¹⁴ As Justice White noted in *Miami Herald v. Tornillo*:

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.¹⁵

10. The means chosen by the Founders to promote the free discussion of public issues was to prohibit the government from intruding into the marketplace of ideas. As the Supreme Court has stated, “the First Amendment does not speak equivocally. It prohibits any law ‘abridging the freedom of speech, or of the press.’ ”¹⁶ The framers of the First Amendment proscribed the government from placing its official imprimatur on any particular viewpoint; they presumed that the marketplace of ideas would flourish best without the necessity or danger of governmental intervention.¹⁷

11. Under the First Amendment the expression of opinion on matters of public concern “is entitled to the most exacting degree of First Amendment protection.”¹⁸ As the United States Supreme

¹³*Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973). See also *American Security Council Education Foundation v. FCC*, 607 F.2d 438, 443 (D.C. Cir. 1979), cert. denied, 444 U.S. 1013 (1980).

¹⁴*New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

¹⁵418 U.S. 241, 259 (1974), quoting *Mills v. Alabama*, 384 U.S. 214, 218-19 (1969) (White J., concurring).

¹⁶*Bridges v. California*, 314 U.S. 252, 263 (1941). As Justice Potter Stewart has stated:

Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believe that “fairness” was too fragile to be left for a government bureaucracy to accomplish.

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. at 145 (Stewart, J., concurring).

¹⁷The United States Supreme Court has stated that “in the realm of ideas [the Constitution] protects expression which is eloquent no less than that which is unconvincing.” *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 360 U.S. 684, 689 (1959).

¹⁸*FCC v. League of Women Voters of California*, _____ U.S. _____, 104 S. Ct. 3106, 3115 (1984). See *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77, reh. denied, 438 U.S. 907 (1978); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

Court has stated, the “[d]iscussion of public issues . . . are integral to the operation of the system of government established by our Constitution,”¹⁹ and, therefore, essential to an informed democratic citizenry.²⁰ In addition, as Justice Brennan has recently observed, a “general proscription against unnecessarily broad content-based regulation permeates First Amendment jurisprudence.”²¹

12. The United States Supreme Court upheld the constitutionality of the fairness doctrine in *Red Lion Broadcasting Co. v. FCC*,²² “despite the general [F]irst [A]mendment prohibition on government regulation of speech and of the press”²³ because the Court, at that time, perceived that the doctrine furthered “the paramount [F]irst [A]mendment right of viewers and listeners to receive ‘suitable access to . . . ideas and experiences.’”²⁴ For several reasons, however, the Court’s decision in *Red Lion*, was narrowly circumscribed. First, in its opinion, the Court expressly stated that its holding did not constitute approval of every aspect of the fairness doctrine.²⁵ Second, relying upon our representation that there was no validity to the contention that the fairness doctrine, in operation, lessens the coverage of controversial issues on the nation’s airwaves,²⁶ the Court asserted that

¹⁹ *Buckley v. Valeo*, 424 U.S. at 14.

²⁰ The United States Supreme Court has recently reaffirmed that:

It is speech on ‘matters of public concern’ that is “at the heart of the First Amendment’s protection.’ *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978), quoting *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940). As we stated in *Connick v. Myers*, 461 U.S. 138, 145 (1983), . . . “the Court has frequently reaffirmed that speech on public issues occupies the ‘highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 445, 467 (1980).”

Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc., _____ U.S. _____, 53 U.S.L.W. 4866, 4869 (U.S. June 26, 1985) (No. 83-18).

²¹ *Id.* at 4874 (Brennan, J., dissenting). See also *Banzhaf v. FCC*, 405 F.2d 1082, 1100 (D.C. Cir. 1968), cert. denied sub nom. *American Broadcasting Companies v. FCC*, 396 U.S. 842 (1969) (“The First Amendment is unmistakably hostile to governmental controls over the content of the press”).

²² *Red Lion Broadcasting Co. v. FCC*, supra n.10.

²³ *American Security Council Education Foundation v. FCC*, 607 F.2d at 443-44.

²⁴ *Id.*, quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 389-90 (ellipses in original).

²⁵ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 396.

²⁶ In *Red Lion*, the Court stated that if broadcasters’

. . . coverage of controversial public issues will be eliminated or at least rendered wholly ineffective [by the doctrine] [s]uch a result would indeed be a serious matter, for . . . the purposes of the doctrine would be stifled.

At this point, however, as the Federal Communications Commission has indicated, that possibility is at best speculative.

if experience with the administration of these doctrines indicates that they have the net affect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications.²⁷

Third, the Court's decision was necessarily premised upon the broadcasting marketplace as it existed more than sixteen years ago.²⁸

13. As a consequence, serious questions regarding the constitutionality of the fairness doctrine continued in spite of the Supreme Court's decision in *Red Lion*. Indeed, as the United States Court of Appeals stated in referring to that decision:

[d]espite this holding, important constitutional questions continue to haunt this area of the law. The doctrine and the rule do, after all, involve the Government to a significant degree in policing the content of communication . . . [and there are] abiding First Amendment difficulties. . . .²⁹

14. Subsequent to *Red Lion*, the Court in *Miami Herald Publishing Co. v. Tornillo*³⁰ invalidated, on First Amendment grounds, a Florida statute which gave political candidates a right to reply to criticisms and attacks by a newspaper. In that case the Court, in a unanimous opinion, determined that the inevitable effect of a governmentally imposed right of reply requirement would be to reduce the amount of controversial issues of public importance presented in the press. The Court concluded that:

Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid

Id. at 393. See also *American Security Council Education Foundation v. FCC*, 607 F.2d at 444.

²⁷ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 393. Similarly, the United States Court of Appeals has stated that "[i]f the fairness doctrine cannot withstand First Amendment scrutiny, the reason is that to insure a balanced presentation of controversial issues may be to insure no presentation, or no vigorous presentation, at all." *Banzhaf v. FCC*, F.2d at 1102-03.

²⁸ As the Supreme Court has recognized:

Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of a great delicacy and difficulty. . . . The problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence.

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. at 102.

²⁹ *Straus Communications, Inc. v. FCC*, 530 F.2d 1001, 1008 (D.C. Cir. 1976).

³⁰ *Miami Herald Publishing Co. v. Tornillo*, *supra* n.15.

controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced. Government-enforced right of access inescapably “dampens the vigor and limits the variety of public debate.”³¹

Indeed, the Court, in *Miami Herald*, intimated that the regulatory requirements that we impose may be even more inhibiting than those contained in the “right of reply” statute because print journalists are not “subject to the finite technological limitations of time that confront a broadcaster. . . .”³²

15. In *FCC v. League of Women Voters*³³ the Court has recently reaffirmed that the constitutional permissibility of the fairness doctrine is predicated upon a factual presumption that the doctrine has the effect of enhancing the coverage of controversial issues available to the viewing and listening public. Indeed, the Court stated that it would be obligated to reevaluate the constitutionality of the doctrine if the Commission demonstrated the falsity of this assumption.³⁴ In addition, the Court indicated that it may be willing to reassess the constitutional standards traditionally applied in broadcast regulation. The Court stated that:

The prevailing rationale for broadcast regulation based upon spectrum scarcity has come under increasing criticism in recent years. Critics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete. *See, e.g.,* Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 *Tex. L. Rev.* 207, 221-226 (1982). We are not prepared, however, to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.³⁵

³¹ *Id.* at 257, quoting *New York Times Co. v. Sullivan*, 376 U.S. at 279.

³² *Id.* at 256-57.

³³ *FCC v. League of Women Voters of California*, *supra* n.18.

³⁴ The Court asserted that:

As we recognized in *Red Lion*, however, were it to be shown by the Commission that the fairness doctrine “has the effect of reducing rather than enhancing” speech, we would then be *forced* to reconsider the constitutional basis of our decision in that case.

Id. at 3117 n.12, quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 393 (emphasis added).

³⁵ *Id.* at 3116 n.11. The United States Court of Appeals has also indicated that the proliferation of broadcast outlets may affect the extent to which the speech of broadcasters is protected by the First Amendment:

[t]oday when the number of broadcast stations not only far exceeds the number when the Communications Act was adopted and the number when

Our reading of this language is that the decision in *Red Lion*, as well as the level of constitutional scrutiny applied to content regulation of broadcast speech, could change if the factual predicates which the Supreme Court relied upon in that case have changed. As a consequence, while we recognize that the Supreme Court's decision in *Red Lion* is controlling law unless the Court expressly states otherwise, we do not agree with the position of some commenters that the mere recitation of the Court's decision in *Red Lion* is sufficient to definitively resolve the complex constitutional issues presented by the doctrine.³⁶

16. We now turn to identifying the standard of review appropriate to restraints on broadcast speech. In ascertaining whether or not a particular broadcast regulation comports with the First Amendment, the United States Supreme Court historically has applied standards which are different from those governing "the traditional free speech case."³⁷ Specifically, the Court has asserted that the utilization by the broadcast media of a public resource justifies the application of what it characterizes as "an unusual order of First Amendment values."³⁸ Under this bipartite standard, the interest of the public under the First Amendment is paramount.³⁹ The second part of this standard recognizes the

the *National Broadcasting Co.* case was decided and rivals and perhaps surpasses the number of newspapers and magazines in which political messages may effectively be carried, it seems unlikely that the First Amendment protections of broadcast political speech will contract further, and they may well expand.

Loveday v. FCC, 707 F.2d 1443, 1459 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 1907 (1984); *See also Banzhaf v. FCC*, *supra* n.21; *Quincy Cable, TV Inc. v. FCC*, No. 83-1283 (D.C. Cir. July 19, 1985).

³⁶ Similarly, we do not believe that the mere fact that the fairness doctrine is a regulation of long-standing makes it invulnerable to First Amendment challenge. The United States Court of Appeals has stated that:

It may well be that some venerable FCC policies cannot withstand constitutional scrutiny in light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets.

Banzhaf v. FCC, 405 F.2d at 1100.

³⁷ *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 101.

³⁸ *Id.*

³⁹ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 390. Contrary to the position of some commenters (*see, e.g.*, Reply Comments of Ecumedia) the general public has no First Amendment right to speak on broadcast frequencies. *See, e.g., Columbia Broadcasting System, Inc. v. Democratic National Committee*, *supra* n.13. The juxtaposing of speakers' and listeners' rights provides an important underpinning of the framework the Supreme Court has employed in analyzing constitutional constraints in the broadcast regulatory area. It suggests that some lessening of the rights of one group (speakers) is necessary to increase the

substantial rights of broadcasters under the First Amendment.⁴⁰ As the Court has recently stated, “broadcasters are ‘entitled under the First Amendment to exercise ‘the widest journalistic freedom consistent with their public [duties].’ ”⁴¹ Indeed, restrictions on the First Amendment rights of broadcasters are upheld only if these are found to be narrowly tailored regulations necessary to vindicate the public’s paramount right to receive information essential to a functional democracy.⁴² This standard of review appears to have left broadcast speech in a position of protection less favorable than the printed media. This dichotomy is vividly presented by comparing the *Red Lion* and *Miami Herald* cases, decided within five years of each other. Had the *Red Lion* court required of the Commission a showing of compelling state interest, as it required of the state of Florida in *Miami Herald*, it is doubtful that the fairness doctrine would have survived. But the *Red Lion* court found that scarcity and its effects had made a licensing scheme necessary and went on to conclude that that scheme afforded broadcasters a standard of review less protective than that accorded the print media.⁴³

17. In light of the significant changes that have occurred in the communications marketplace, a number of commenters have taken

rights of another (listeners and viewers). While such an analysis initially appears to provide a useful insight into why broadcast licensees receive differential treatment under the First Amendment, it conflicts fundamentally with what would appear to be the historic philosophy underlying the First Amendment. That is, that it is through the protection of the rights of speakers that the interest of society as a whole will best be protected.

⁴⁰ See, e.g., *Columbia Broadcasting System, Inc. v. Democratic National Committee*, supra n.13; *League of Women Voters of California v. FCC*, 104 S.Ct. at 3116-17.

⁴¹ *FCC v. League of Women Voters of California*, 104 S.Ct. at 3116-17, quoting *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981), quoting *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 110.

⁴² *Id.* at 3118.

⁴³ Although *Red Lion* was a unanimous decision, Justice William O. Douglas did not participate and four years later wrote “[m]y conclusion is that TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines.” *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 148. (Douglas, J., concurring). Justice Douglas added, “I did not participate in that decision [*Red Lion*] and, with all respect, would not support it. The Fairness Doctrine has no place in our First Amendment regime.” *Id.* at 154. And compare:

We have been beginning, so to speak, in the wrong corner. The question is not what does the need for licensing permit the Commission to do in the public interest; rather it is what does the mandate of the First Amendment inhibit the Commission from doing even though it is to license.

H. Kalven, Jr., “Broadcasting, Public Policy and the First Amendment,” 10 J.L. & Econ. 15, 37 (1967).

the position that the application of a disparate First Amendment standard to cases involving broadcast journalists is no longer appropriate. These parties argue that the constitutionality of the fairness doctrine and other cases involving broadcast journalists should be evaluated under the general constitutional standards that apply to the print media.⁴⁴ We would agree that the courts may well be persuaded that the transformation in the communications marketplace justifies the adoption of a standard that accords the same degree of constitutional protection to broadcast journalists as currently applies to journalists of other media. We do not believe, however, that it is necessary or appropriate for us to make that determination in this proceeding.

18. Administrative agencies are not tasked with the duty to adjudicate the constitutionality of a federal statute.⁴⁵ For the reasons set forth in detail below,⁴⁶ the issue as to whether or not the fairness doctrine is codified is not one which is susceptible of an easy resolution. Moreover, we are mindful that it is the province of the federal judiciary — and not this Commission — to interpret the Constitution.⁴⁷ We do not purport, therefore, to definitively resolve whether or not the fairness doctrine is constitutional. However, for several reasons we believe that it is appropriate for us to state our opinion on this issue. First, as noted above, constitutional considerations are an integral component of the public interest standard and we believe that an evaluation of the constitutionality of the doctrine is necessary in order to make a meaningful evaluation as to whether or not retention of the doctrine is in the public interest. Second, as the expert administrative agency charged by the Congress with the day-to-day implementation of broadcast regulation, we believe that our opinions on these matters provide a unique perspective which may prove useful.⁴⁸ Third, as noted above, in upholding the

⁴⁴ See generally ¶¶ 9-11, *supra*.

⁴⁵ As the United States Supreme Court has stated, “[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.” *Johnson v. Robison*, 415 U.S. 361, 368 (1974), quoting *Oestereich v. Selective Service Board*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring in result). *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975).

⁴⁶ See Section V, *infra*.

⁴⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁴⁸ The Supreme Court has stated that “in evaluating First Amendment claims . . . we must afford great weight to the . . . experience of the Commission.” *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 102. Moreover, in *FCC v. League of Women Voters of California*, the Court indicated that it may reevaluate the standard utilized in First Amendment cases if, *inter alia*, the Commission provides it with a “signal” that

constitutionality of the fairness doctrine in the *Red Lion* decision, the Supreme Court relied upon our representation that the fairness doctrine did not operate to inhibit the coverage of controversial issues of public importance; the evidence in this proceeding, however, compels the conclusion that this assumption is no longer valid.

19. We believe that there are serious questions raised with respect to the constitutionality of the fairness doctrine whether or not the Supreme Court chooses to continue to apply the less exacting standard which it has traditionally employed in assessing the constitutionality of broadcast regulation. As demonstrated *infra*, the compelling evidence in this proceeding demonstrates that the fairness doctrine, in operation, inhibits the presentation of controversial issues of public importance. As a consequence, even under a standard of review short of the strict scrutiny standard applied to test the constitutionality of restraints on the press, we believe that the fairness doctrine can no longer be justified on the grounds that it is necessary to promote the First Amendment rights of the viewing and listening public. Indeed, the chilling effect on the presentation of controversial issues of public importance resulting from our regulatory policies affirmatively disserves the interest of the public in obtaining access to diverse viewpoints. In addition, we believe that the fairness doctrine, as a regulation which directly affects the content of speech aired over broadcast frequencies, significantly impairs the journalistic freedom of broadcasters. As set forth in detail below, in light of the substantial increase in the number and types of information sources, we believe that the artificial mechanism of interjecting the government into an affirmative role of overseeing the content of speech is unnecessary to vindicate the interest of the public in obtaining access to the marketplace of ideas. Were the balance ours alone to strike, the fairness doctrine would thus fall short of promoting those interests necessary to uphold its constitutionality. And because the constitutionality of the fairness doctrine, in our view, is suspect under the less searching broadcast standard of review, *a fortiori*, it would prove constitutionally infirm under the more stringent First Amendment standard applicable in cases involving the print media.⁴⁹

technological advancements warrant such a reevaluation. *League of Women Voters*, 104 S. Ct. at 3116 n.11.

⁴⁹ Indeed, in light of the Supreme Court's decision in *Miami Herald Publishing Co. v. Tornillo*, *supra* n.15, it is clear that the fairness doctrine would not be constitutional were the Court to apply the general First Amendment standards

20. A number of commenters have argued that the limited availability of the electromagnetic spectrum is sufficient to justify the fairness doctrine. For example, the Media Access Project and the Telecommunications Research and Action Center (“MAP/TRAC”) argue that:

The most important justification for the fairness doctrine is that there are more individuals who want to broadcast than there are broadcast frequencies for the Commission to allocate. This continuing outstripping of supply by demand is the basis of the so-called “scarcity” rationale.⁵⁰

While it is true that the limited availability of the electromagnetic spectrum may constitute a *per se* justification for certain types of government regulation, such as licensing, it does not follow that all other types of governmental regulation, particularly rules which affect the constitutionally sensitive area of content regulation, are similarly justified. As the United States Court of Appeals stated:

First Amendment complaints against FCC regulation of content are not adequately answered by mere recitation of the technically imposed necessity for *some* regulation of broadcasting and the conclusory propositions that “the public owns the airwaves” and that a broadcast license is a “revocable privilege.”⁵¹

21. In sum, while we recognize that the United States Supreme Court found that the fairness doctrine was constitutionally permissible sixteen years ago, we believe that the transformation of the broadcast marketplace and the compelling documentation of the “chilling effect” undermine the factual predicate of that decision. We will now specifically address the factors which, in our view, mandate a reassessment of our historical position that the fairness doctrine is consistent with the public interest.

III. A Number of Factors Justify a Reassessment of the Fairness Doctrine

A. The Need for and Costs of the Fairness Doctrine and its Actual

governing the print media.

⁵⁰ “Comments of Media Access Project and Telecommunications Research and Action Center” at 61 [hereinafter cited as “MAP/TRAC Comments”].

⁵¹ *Banzhaf v. FCC*, 405 F.2d at 1100 (emphasis in original) (footnotes omitted). Indeed, notwithstanding its express recognition of the limited availability of the electromagnetic spectrum in *FCC v. League of Women Voters of California*, the Court invalidated a statutory prohibition on editorializing by funded, non-commercial broadcast stations on the grounds that the statute violated the First Amendment rights of broadcasters. *FCC v. League of Women Voters of California*, *supra* n.18.

*Effect on the Coverage of Controversial Issues of Public
Importance.*

22. As we stated in our *Notice*, the purpose in instituting this inquiry was to undertake a "searching and comprehensive reexamination of the fairness doctrine...."⁵² This reappraisal will consist of three parts: an exploration as to whether the doctrine furthers or impedes the regulatory and constitutional objectives it seeks to promote, an assessment of the potential costs and other detriments which may arise from the operation of the doctrine and an evaluation as to whether or not the communications marketplace has undergone such a transformation that the doctrine is no longer warranted or supportable.

23. As we stated above, the historic justification of the retention of the fairness doctrine, as a matter of policy, has been that government regulation is necessary to assure access to the "widest possible dissemination of information from diverse and antagonistic sources,"⁵³ to the listening and viewing public. While we have historically expressed our belief that the fairness doctrine, in operation, had the effect of expanding coverage of controversial issues on the nation's airwaves,⁵⁴ we have never specifically made an empirical assessment as to the efficacy of this chosen regulatory mechanism to promote access by the public to the marketplace of ideas. As a consequence, in this proceeding, we believe that it is essential to undertake a detailed evaluation as to whether or not the fairness doctrine in operation, enhances or inhibits the presentation of diverse views on public issues. In undertaking this evaluation, we will assess both the potential for the doctrine to chill the speech of broadcasters and review the

⁵² *Notice*, *supra* n.1. at ¶¶4.

⁵³ *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *1974 Fairness Report*, 48 FCC 2d at 3.

⁵⁴ *1974 Fairness Report*, 48 FCC 2d at 7. We have, however, always recognized the dangerous potential that the fairness doctrine, in operation, could have a "chilling effect" on the coverage of controversial issues of public importance. In fact, in the *1974 Fairness Report*, we stated that:

there exists within the framework of fairness doctrine administration and enforcement the potential for undue governmental interference in the processes of broadcast journalism, and the concomitant diminution of the broadcaster's and the public's First Amendment interests.

Id. at 6. We have also indicated that if it were shown in actual operation that the doctrine either unnecessarily restricted the journalistic freedoms of broadcasters or impeded the right of the public to obtain access to diverse viewpoints on public issues, we would be compelled to reassess the policy. See *Notice of Inquiry* in Docket No. 19260, 30 FCC 2d 26, 28 (1971).

actual evidence presented by the commenting parties to determine whether the fairness doctrine impedes or inhibits access by the public to the marketplace of ideas.

24. Because a meaningful evaluation of an administrative policy necessarily involves an assessment of regulatory burdens, we shall also evaluate the costs and other potential detriments directly and indirectly borne by broadcasters, the Commission and the public at large which arise from the operation of the fairness doctrine. These costs do not merely include financial expenses but may also involve a restriction of cherished First Amendment values and an increased danger of government abuse.

25. Finally, in our comprehensive reappraisal of the fairness doctrine, we shall determine whether active government intervention in this constitutionally sensitive area involving content regulation is necessary or appropriate in promoting access to the marketplace of ideas. In determining whether or not there is a need to retain the fairness doctrine, we shall initially assess the nature and scope of the relevant market and then evaluate the sufficiency of antagonistic viewpoints available to the public in that market. We are particularly interested in ascertaining whether there have been significant changes in the number and variety of information sources available to the public which would attenuate the need for an artificial regulatory mechanism to assure that the public has access to diverse viewpoints on controversial and important issues.

*B. The Fairness Doctrine in Operation Lessens the Amount of
Diverse Views Available to the Public*

*1. Broadcasters Perceive That the Fairness Doctrine Involves
Significant Burdens*

26. A licensee may be inhibited from presenting controversial issues of public importance by operation of the fairness doctrine even though the first prong of that doctrine affirmatively requires the licensee to broadcast such issues.⁵⁵ The reason underlying this apparent paradox is that the two parts of the fairness doctrine differ markedly in the scope of the controversial issues that they encompass, the ease by which a licensee can meet the requirements embodied in the two prongs and the degree to which the

⁵⁵ Under the first prong of the fairness doctrine the licensee is required to provide coverage of controversial issues of vital importance to the community. *See, e.g., Friends of the Earth*, 24 FCC 2d 743, 750-51 (1970); *1974 Fairness Report*, 48 FCC 2d at 9-10; *Representative Patsy Mink*, 59 FCC 2d 987 (1976).

Commission, in the past, has taken affirmative action to enforce compliance with them.

27. It is well-established that a licensee, in complying with the first prong of the fairness doctrine, has broad discretion in determining the specific controversial issues of public importance that it chooses to present.⁵⁶ Indeed, in our *1974 Fairness Report*, we stated that “we have no intention of becoming involved in the selection of issues to be discussed, nor do we expect a broadcaster to cover each and every important issue which may arise in his community.”⁵⁷ Rather, with respect to the affirmative obligation to cover controversial issues of public importance “[a] presumption of compliance exists”⁵⁸ and only “in rare instances, where a licensee has failed to give coverage to an issue found to be of critical importance to its particular community, would questions be raised as to whether a licensee had fulfilled its fairness obligations.”⁵⁹ Indeed, the United States Court of Appeals has characterized this requirement as one which is “not extensive and [can be] met by presenting a minimum of controversial subject matter.”⁶⁰

28. In contrast to the paucity of challenges under the first part of the fairness doctrine, “[t]he usual fairness complaint . . . concerns a claim that the licensee has presented one viewpoint on a ‘controversial issue of public importance’ and has failed to afford a ‘reasonable opportunity for the presentation of contrasting viewpoints.’”⁶¹ The responsive programming obligation embodied in the second prong of the fairness doctrine arises whenever the licensee airs any controversial issue of public importance, even in situations where the issue broadcast is not

⁵⁶ See, e.g., *1949 Fairness Report*, 13 FCC at 1251.

⁵⁷ *1974 Fairness Report*, 48 FCC 2d at 10.

⁵⁸ *Memorandum Opinion and Order* in BC Docket No. 78-60, 89 FCC 2d 916, 925 (1982) (emphasis added).

⁵⁹ *Brent Buell*, 97 FCC 2d 55, 57 (1984) (emphasis added). See *Memorandum Opinion and Order* in BC Docket No. 78-60, 89 FCC 2d at 925; *1974 Fairness Report*, 48 FCC 2d at 10. As the United States Court of Appeals has stated:

Throughout the history of fairness doctrine enforcement, much more attention has been given to th[e] second obligation — the provision of opposing points of view on controversial issues about which only one viewpoint has been broadcast — than to the first, namely, the affirmative obligation to provide coverage of controversial and important issues. The FCC has only once sustained a complaint relating to the part one obligation.

National Citizens Committee for Broadcasting v. FCC, 567 F.2d 1095, 1100 n.13 (D.C. Cir. 1977), cert. denied, 436 U.S. 926 (1978).

⁶⁰ *American Security Council Education Foundation v. FCC*, 607 F.2d at 444.

⁶¹ *1974 Fairness Report*, 48 FCC 2d at 10.

“so critical or of such great public importance”⁶² to trigger a requirement under the first part of the fairness doctrine.⁶³ An overwhelming majority of the complaints we receive and virtually all our orders directing licensees to take corrective action to conform to the requirements of the fairness doctrine involve the second prong of that doctrine.⁶⁴

29. As a result of the asymmetry between its two components, the fairness doctrine in its operation encourages broadcasters to air only the minimal amount of controversial issue programming sufficient to comply with the first prong. By restricting the amount and type of controversial programming aired, a broadcaster minimizes the potentially substantial burdens associated with the second prong of the doctrine while remaining in compliance with the strict letter of its regulatory obligations.⁶⁵ Therefore, despite the first prong obligation, in net effect the fairness doctrine often discourages the presentation of controversial issue programming.⁶⁶

⁶² *Id.*

⁶³ As the Court of Appeals has stated

... issues giving rise to the part two obligation would not necessarily be required to be covered under the first obligation; the threshold which triggers the second fairness obligation is lower than that which triggers the first.

National Citizens Committee for Broadcasting v. FCC, 567 F.2d at 1100 n.13.

⁶⁴ See generally n.59, *supra*.

⁶⁵ One commentator has noted that:

[L]icensees risk more by providing programming on controversial issues than by ignoring such issues; in only one case in the FCC's history has a complaint relating to the coverage requirement been resolved against a licensee. Hence, licensees are likely to assume that it is safer to ignore the coverage requirement than to risk balancing complaints. . . .

[This] can only have the effect of encouraging licensees to avoid all but the most significant community concerns, discouraging the open debate of many important issues.

B. Chamberlin, “The FCC and the First Principle of the Fairness Doctrine: A History of Neglect and Distortion,” 31 Fed. Comm. L.J. 361, 408–09 (1979) (footnotes omitted). See also *American Security Council Education Foundation v. FCC*, 607 F.2d at 459 n.5 (Bazelon, J., concurring).

⁶⁶ We do not believe that more stringent enforcement of the first prong would be an appropriate remedial response to the existence of a “chilling effect.” Indeed, such an approach increases the severity of major detriments associated with the fairness doctrine. For example, contrary to the principles of the First Amendment, a stricter regulatory approach would increase the government’s intrusion into the editorial decisionmaking process of broadcast journalists. It would enlarge the opportunity for governmental officials to abuse the doctrine for partisan political purposes. Were the chilling effect of the government sanction removed, the result might well be greater coverage of issues and thus more satisfaction of the policy behind the fairness doctrine’s first prong. Moreover, a more stringent enforcement of first prong obligations would merely

30. There are a variety of reasons why a broadcaster might be inhibited from providing comprehensive coverage of controversial issues of public importance by operation of the fairness doctrine. One reason is the fear of government sanction. Under our regulatory scheme, a broadcaster must obtain a license from the Commission prior to entry into the broadcast field.⁶⁷ Because broadcast licenses are granted only for limited periods of time, all broadcasters must periodically renew that license if they wish to remain in business.⁶⁸ Compliance with the fairness doctrine is an important consideration in our determination as to whether renewal of a broadcast license is in the public interest.⁶⁹ Indeed, we have characterized the “strict adherence to the fairness doctrine . . . as the *sine qua non* for grant of a renewal of license.”⁷⁰

31. Because a decision by this Commission to deny the renewal of a broadcast license is “a sanction of tremendous potency”⁷¹ which can be triggered by a finding by this Commission that the licensee failed to comply with the fairness doctrine, a licensee has the incentive to avoid even the potential for such a determination.⁷² Therefore, in order to attenuate the possibility that opponents, in a renewal proceeding, will challenge the manner in which a licensee provides balance with respect to the controversial issues it chooses to cover, a broadcaster may be inhibited from presenting controversial issue programming in excess of the minimum required to satisfy the first prong of the fairness doctrine.⁷³ As Chief Judge David Bazelon has stated, “[w]hen the

increase the economic costs that are borne both by broadcasters and the Commission.

⁶⁷ 47 U.S.C. § 301 (1982).

⁶⁸ Section 307(c) of the Communications Act prohibits the Commission from granting a television license for a period exceeding five years or a radio license for a period in excess of seven years. 47 U.S.C. § 307(c) (1982).

⁶⁹ See 47 U.S.C. § 309 (1982).

⁷⁰ *Committee for the Fair Broadcasting of Controversial Issues*, 25 FCC 2d 283, 292 (1970); *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 944, 1008 (D.C. Cir. 1966) (Burger, C. J.). See also *1974 Fairness Report*, 48 FCC 2d at 10.

⁷¹ *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642, 666 (D.C. Cir. 1971), *rev'd sub nom. Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) (McGowan, J., dissenting).

⁷² As Judge Leventhal recognized, “[f]airness rulings raise the problem of a chilling effect on broadcast journalism; the licensee “faces the possibility that the [controversial programming] will haunt [its] renewal applications.” *National Broadcasting Company, Inc. v. FCC*, 516 F.2d 1180 (D.C. Cir. 1975), *cert. denied*, 436 U.S. 926 (1976) (Leventhal, C.J. concurring in part and dissenting in part).

⁷³ The evidence of record from a fairness doctrine supporter demonstrates that organizations have effectively used the threat of license revocation in fairness

right to continue to operate a lucrative broadcast facility turns on periodic government approval, even a governmental 'raised eyebrow' can send otherwise intrepid entrepreneurs running for the cover of conformity."⁷⁴

32. While denial of a license renewal is the most severe sanction we can impose for failure to abide by the fairness doctrine,⁷⁵ it is not the only sanction.⁷⁶ Typically, upon a finding that a licensee has violated the fairness doctrine, we order the broadcaster to provide additional programming in order to redress the imbalance in time and frequency given to one side of a controversial issue.⁷⁷ Since broadcast time is a valuable resource, such a requirement

doctrine negotiations in order to pressure broadcasters to give them air time for their specific programming. The Public Media Center ("PMC"), an organization which utilizes the fairness doctrine "to help various organizations secure air time for the expression of their views via the electronic media," ["Comments of the Public Media Center" at 1, n.1 (hereinafter cited as "PMC Comments")] has recounted one such instance in which an anti-nuclear coalition sought to obtain free advertising time from broadcast stations in order to present its views on a nuclear dumping controversy. PMC stated that:

COND [the anti-nuclear coalition] made it clear that a Petition to Deny License Renewal would be filed if the fairness doctrine question went unresolved. *While it's unlikely the FCC would pull a license solely because of a fairness violation, most stations will do everything they can to avoid any kind of license challenge.* The cost of fighting a Petition to Deny is, after all, much higher the price of complying.

Id. at 14. (emphasis added). Although the stations offered to present the anti-nuclear viewpoint by means of a talk show, the coalition took the position that this offer was insufficient; instead it demanded that the responsive programming requirement of the fairness doctrine be met by the broadcast of specific spot advertising prepared by them. *Id.* at 14. The stations ultimately acceded to the coalition's demand. As PMC admitted, it was "[t]he implied threat of a license renewal challenge [which] increased the stations' desire for a negotiated settlement." *Id.* at 15.

⁷⁴ D. Bazelon, "The First Amendment and the 'New Media'—New Directions in Regulating Telecommunications," 31 Fed. Comm. L.J. 201, 206 (1979).

⁷⁵ A number of parties disagree that the power of the Commission to refuse to renew a station license has an inhibiting effect because the exercise of this power is sparingly used. For example, MAP/TRAC contend that "[l]icensees do not lose licenses for violation of the fairness doctrine in the coverage of an issue and the Commission knows it." MAP/TRAC Comments, *supra* n.50 at 137. We disagree. First, contrary to MAP/TRAC's assertion, we have in fact denied a license renewal on the basis of a fairness doctrine violation. *Brandywine Main-Line Radio, Inc.* 24 FCC 2d 18 (1970), *reconsideration denied*, 27 FCC 2d 565 (1971), *aff'd on other grounds*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973). Second, while we perceive the denial of a license renewal to be an extreme remedy which should not be lightly assessed, in light of the severity of this sanction, we believe that its mere potential has an inhibiting effect.

⁷⁶ See ¶¶52, *infra*.

⁷⁷ See, e.g., Public Notice, "Controversial Issue Programming, Fairness Doctrine," FCC 63-734 (July 26, 1963), 25 RR 1899 (1963). See generally *Syracuse Peace Council*, FCC 84-518 (released December 20, 1984), 57 RR 2d 519 (1984).

imposes costs upon the licensee. In order to avoid these costs, a broadcaster may be inhibited from presenting more than a minimal amount of controversial issue programming.

33. The potential of a “chilling effect,” however, is not restricted to the fear by a broadcaster that the Commission will find a violation of the fairness doctrine and impose sanctions on the licensee. A licensee may also be inhibited from presenting controversial issue programming by the fear of incurring the various expenses and other burdens which may arise in the context of fairness doctrine litigation regardless of whether or not it is ultimately found to be in violation of the doctrine.

34. As one broadcaster noted, licensees are “conscious of the probability that coverage of a highly controversial issue will trigger an avalanche of protests”⁷⁸ demanding air time for the presentation of opposing viewpoints. While most requests may be made in good faith, there is evidence that some complainants invoke a licensee’s fairness doctrine obligations in an attempt either to pressure a broadcaster to censor specific programming⁷⁹ to harass licensees into presenting a particular spokesman or broadcast.⁸⁰ Whether or not the requests are legitimate, a station

⁷⁸ “Comments of Tribune Broadcasting Co.” at 9 [hereinafter cited as “Tribune Comments”].

⁷⁹ For example, PMC, a fairness doctrine supporter, describes a situation in which a coalition of organizations supporting legalized abortion invoked the fairness doctrine in their efforts to convince a Washington, D.C. television station, WJLA-TV, to cancel an anti-abortion film. PMC Comments, *supra* n.73 at 12. While the group was unsuccessful, in its Comments PMC recounts several situations, which are described *infra* at ¶¶ 48-49, in which complainants did in fact dissuade broadcasters from airing advertisements supporting or opposing ballot propositions. Similarly, as described at ¶ 44, *infra*, the National Association of Broadcasters (“NAB”) recounts an instance in which a member of a religious cult, threatening to file a fairness doctrine complaint, successfully demanded the station to cancel a series on the religious organization. “Comments of the National Association of Broadcasters”, App. Vol., App. D at 2 (Example No. 1) [hereinafter cited as “NAB Comments”].

⁸⁰ PMC describes the following situation in which an anti-nuclear group used the fairness doctrine to have its ballot propositions aired:

Schwartzman [a Washington D.C. communications attorney] applied muscle in Washington.

Inside forty-eight hours, every radio station had been contacted to find out which were running the industry ads [A] few refused to negotiate, claiming their news and public affairs coverage gave adequate balance.

With Schwartzman’s aid, a preliminary complaint was filed against the largest station by telegram on Thursday night.

MNRC [the anti-nuclear group] also called the Chief of the FCC’s fairness/political broadcast branch at home. On Friday morning, MNRC and the station’s attorneys negotiated a settlement and the complaint was

nonetheless may incur additional personnel costs in negotiating with the group seeking responsive programming.

35. Broadcasters can also be deterred by the financial costs involved in defending a fairness doctrine complaint. The record reflects that such costs can be substantial. For example, a fairness doctrine complaint was brought against KREM-TV, a television station in Spokane, Washington charging the station with unbalanced coverage of a bond issue for an international exposition entitled "Expo-74."⁸¹ While the Commission ultimately made the determination that the licensee did not violate the fairness doctrine, the administrative process extended for more than 20 months.⁸² The licensee incurred legal costs of at least \$20,000 and other expenses, such as travel expenses, significantly added to that total.⁸³ As the total profits reported by all three Spokane television stations in 1972 were approximately \$494,000,⁸⁴ the financial burden borne by the station in defending

withdrawn.

With this precedent, and more pressure from Schwartzman, every station that had carried the industry's ads was airing MNRC ads for free by Friday night.

PMC Comments, *supra* n.73 at 31. It is significant that PMC, in describing this scenario, does not dispute the stations' contention that they already were in compliance with the fairness doctrine by virtue of the fact that their news and public affairs programming provided adequate balance to the industry's advertisements. Rather, the objective of the anti-nuclear group, as expressed by PMC, was to have the stations broadcast their particular advertisements rather than to have the stations comply with the requirements of the fairness doctrine. It is also noteworthy that the complaint—which was withdrawn in less than one day—was filed against the "largest" station; the commenter did not state that the anti-nuclear coalition perceived that this station was in violation of the fairness doctrine. A number of other examples in which complainants invoked the fairness doctrine to demand that a licensee air a specific broadcast or present a specific spokesperson are described elsewhere in this Report. See ¶¶ 49-50, *infra*.

⁸¹ *Sherwyn M. Heckt*, 40 FCC 2d 1150 (1973).

⁸² The complaint was filed on September 8, 1971; the station responded on October 12, 1971 and the complainant replied seventeen days later. The licensee made further responses on December 2, 1971 and May 11, 1972. The Commission initiated a four-day field investigation on June 5, 1972. The Commission made an additional inquiry to the licensee on December 6, 1972 and the licensee responded on February 6, 1973. The Commission's staff issued a ruling vindicating the licensee on May 17, 1973. *Id.*

⁸³ See "Comments of Henry Geller and Donna Lampert," App. B at 2 [hereinafter cited as "Geller/Lampert Comments"]; "Comments of CBS, Inc." at 83 [hereinafter cited as "CBS Comments"]; "Comments of the Freedom of Expression Foundation" at 75 [hereinafter cited as "FEF Comments"]; NAB Comments, *supra* n.79 at 42.

⁸⁴ See Geller/Lampert Comments, *supra* n.83, App. B at 2; CBS Comments, *supra* n.83 at 84. Indeed, the station manager of KREM-TV testified that the fairness doctrine complaint resulted in a severe personal financial loss. *Freedom of*

this single fairness doctrine complaint was considerable. Moreover, in addition to the legal costs and other out-of-pocket expenses incurred by the station, the licensee was further burdened by the dislocation of normal operational functions that necessarily resulted from the significant amount of time expended by high-level management and station employees with respect to this matter.⁸⁵

36. Another example of the significant financial burdens which can result from fairness doctrine litigation is the NBC award-winning⁸⁶ documentary on abuses in the private pension industry entitled "Pensions: the Broken Promise."⁸⁷ Determining that the program presented one side of the controversial issue of the "performance and need for regulation of private pension plans,"⁸⁸ the Commission found NBC was required to present contrasting viewpoints. While NBC was ultimately vindicated,⁸⁹ the administrative and judicial proceedings extended for four years and NBC incurred approximately \$100,000 in legal costs in defense of the fairness doctrine complaint.⁹⁰

Expression Act of 1983: Hearings Before the Senate Committee on Commerce, Science and Transportation, 98th Cong., 2d Sess. 129, 227 (1984) [hereinafter cited as "1983 Hearings"].

⁸⁵ The President and Vice-President of KREM-TV devoted 80 hours to the fairness doctrine complaint. In addition, the station manager and six members of the news staff spent 207 hours and 194 hours, respectively, on this matter. See Geller/Lambert Comments, *supra* n.83, App. B at 2-3; NAB Comments, *supra* n.79 at 42 and App. Vol., App. D at 19 (Example No. 17); CBS Comments *supra* n.83 at 84, n.**. Additional time was incurred by secretarial or clerical employees.

⁸⁶ NBC received a Christopher Award, a National Headliner Award, an American Bar Association Award and the George Foster Peabody Award for its investigative documentary. "Comments of the National Broadcasting Co., Inc." at 16 [hereinafter cited as "NBC Comments"].

⁸⁷ See, e.g., Notice, *supra* n.1 at ¶¶ 73-75; NBC Comments, *supra* n.86 at 14-36; NAB Comments, *supra* n.79, App. Vol., App. D at 18 (Example No. 16).

⁸⁸ *Accuracy in Media, Inc. Against National Broadcasting Co.*, 44 FCC 2d 1027, 1043 (1973), *rev'd sub nom. National Broadcasting Co. v. FCC*, 516 F.2d 1101 (D.C. Cir. 1974), *reversal vacated and hearing en banc granted*, 516 F.2d 1155 (D.C. Cir.), *rehearing en banc vacated*, 516 F.2d 1156 (D.C. Cir. 1975), *second reversal vacated as moot and remanded with direction to vacate initial order and dismiss complaint*, 516 F.2d 1180 (D.C. Cir.), *cert. denied*, 424 U.S. 910 (1976). The Commission subsequently vacated its order and dismissed the case as moot. *Accuracy in Media, Inc. Against National Broadcasting Co.*, 58 FCC 2d 361 (1976).

⁸⁹ The United States Court of Appeals reversed the Commission's Order but that decision was in turn vacated because the passage of legislation on private pension plans had rendered the decision moot. See n.88, *supra*.

⁹⁰ A further example involves the series of editorials critical of the Mayor of Milwaukee, other government officials and the city management aired by WTMJ. The Mayor, Henry Maier, filed a complaint with the Commission on June 5, 1981, arguing, *inter alia*, that the station had violated the fairness

37. Certain parties take issue with the contention that the fear of fairness doctrine litigation can have an inhibiting effect on the presentation of controversial issues of public importance.⁹¹ In support of their position, these parties argue that the Commission requests broadcasters to respond to only a small number of the complaints it receives annually and, as a consequence, most broadcasters do not in fact incur such costs. The evidence of record in this proceeding, however, reflects that broadcasters are convinced that these costs can in fact be a significant inhibiting factor in the presentation of controversial issues.⁹² Moreover, while it may be true that most broadcasters may not be confronted with actual fairness doctrine litigation, virtually all broadcasters do incur administrative and financial costs which result from presenting responsive programming and negotiating with complainants. Furthermore, in light of the fact that the costs involved in fairness doctrine cases which do proceed beyond the complaint stage can be prohibitively expensive, particularly to smaller stations, we believe that there is a substantial danger that many broadcasters are inhibited from providing controversial issues of public importance by operation of the fairness doctrine.

38. We also reject the contention that we should be unconcerned with the administrative and financial burdens that result from the fairness doctrine because they merely represent the cost of doing business. Indeed, the United States Supreme Court has recognized that financial considerations “may be markedly more inhibiting than the fear of prosecution under a criminal statute.”⁹³

doctrine. This complaint was denied by the Broadcast Bureau application for review of this *Order* filed by the complainant was denied by the Commission and the United States Court of Appeals affirmed the Commission's *Order*. *Maier v. FCC*, 735 F.2d 220 (7th Cir. 1984). The administrative and judicial proceedings, however, extended for a period of three years. During the pendency of the appellate case, the Manager of Public Affairs of WTMJ, Mr. Ed Hinshaw, testified that defense of the fairness doctrine complaint had already caused the station to incur legal expenses in excess of \$17,000. He also estimated that the management and staff time expended on the complaint to be more than two person months. 1983 *Hearings*, *supra* n.84 at 146; NAB Comments, *supra* n.79, App. Vol. App. D at 21 (Example No. 18).

⁹¹ “Reply Comments of Black Citizens for a Fair Media, Citizens Communications Center, League of United Latin American Citizens, National Association for the Advancement of Colored People, and National Association for Better Broadcasting” at 59 [hereinafter cited as “BCFM Reply Comments”]. For the reasons described above, we also reject the assertion of BCFM that the expenses incurred in responding to fairness doctrine complaints are not substantial. *Id.* at 59-60.

⁹² See e.g., NAB Comments, *supra* n.79, App. Vol., App. D at 5, 7, 21-22, 25-26 (Example Nos. 4, 6, 18, 20).

⁹³ *New York Times Co. v. Sullivan*, 376 U.S. at 277.

To the extent that the fear of incurring financial expenses discourages the presentation of controversial issues of public importance, important constitutional principles are thwarted; indeed such inhibition directly and adversely impacts upon "the principle [underlying the First Amendment] that debate on public issues should be uninhibited, robust and wide-open" ⁹⁴

39. In addition to the fear of incurring the administrative and financial costs attributable to fairness doctrine obligations, the mere accusation by a federal agency or even a complainant that a broadcast station has not abided by its responsibility to provide balanced coverage of controversial issues can have an inhibiting effect. A station is dependent upon the good will of its viewing or listening audience as a consequence, a station has a positive incentive to avoid a charge which may have the effect of lowering its reputation in the community. Broadcasters are acutely aware of the harm which may result from even a frivolous charge that the station violated the fairness doctrine. For example, WINZ, a radio station in Miami, Florida, initiated a petition drive in conjunction with the Dade County Consumer Affairs Office that was designed to persuade the Florida Public Service Commission to reduce or reject a rate increase proposed by Florida Power and Light Company. Despite the fact that the radio station was ultimately vindicated of any wrongdoing by the Commission, the general manager of the station testified that:

I feel that Florida Power & Light used the fairness doctrine to provide themselves with a way to create adverse publicity for WINZ. The simple fact that they accused us of violating this rule created the impression we were wrong in undertaking the issue, even if that wasn't the case. Often the accused party suffers, whether right or wrong, only because they have been accused. ⁹⁵

40. Similarly, Mr. Bos Johnson, News Director of WSAZ-TV in Huntington, West Virginia, recounted a situation in which his station was subject to a fairness doctrine complaint during negotiations for the transfer of that station. He stated that:

⁹⁴ *Id.* at 270.

⁹⁵ 1983 *Hearings*, *supra* n.84 at 29 (testimony of Stan Cohen). See also FEF Comments, *supra* n.83 at 73-74; NAB Comments, *supra* n.79, App. Vol., App. D at 27-28 (Example No. 21). In addition to the damage to the reputation of the station, the stigma arising from an accusation that the station violated the fairness doctrine can have an adverse effect upon the station's employees. For example, Mr. Eugene Wilkin, the former general manager of KREM-TV in Spokane, Washington testified that the financial and emotional strain arising from an accusation that he violated the fairness doctrine was the main reason that he left broadcasting management, despite a career in that field spanning more than a decade. See *e.g.*, FEF Comments, *supra* n.83 at 75-76; NAB Comments, *supra* n.70, App. Vol., App. D at 32-33 (Example No. 24).

It was a serious embarrassment to me professionally to feel responsible for the cost and effort of a Fairness Doctrine complaint in the midst of delicate business negotiations. And for the duration of those negotiations, while sitting at my desk working as a journalist, I was always aware of the large file containing information relating to the complaint.⁹⁶

41. In sum, with the potential of government sanction; administrative; legal, and personnel expenses; and reputational costs, there is a significant danger that broadcasters will minimize their presentation of controversial issue programming in order to avoid the substantial dangers associated with the fairness doctrine. In the following section we shall evaluate the record evidence in order to ascertain whether or not broadcasters are in fact deterred from presenting controversial issue programming by operation of the fairness doctrine.

2. The Record Demonstrates that The Fairness Doctrine Causes Broadcasters to Restrict Their Coverage of Controversial Issues.

42. The record reflects that, in operation, the fairness doctrine — in stark contravention of its purpose — operates as a pervasive⁹⁷ and significant impediment to the broadcasting of controversial issues of public importance.⁹⁸ In spite of the difficulty generally encountered in establishing a “chilling effect,”⁹⁹ we find

⁹⁶ NAB Comments, *supra* n.83, App. Vol., App. D at 34 (Example No. 25).

⁹⁷ The record reflects that the chilling effect resulting from fairness doctrine obligation is widespread. A recent survey of broadcasters in the Houston area revealed that the majority of responding parties with opinions stated that they were personally aware of instances in which programming has been suppressed as a direct result of the inhibiting effect of the fairness doctrine. “Comments of the Society of Professional Journalists, Sigma Delta Chi and the Legal Foundation of America” at 5-6 [hereinafter cited as “Society of Professional Journalists’ Comments”].

⁹⁸ In our 1974 *Fairness Report* we rejected the arguments of some broadcasters that in operation the fairness doctrine inhibited the coverage of controversial issues of importance to the public. In that proceeding, we stated that we have seen “no credible evidence that our policies have in fact had ‘the net effect of reducing rather than enhancing the volume and quality of coverage.’ 1974 *Fairness Report*, 48 FCC 2d at 8, quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 393. As set forth in this section, however, the substantial and significant evidence presented in this proceeding demonstrates the existence of a pervasive and substantial “chilling effect” on the presentation of controversial issues by broadcasters. As a consequence, we can no longer conclude that the fairness doctrine operates to enhance, in either quantitative or qualitative terms, the amount of controversial issue programming available to the public.

⁹⁹ The United States Court of Appeals has stated that:

Chilling effect is, by its very nature, difficult to establish in concrete and quantitative terms; the absence of any direct actions against individuals assertedly subject to a chill can be viewed as much as proof of the success of the chill as of evidence of the absence of any need for concern. To be sure,

that the evidence of record mandates the conclusion that the requirement that broadcasters provide balance in their overall coverage of controversial public issues in fact makes them more timid than they would otherwise be in airing programming that involves such issues.¹⁰⁰ We recognize that the first prong of the fairness doctrine requires licensees to present controversial issues of public importance to their viewers and listeners; as a consequence, we do not believe that the fear of fairness doctrine obligations typically results in a systematic avoidance of all controversial issues by broadcasters.¹⁰¹ The record reflects, however, that the intrusion by government into the editorial decisions

where actual instances of harassment are established, or where past experience with similar regulation yields concrete evidence of a successful chill, the case is a stronger one. . . .

Community-Service Broadcasting of Mid-America, Inc. v. FCC, 593 F.2d 1102, 1118 (D.C. Cir. 1978).

¹⁰⁰ One example of this "timid" approach is recounted by the station manager of the Cornhusker Television Corporation. With the exception of programming produced by the network, he states that it is standard practice for the station not to accept nationally produced programming which discusses controversial subjects:

The reason for this [policy] is although the producer says the program is objective in nature, we as licensees must be the sole judge of what is or is not controversial in order to act properly under the Fairness Doctrine. Also, is it true that what a producer in New York or Washington D.C. may consider objective, may not be defined in the same way in Nebraska because as you know viewpoints vary drastically from one section of the country to another. Therefore, there are probably some good Public Affairs programs which we have decided not to run because the Fairness Doctrine might come into play and we would not be prepared to give reasonable access to opposing viewpoints.

NAB Comments, *supra* n.79, App. Vol., App. D at 38 (Example No. 27) (emphasis omitted). Notwithstanding the station manager's express representation that the avoidance of fairness doctrine obligations was the reason that the station rejected all non-network nationally-produced programming, BCFM nonetheless contends that this policy must be based on some other reason. BCFM argues that "if the station truly wished to avoid controversial subjects, it would review each program independently, "whether or not it was locally or nationally produced. BCFM Reply Comments, *supra* n.91 at 65. BCFM's argument, however, ignores the fact that a station may wish to lessen the amount of controversial public issue programming in order to minimize the burdens associated with providing access to opposing viewpoints without totally eliminating such programming, particularly in light of the fact a total elimination would subject the station to charges that it violated the first prong on the fairness doctrine. Furthermore, as noted above, the station manager affirmatively stated that the reason that station adopted this policy was to minimize the regulatory burdens associated with the fairness doctrine.

¹⁰¹ At least one broadcaster, however, has candidly admitted that "his news staff avoids controversial issues as a matter of routine because of the Fairness Doctrine." NAB Comments, *supra* n.79, App. Vol., App. D at 5 (Example No. 4).

of broadcast journalists occasioned by fairness doctrine requirements overall lessens the flow of diverse viewpoints to the public to the detriment of the broadcasters and the public alike.

43. Journalists who have worked in both the broadcast and print media have testified that the very existence of the fairness doctrine creates a climate of timidity and fear, unexperienced by print journalists, that is antithetical to journalistic freedom. The inhibitions resulting from the interjection of a ubiquitous and brooding governmental presence into the editorial decisionmaking process is vividly described by Mr. Dan Rather, Managing Editor and Anchor of CBS News, as follows:

When I was a young reporter, I worked briefly for wire services, small radio stations, and newspapers, and I finally settled into a job at a large radio station owned by the Houston Chronicle. Almost immediately on starting work in that station's newsroom, I became aware of a concern which I had previously barely known existed -- the FCC. The journalists at the Chronicle did not worry about it; those at the radio station did. Not only the station manager but the newspeople as well were very much aware of this Government presence looking over their shoulders. I can recall newsroom conversations about what the FCC implications of broadcasting a particular report would be. Once a newsperson has to stop and consider what a Government agency will think of something he or she wants to put on the air, an invaluable element of freedom has been lost.¹⁰²

44. The record reflects that broadcasters from television network anchors to small radio station journalists perceive the fairness doctrine to operate as a demonstrable deterrent in the coverage of controversial issues. Indeed, the record is replete with descriptions from broadcasters who have candidly recounted specific instances in which they decided not to air controversial matters of public importance because such broadcasts might

¹⁰² CBS Comments, *supra* n.83 at 72-73. Similar sentiments have been expressed by Mr. Bill Monroe, moderator and executive producer of the popular show "Meet the Press." He has stated that:

Some years ago as a young man I worked for a newspaper. I was very impressed with the spirit of independence on the part of the editors of the newspaper. They didn't care if something they put in the paper offended a major political figure. Later I went to a television station and slowly I discovered that the managers of the television station were a little afraid of government. They were timid, conscious of government looking over their shoulder in a way that the newspaper publisher and editor for whom I had worked had not been. I began to feel I was a little bit less than free, and it worried me.

FEF Comments, *supra* n.83 at 69, quoting American Enterprise Institute Roundtable, *Freedom of the Press* (July 29 and 30, 1975) published by the American Enterprise Institute for Public Policy Research, Washington D.C. (Statement of Bill Monroe before the National Press Club).

trigger fairness doctrine obligations. For example, fearing the imposition of onerous regulatory burdens, Meredith Corporation states that one of its stations elected not to air a paid program on the nuclear arms race.¹⁰³ As a result of this decision, the public was deprived of information on an important public issue. Similarly, Mr. J. T. Whitlock, the President and General Manager of the Lebanon-Springfield Broadcasting Company, testified that the fear of having to defend a fairness doctrine complaint was the reason that his station did not editorialize on an important local issue even though, in his editorial judgment, the situation “. . . cried for editorials by the station.”¹⁰⁴

45. As a further example, after work had begun in the preparation of a series on religious cults, the manager of a Southern California radio station decided that the series would not be broadcast. The decision to cancel this series was not based upon the editorial judgment of the broadcaster but rather upon an assessment of the legal and personnel costs associated with defending a possible fairness doctrine complaint.¹⁰⁵ Similarly, Mr.

¹⁰³ “Meredith Corporation’s Comments Regarding Notice of Inquiry” at 3. [hereinafter cited as “Meredith Comments”].

¹⁰⁴ NAB Comments, *supra* n.79, App. Vol., App. D at 29 (Example No. 22). BCFM contends that the decision not to editorialize “appears” to be based upon an incorrect perception that the “equal time” requirements of the political editorial rules are applicable in this situation. BCFM Reply Comments, *supra* n.91 at 69 n.32. See 47 C.F.R. §73.1930 (1984). It also asserts that any fairness doctrine obligations incurred by the station in the broadcast of this editorial “would probably have been met by its news coverage.” BCFM Reply Comments, *supra* n.91 at 69 n.32. In our view, both arguments are speculative. There is nothing in the example to suggest either that the concern of the broadcaster was based upon the requirements of the political editorial rule or that the station’s news coverage would have provided opposing viewpoints sufficient to meet the requirements of the fairness doctrine.

¹⁰⁵ NAB Comments, *supra* n.79, App. Vol., Vol D at 2 (Example No. 1). Two parties contend that this example lends no support for the existence of a “chilling effect,” but we believe that their arguments lack merit. Citing *Religion and Ethics Institute, Inc.*, 42 RR 2d 1657 (1978), a Broadcast Bureau decision, MAP/TRAC argue that “[t]he Commission has repeatedly held . . . that discussion of religious doctrine and related issues are matters of private, not public controversy, and do not involve application of the fairness doctrine” (“Reply Comments of Media Access Project and Telecommunications Research and Action Center” at 39 [hereinafter cited as “MAP/TRAC Reply Comments”]); as a consequence, MAP/TRAC contend that it was not reasonable for the broadcasters to be concerned about potential fairness doctrine litigation. The assertion that we have held that issues concerning religious doctrine to be *per se* beyond the scope of the fairness doctrine, however, is clearly erroneous. In fact, even *Religion and Ethics Institute* -- the case cited by MAP/TRAC -- noted that some issues concerning religious doctrine “must be considered controversial and of importance to the community at large” (42 RR 2d at 1659), thereby triggering fairness doctrine obligations. Indeed, the Commission has long asserted that “[t]he fairness doctrine extends to all expressions of views

Paul Jenson, the station manager of Cornhusker Television Corporation, asserted that the fear of fairness doctrine obligations precipitated his cancellation of a series of public announcements concerning inflation. Mr. Jenson testified that the only reason that these announcements were not aired was to avoid the presentation of opposing announcements mandated by the requirements of the fairness doctrine.¹⁰⁶ Another example in the record is the cancellation of a series on the B'nai B'rith by a Pennsylvania radio station. The series was not broadcast because the licensee felt that it could not afford the personnel time to respond to the complaints, the broadcast time to provide responsive programming or the potential legal fees resulting from complaints by perceived extremist groups.¹⁰⁷ In addition, a major Houston

on controversial issues of public importance, whether or not they [would] be deemed religious views by some persons." *Brandywine Main-Line Radio, Inc.*, 27 FCC 2d 565, 570 (1971), *aff'd*, 473

F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973). Indeed, in *Brandywine*, we refused to renew the station's license on the basis, *inter alia*, that it had violated the fairness doctrine with respect to its religious programming. Therefore, the argument of MAP/TRAC that it was patently unreasonable in this situation for the broadcaster to be concerned about potential fairness doctrine litigation is without merit.

BCFM argues that the broadcaster's fear of incurring the legal and administrative costs in defending a fairness doctrine complaint is irrational; Therefore it contends that the broadcaster was not reasonably inhibited by fairness doctrine obligations and, consequently, this example is not probative of a "chilling effect." BCFM Reply Comments, *supra* n.91 at 67. We have addressed the manner in which legal and administrative costs can result in a "chilling effect," *supra* at ¶¶ 35-36. We believe, therefore, that BCFM's assertion also is without merit.

¹⁰⁶ NAB Comments, *supra* n.79, App. Vol., App. D at 38-39 (Example No. 27). In an attempt to discredit this example, BCFM contends that the station manager was not reasonably inhibited by fairness doctrine obligations; it argues that no equal access for opposing views was required and contends that the station's obligation to provide reasonable access for opposing views "probably" would have been met by its news coverage. BCFM Reply Comments, *supra* n.91 at 69. BCFM provides no support for its assertion concerning the adequacy of the station's news coverage in meeting the station's fairness doctrine obligations on this issue. In any event, we have no basis for disregarding the station manager's explanation for the reason for the cancellation of the series.

¹⁰⁷ NAB Comments, *supra* n.79, App. Vol., App. D at 62 (Example No. 42). While acknowledging that this example "implies" that the broadcaster's cancellation was induced by the fairness doctrine, BCFM contends that the broadcaster's actual concern was to avoid harassment by extremist groups and that this concern would exist without regard to fairness doctrine obligations. BCFM Reply Comments, *supra* n.91 at 62-63 n.30. We disagree. While a station may have to incur personnel costs in order to respond generally to complaints by the public in the absence of the fairness doctrine, the number of complaints — and consequently the amount of personnel costs — are necessarily increased when a station is obligated to comply with the fairness doctrine; moreover, the costs resulting from a requirement to provide additional "balanced" programming and the costs incurred in defending broadcast decisions clearly are

television station invited a former city official to address the issue of pay raises for police officers but, during the course of the interview, the former official also expressed his views on the issues of pay increases for firefighters and other municipal workers. Fearing to trigger additional fairness doctrine obligations, the station refused to air his views on these additional topics.¹⁰⁸

46. Equally or perhaps even more disturbing than the self-censorship of individual broadcasts is the fact that the avoidance of fairness doctrine burdens has precipitated specific “policies” on the part of broadcast stations which have the direct effect of diminishing, on a routine basis, the amount of controversial material presented to the public on broadcast stations. For example, the owner of a broadcast station and two newspapers regularly prints editorials in his newspapers but, inhibited by regulatory restrictions, is reluctant to repeat the same editorials on his radio station.¹⁰⁹ Similarly, the Meredith Corporation acknowledges that one of its television stations has chosen “not to editorialize on matters of public importance, because of its concern that it does not have the resources necessary to seek out and provide exposure to opposing viewpoints in all instances.”¹¹⁰ Unfortunately, the policies of these stations are not atypical. In fact, a survey conducted by NAB in 1982 found that only 45 percent of responding stations had presented editorials in the preceding two years.¹¹¹ Moreover, the record reflects that even stations which do elect to editorialize are inhibited by fairness doctrine requirements. According to Mr. Donald Gale, News Director of KSL-AM, the regulatory burdens associated with the fairness doctrine were a crucial factor in the decision of his station not to air “guest editorials.”¹¹²

47. Policies of stations that restrict public issue programming are not limited to editorials; they extend to the airing of political

attributable directly to fairness doctrine obligations.

¹⁰⁸ Society of Professional Journalists’ Comments, *supra* n.97 at 7-8.

¹⁰⁹ NAB Comments, *supra* n.79, App. Vol., App. D at 61 (Example No. 41). In its Reply Comments, MAP/TRAC characterize this example as “ignorant and meaningless” but provide no support for this pejorative appellation. MAP/TRAC Reply Comments, *supra* n.105 at 29.

¹¹⁰ Meredith Comments *supra* n.103 at 3. See also “Comments of Arizona Television Company.”

¹¹¹ NAB Comments, *supra* n.79 at 38. Moreover, in its Comments NAB describes an informal survey conducted at its the Northwest regional conference which found at least 95 percent of the broadcasters, inhibited by regulatory concerns, did not speak out on local issues. *Id.*, App. Vol., App. D at 52 (Statement of Rev. Jim Nicholls) at 52 (Example No. 36).

¹¹² *Id.*, App. Vol., App. D at 11 (Example No. 11).

advertisements.¹¹³ For example, as a direct result of fairness doctrine obligations, CBS acknowledges that its owned and operated stations, as a general matter, limit the amount of time they will sell both to persons seeking to place advertisements relating to ballot propositions and to political parties attempting to purchase broadcast time outside of campaign periods. CBS states that many of the television stations in four of the five markets in which those stations operate also either refuse or severely limit the sale of time for ballot proposition advertising.¹¹⁴ Ms. Harriet Kaplan, the Chief Executive Officer of Station WAYS and WROQ-FM in Charlotte, North Carolina states that as a result of the regulatory obligations associated with the fairness doctrine, "I do not even let our sales department pursue political advertising. It is handled by a separate person. . . ."¹¹⁵ The President and General Manager of WNJR Radio in Union, New Jersey also testified that she is "inclined to steer away from [political advertisements] because of the [regulatory] problems."¹¹⁶ Similarly, Ms. Karen Maas, Vice President and General Manager of KIUP-AM and KRSJ-FM in Durango, Colorado states that her stations "think twice" about covering state ballot and related political issues.¹¹⁷

48. Moreover, the evidence of the "chilling effect" of the fairness doctrine, as applied to political advertisements, is not limited to the statements of broadcasters. For example, in its comments the Glass Packaging Institute ("GPI"), a trade association of the container glass industry which supports the retention of the fairness doctrine,¹¹⁸ recounts its difficulties in placing advertisements on ballot issues:

When various coalitions of which GPI was a member have sought to buy broadcast time for the presentation of views on ballot initiatives, many broadcasters have refused to consider their proposals. This refusal generally was occasioned not by normal market forces or broadcaster bias, but by broadcaster's unwillingness to assume the financial cost of providing free response time, as required by *Cullman*. In other instances, the coalitions' requests were met not by a broadcaster refusal to sell time, but, instead, by a rate purposely inflated to cover the anticipated cost of free response time being demanded by the coalitions' opponents on the ballot proposals. The result of these factors was that the coalitions found

¹¹³ See, e.g., FEF Comments, *supra* n.83 at 64-65.

¹¹⁴ CBS Comments, *supra* n.83 at 77, n.*.

¹¹⁵ 1983 Hearings, *supra* n.84 at 224.

¹¹⁶ *Id.*

¹¹⁷ NAB Comments, *supra* n.79, App. Vol., App. D at 8 (Example No. 7).

¹¹⁸ The Glass Packaging Institute, however, has urged the Commission to modify the *Cullman* Doctrine. "Comments of the Glass Packaging Institute" at 13.

themselves unable to purchase broadcast time within which to address ballot issues, either because of a broadcast licensee's refusal to sell time, or because the time costs were prohibitive, both obstacles being the result of the broadcasters' fear of resulting *Cullman* obligations.¹¹⁹

Similarly, in its comments, the National Rifle Association of America ("NRA"), an organization which has also urged the Commission to retain the fairness doctrine, documented its difficulties in placing advertisements on ballot propositions. Like the GPI, the NRA attributed the reluctance of broadcasters to accept these advertisements on the fact that their acceptance would subject broadcasters to the responsive requirements of the fairness doctrine.¹²⁰

49. The most compelling evidence of the existence of a "chilling effect" with respect to ballot advertising is presented in the Comments of the Public Media Center ("PMC"), an organization which, as noted above,¹²¹ is actively involved in prosecuting complaints under the fairness doctrine. In its Comments, PMC vividly illustrates the manner in which a complainant can successfully pressure broadcasters into refusing to sell advertising on ballot issues. For example, PMC recounts the tactics of a pro-bottle bill coalition as follows:

Ads opposing the beverage deposit — sponsored by an industry front group . . . hit the air in early August. Within ten days, [the pro-bottle bill coalition] sent a letter to all 500 California stations asking for a 2 to 1

¹¹⁹ *Id.* at 11-12. In *Cullman Broadcasting Co.*, 40 FCC 576 (1963), we stated that:

where the licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, has not presented (or does not plan to present) contrasting viewpoints in other programming, and has been unable to obtain paid sponsorship for the appropriate presentation of the opposing viewpoint or viewpoints, he cannot reject a presentation otherwise suitable to the licensee — and *thus leave the public uninformed* — on the ground that he cannot obtain paid sponsorship for that presentation.

Id. at 577 (emphasis in original).

¹²⁰ In its Comments, the NRA stated that:

In attempting to address controversial issues, including ballot propositions affecting the Second Amendment, *ad hoc* organizations formed by local firearms owners and other citizens often have been faced with a broadcast licensee who has elected to exercise its right to refuse all advocacy advertising. Invariably, this refusal is based . . . on an unwillingness of the broadcast licensee to risk the imposition of the financial penalty inherent in the *Cullman* obligation to invade its limited stock of commercial time in order to provide free response time to opponents on the issue.

"Comments of the National Rifle Association of America" at 32-33.

¹²¹ See n.73, *supra*.

ratio in free spot time. [The coalition] urged broadcasters to refuse to sell time and therefore avoid a fairness situation at all.¹²²

The majority of the California stations followed the coalition's exhortation. Less than one-third of the stations contacted by the coalition sold ballot advertising to the industry group.¹²³

50. Similarly, PMC describes the successful invocation of the fairness doctrine by anti-smoking group in order to pressure broadcasters into refusing to sell advertising time to their opponents. PMC recounts that the anti-smoking group:

... mailed "pre-emptive" letters to every local broadcast station, remarking on the upcoming vote and asking to be notified as soon as the tobacco industry bought airtime [T]en Miami stations, seeking to avoid [the group's] predictable demands, simply refused to sell time to the industry front.¹²⁴

As a consequence, the public was denied information on a matter of important local concern.

51. In addition to political advertisements, the record reflects that the onerous requirements associated with the fairness doctrine have resulted in the widespread practice of many broadcasters to refuse to air any public issue advertisements. For example, one broadcaster employed by a large television station states that his station and six others under common ownership have a "company policy" not to accept issue advertising.¹²⁵ A number of trade associations have also documented that broadcast licensees, inhibited by the requirements of the fairness doctrine, have refused to air issue-oriented advertisements. The comments of the American Association of Advertising Agencies are illustrative:

Many large corporations, consistent with a special expertise or interest in a specific public policy or issue, occasionally approach the broadcast media seeking to purchase air time for dissemination of public interest advertisements [B]roadcast licensees have regularly rejected offers for such advertisements — *not* because of some defect in the ads themselves, but rather because the Fairness Doctrine requires broadcasters

¹²² PMC Comments, *supra* n.73 at 28 (emphasis added).

¹²³ *See id.*

¹²⁴ *Id.* at 16-17 (emphasis added).

¹²⁵ NAB Comments, *supra* n.79, App. Vol., App. D at 11 (Example No. 10). Similarly, as noted by the United States Court of Appeals in *Maier v. FCC*, 735 F.2d 220, 234 n.19 (7th Cir. 1984), WTMJ-TV, a broadcast station in Milwaukee, Wisconsin has a "station policy that '[t]ime is not sold for the discussion of controversial issues.'"

carrying paid public interest advertisements to carry opposing viewpoints as well — even if no one steps forward to pay for them.¹²⁶

Similarly, the Association of National Advertisers, a trade association composed of companies which employ advertising in the marketing of goods and services to the public, documents that its members wish to present their views on issues of public controversy but are often “frustrated by rejections at the hands of broadcast licensees who claim that to accept such paid communications will subject them to onerous balancing obligations because of the Fairness Doctrine”¹²⁷

52. The inhibiting effect of the fairness doctrine on the presentation of issue-oriented advertising is vividly illustrated in the comments of Mobil Corporation, another party who actively supports the retention of the fairness doctrine. Relying on its “considerable experience” in this area, Mobil recounts that it has been thwarted in its efforts to provide the public with its side of public issue as a result of “the broadcasters’ outright refusal to permit the presentation of conflicting views on particular issues of public importance.”¹²⁸ In stark contrast to this experience, Mobil states that the “print media has been willing to sell space for Mobil to present its views, and has never disagreed with the substance or placement of materials”¹²⁹ While Mobil itself does not attribute its difference in treatment to the regulatory burdens associated with complying with the requirements of the fairness doctrine, evidence in the record, which we find persuasive, indicates that the refusal of many broadcasters to air Mobil’s advertisements was in fact based upon a concern that the commercial would trigger requests for the broadcast of responsive viewpoints under the fairness doctrine.¹³⁰

53. Further evidence of the demonstrable inhibiting effect of the fairness doctrine is documented by our own administrative decisions. Except in extremely rare situations, a licensee is not challenged under the fairness doctrine for a failure to air a specific

¹²⁶ “Comments of the American Association of Advertising Agencies in Furtherance of the Commission’s Inquiry to Support Repeal of the Fairness Doctrine” at 3–4 (emphasis in original). See also “Comments of the American Advertising Federation”; “Comments of the Association of National Advertisers Inc.” [hereinafter cited as “ANA Comments”]. See also NAB Comments, *supra* n.79, App. Vol., App. D at 30–31 (Example Nos. 23).

¹²⁷ ANA Comments, *supra* n.126 at 2.

¹²⁸ “Comments of Mobil Corporation,” at 3–4 [hereinafter cited as “Mobil Corp. Comments”].

¹²⁹ *Id.* at 4.

¹³⁰ NAB Comments, *supra* n.79, App. Vol., App. D at 60 (Example No. 40).

controversial issue of importance to the community;¹³¹ rather, the typical fairness doctrine case addresses whether the licensee provided overall balanced coverage with respect to those issues which, in its discretion, it chose to present. As a consequence, in those instances in which we determined that the licensee failed to broadcast a sufficient amount of responsive programming which is mandated under the second prong of the fairness doctrine, we have imposed sanctions — including the ultimate penalty of non-renewal — upon broadcasters who have actually provided large amounts of controversial issue programming. With respect to these broadcasters, the anomalous result of enforcing the second prong of the fairness doctrine is to inhibit or silence licensees who make significant contributions to the marketplace of ideas.¹³²

54. *Brandywine-Main Line Radio Inc.*,¹³³ a case involving the license renewal of WXUR, is a vivid illustration of the way in which application of the fairness doctrine has operated to stifle controversial issue programming. The uncontroverted evidence of that case demonstrated that “controversial issue programming was a substantial part of WXUR’s total programming”¹³⁴ during

¹³¹ See, e.g., *Brent Buell*, 97 FCC 2d 55, 57 (1984). As we stated in our 1974 *Fairness Report*, “the usual fairness complaint does not involve an allegation that the licensee has not devoted sufficient time to the discussion of public issues.” 1974 *Fairness Report*, 48 FCC 2d at 10. Indeed, on only one occasion have we determined that the licensee acted unreasonably in failing to cover a specific controversial issue of paramount importance to the community. *Representative Patsy Mink*, 59 FCC 2d 987 (1976).

¹³² In making this assertion, we do not — and cannot — pass judgment on the wisdom or propriety of the viewpoints expressed. Indeed, the Commission may conclude that a licensee makes a significant contribution to the marketplace of ideas, even though the Commission—or a majority of the public — may disagree or even abhor the opinions expressed by the licensee. As the United States Supreme Court has stated, “it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.” *FCC v. Pacifica Foundation*, 438 U.S. 726, 745–46 (1978). The presentation of diverse viewpoints on controversial issues of public importance enables members of the public, rather than any governmental entity, to accept or reject the different attitudes and viewpoints; the exposure to the marketplace of ideas, therefore, provides the public with the means to understand the vital issues of the day.

¹³³ *Brandywine-Main Line Radio Inc.*, *supra* n.75.

¹³⁴ *Id.*, 24 FCC 2d at 22. Indeed, the Initial Decision noted that:

In the broad perspective of this record, it is almost inconceivable that any station could have broadcast more variegated opinions upon so many issues than WXUR The multitudinous seas of opinion were navigated in what seemed to be a breathtaking course and this, indeed, was a main cause of the station’s difficulties—not that it was narrowly partisan but that it sought and received too much controversy.

* * * *

There is a strange irony in the fact that WXUR has attempted to do

its term of license. The Commission also found that the station did provide some coverage of opposing viewpoints, but the Commission determined that the station did not satisfy the requirement of overall balance in its public issue programming, as “those holding viewpoints contrary to those of the moderator were forced to give their views in an antagonistic setting.”¹³⁵ As a consequence, the Commission refused to renew the license of WXUR.

55. The Commission’s decision in that case had the direct result of reducing the amount of controversial issue programming available to the public. Chief Judge David Bazelon, in dissent to the Court of Appeals’ affirmance, stated that WXUR was:

a radio station devoted to speaking out and stirring debate on controversial issues. The station . . . propogate[d] a viewpoint which was not being heard in the greater Philadelphia area. The record is clear that through its interview and call-in shows it did offer a variety of opinions on a broad range of public issues, and that it never refused to lend its broadcast facilities to spokesman of conflicting viewpoints

The Commission’s . . . decision, has removed WXUR from the air. This has deprived the listening public not only of a viewpoint but also of robust debate on innumerable controversial issues. It is beyond dispute that the public has lost access to information and ideas. This is not a loss to be taken lightly, however unpopular or disruptive we might judge these ideas to be.¹³⁶

56. A number of parties characterize the statements made by broadcasters that document the existence of “chilling effect” as mere “self-serving” utterances to which the Commission should accord little probative value.¹³⁷ Because these broadcasters at most merely recount their “personal beliefs about the effect of the Doctrine on programming practices,”¹³⁸ these parties argue that their statements do not substantiate the proposition that the overall effect of the fairness doctrine is to inhibit the presentation

what broadcasters have been exhorted to do and that is to offer vigorous discussion of controversial issues. *The station has, in fact, presented such discussion in about the same degree that most stations offer entertainment.*

Brandywine-Main Line Radio, Inc., 24 FCC 2d 42, 130–131 (1970), *rev’d*, 24 FCC 2d 18 (1970), *recon. denied*, 27 FCC 2d 565 (1971), *aff’d*, 473 F.2d 16 (D. C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973). (Initial Decision of Hearing Examiner H. Gifford Irion) (emphasis added).

¹³⁵ *Brandywine-Main Line Radio, Inc.*, 24 FCC 2d at 23.

¹³⁶ *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 70 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973) (Bazelon, C. J. dissenting) (emphasis omitted).

¹³⁷ See, e.g., “Reply Comments of the American Civil Liberties Union” at 9 [hereinafter cited as “ACLU Reply Comments”]; MAP/TRAC Reply Comments, *supra* n.105 at 36.

¹³⁸ See ACLU Reply Comments, *supra* n.137 at 10.

of controversial issues of public importance.

57. We disagree. Because the existence of a “chilling effect” is a subjective perception, the statements of broadcasters who are personally subject to its requirements on a daily basis are able to present some of the best evidence on whether or not the doctrine, in operation, inhibits the presentation of controversial issues of public importance. We also believe that this evidence is more probative than the statements of persons who, by necessity, have to second-guess the broadcaster’s state of mind.

58. In addition, we reject the proposition that the evidentiary value of these statements is undercut by their alleged “self-serving” nature. A statement by a broadcaster that he or she is inhibited from presenting controversial issues of public importance is, in a very real sense, an admission against interest. Such a statement may constitute an acknowledgement that the broadcaster may not be abiding by the highest standards of professional journalism, thereby potentially diminishing his or her standing in the profession. In addition, it could create potential regulatory problems for the broadcaster.¹³⁹ Further, while it is true that these statements evidencing a “chiling effect” are “self-serving” in the sense that the broadcasters who made them have a direct interest in the outcome of this proceeding, the identical charge could be leveled against every statement of every commenting party. We have never held that the evidence of interested parties lack probity; indeed, were we to adopt such a rule it would be virtually impossible for us to come to any conclusions about any issue raised in this proceeding.

59. Some parties to this proceeding attempt to support the absence of a “chilling effect” by asserting that most broadcasters either support the doctrine or at a minimum deny that it inhibits their speech.¹⁴⁰ We find this argument to be unpersuasive. Virtually all broadcasters or their trade associations which commented on this issue took the position that the fairness doctrine operates as a significant deterrent to the presentation of controversial issues of public importance.¹⁴¹ There was only one

¹³⁹ The United States Supreme Court has stated that “if present licensees should suddenly prove timorous [in presenting controversial issues of public importance], the Commission is not powerless [to redress the situation].” *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 391. In light of this judicial warning, a licensee may believe it imprudent to acknowledge that it has in fact been timorous, thereby inviting potential regulatory litigation.

¹⁴⁰ See, e.g., BCFM Reply Comments, *supra* n.91 at 50-54; PMC Comments, *supra* n.73 at 7-9.

¹⁴¹ See, e.g., “Comments [of National Radio Broadcasters Association] on Reassessment of the Fairness Doctrine,” at 8; NAB Comments, *supra* n.79, App. Vol.,

broadcaster on the record of this proceeding which voiced its support for the fairness doctrine as a matter of policy.¹⁴² Moreover, the second-hand accounts of support of the doctrine by broadcasters that are contained in the pleadings of some proponents of the doctrine are directly contradicted by the statements of the broadcasters themselves in this proceeding.¹⁴³ Furthermore, we do not believe that the isolated representations of some broadcasters to the effect that the doctrine does not have any effect on the type, frequency or duration of the controversial viewpoints they air are probative of an absence of chilling effect within the industry as a whole; the fact that some broadcasters may not be inhibited in the presentation of controversial issues of public importance does not prove that broadcasters in general are similarly uninhibited.

60. Some parties assert that any inhibiting effect of the fairness doctrine is not attributable to the actual requirements of the doctrine itself but rather to the misperception of broadcasters as to their precise obligations under the doctrine. These commenters contend that broadcasters are not inhibited by the fear of incurring fairness doctrine obligations unless regulatory requirements in fact attach to their programming.¹⁴⁴ However, broad-

App. D; "Joint Comments of Radio-Television News Directors Association" at 60-65; CBS Comments, *supra* n.83 at 70-98; NBC Comments, *supra* n.86 at 9-52; Tribune Comments, *supra* n.78 at 8.

¹⁴² "Comments of Group W [Westinghouse Broadcasting & Cable Co.]" at 6-7 [hereinafter cited as "Group W Comments"].

¹⁴³ For example, in its Reply Comments, BCFM contends that it "is not the case" that "a majority of licensees, or at least the major networks, . . . oppose the [fairness] doctrine." BCFM Reply Comments, *supra* n.91 at 50. It states further that "NBC, CBS and ABC do not share NAB's view that the doctrine inhibits their speech." *Id.* at 50-51. Based upon the pleadings submitted by broadcasters in this proceeding, these representations appear erroneous. As noted above, the record reflects that the overwhelming majority of broadcasters participating in this inquiry oppose retention of the fairness doctrine. Moreover, with respect to the networks, NBC and CBS filed lengthy comments in this proceeding urging the Commission to eliminate the doctrine; one reason that these parties took this position was that they perceived the doctrine to have a chilling effect upon the speech of broadcasters. NBC Comments, *supra* n.86 at 8-9; CBS Comments, *supra* n.83 at 70-77. Furthermore, expressing the view that the total repeal of the fairness doctrine is a long term goal, ABC urged the Commission to adopt proposals for "major overhaul of the fairness doctrine" to "further enhance the First Amendment rights of broadcast journalists. "Reply Comments of American Broadcasting Companies, Inc." at 5. Indeed, BCFM actually characterizes ABC's proposals as designed "to exempt broadcasters from every meaningful obligation under the fairness doctrine . . ." BCFM Reply Comments, *supra* n.91 at 74. It is clear, therefore, that the statements of the networks in the record of this proceeding are directly at odds with BCFM's representation that these parties support the fairness doctrine.

¹⁴⁴ See, e.g., BCFM Reply Comments, *supra* n.91 at 66-69; MAP/TRAC Reply

casters are not lawyers. A broadcaster may be uncertain as to the precise boundaries of our detailed and complex regulatory scheme¹⁴⁵ or may be uncertain as to whether he or she will be able to convince us, in the course of fairness doctrine litigation, that the station's overall programming complies with our regulatory requirements. As a consequence, a broadcaster, in order to avoid even the possibility of litigation, may be deterred from airing material even though the Commission, after hearing all the evidence, would have concluded that the program did not trigger fairness doctrine obligations.¹⁴⁶ Indeed, the uncertainty as to whether or not a broadcast contains information which rises to the level of a controversial issue of public importance may itself have an inhibiting effect.¹⁴⁷ In any event, it is the fact of deterrence — not whether or not the Commission, in making an

Comments, *supra* n.105 at 38-40.

¹⁴⁵ The regulatory requirements associated with the fairness doctrine are not as clear and unambiguous as the parties making this argument would have us believe. As noted in n.105 *supra*, BCFM argued that it was patently absurd for a broadcaster to decide not to air a series on religious cults on the basis that the series would trigger fairness doctrine obligations because religious matters are clearly beyond the scope of the fairness doctrine. Yet, contrary to BCFM's assertions, we have affirmatively stated that matters of religious doctrine, in appropriate circumstances, could precipitate fairness doctrine obligations. See n.105, *supra*; *Brandywine Main-Line Radio, Inc.*, 27 FCC 2d at 570.

¹⁴⁶ As the United State Supreme Court has stated:

The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone This is especially to be feared when the complexity of the proofs and the generality of the standards applied provide but shifting sands on which the litigant must maintain his position.

Speiser v. Randall, 357 U.S. 513, 526 (1958) (citation omitted). See also *New York Times Co. v. Sullivan*, 376 U.S. at 279. See generally *Central Intelligence Agency against American Broadcasting Companies, Inc.*, No. 1862 (released Jan. 10, 1985), *application for review denied*, FCC No. 85-374 (adopted July 12, 1985).

¹⁴⁷ We have traditionally recognized that:

One of the most difficult problems involved in the administration of the fairness doctrine is the determination of the *specific* issue or issues raised by a particular program. Those would seem to be a simple task, but in many cases it is not.

1974 Fairness Report, 48 FCC 2d at 12 (emphasis in original). As Chief Judge J. Skelly Wright of the United States Court of Appeals stated, "issue ambiguity in the fairness doctrine context is a certainty to lessen the free flow of information favored by the First Amendment, and is therefore unacceptable." *American Security Council Education Foundation v. FCC*, 607 F.2d at 458 (J. Skelly Wright, C. J. concurring). In enforcing the fairness doctrine, we are required, *inter alia*, to determine whether or not issues are "publicly important," "controversial," *etc.* Because our experience indicates that identifying and characterizing issues is inherently subjective, issue ambiguity under the fairness doctrine scheme appears unavoidable.

adjudicatory determination on the substantive law would in fact find a fairness doctrine obligation — which is relevant in ascertaining the existence of a chilling effect. As the United States Court of Appeals stated:

In seeking to identify the chilling effect . . . our ultimate concern is not so much with what government officials will actually do, but with how reasonable broadcasters will perceive regulation, and with the likelihood they will censor themselves to avoid official pressure and regulation.¹⁴⁸

61. A number of commenters argue that there is no inhibiting effect because the Commission has been careful to administer the fairness doctrine in a manner which attenuates the regulatory burdens on broadcasters.¹⁴⁹ It is true that we have enforced the doctrine with a view toward minimizing editorial intrusion on broadcast journalists.¹⁵⁰ But the record in this proceeding has convinced us that the fairness doctrine generally operates to inhibit the presentation of controversial issues of public importance on the airwaves. Because the inhibiting effect is an inevitable result of the substantive rule itself, even carefully crafted implementing mechanisms have not been successful in preventing the fairness doctrine from operating to deter broadcasters from airing important and controversial issues. The mere fact that a more intrusive implementing approach might result in even greater restrictions on the editorial discretion of broadcast-

¹⁴⁸ *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d at 1116.

¹⁴⁹ See, e.g., Mobil Corp. Comments *supra* n.128 at 25-30; MAP/TRAC Comments *supra* n.50 at 128-133.

¹⁵⁰ *1974 Fairness Report*, *supra* n.3. Historically we have been concerned over the dangerous potential of the fairness doctrine to chill the speech of broadcasters. Consequently, in enforcing the doctrine we have adopted a number of procedural rules in an attempt to attenuate the intrusion on the editorial freedom of broadcast journalists. *Id.* For example, the Commission, as a condition precedent to filing a fairness doctrine complaint, requires a viewer or listener to first present his or her grievance to the broadcaster. See, e.g., *American Security Council Education Foundation v. FCC*, 607 F.2d at 445. We have also required a person filing a fairness doctrine complaint to establish a *prima facie* case. See, e.g., *Memorandum Opinion and Order on Reconsideration of the Fairness Doctrine Report* in Docket No. 19260 58 FCC 2d 691, 696 (1976), *aff'd sub nom. National Citizens Committee for Broadcasting v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978). *American Security Council Education Foundation v. FCC* 607 F.2d at 447. In addition, in implementing the doctrine, we have traditionally accorded a significant amount of discretion to broadcasters in the selection of the issues, the manner of coverage, the appropriate spokespersons, and the amount of time devoted to a specific matter. See *1974 Fairness Report*, 48 FCC 2d at 16. See also *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 FCC 598 (1964).

ers does not negate the existence of a demonstrable “chilling effect” under the present regulatory scheme.

62. Furthermore, noting that the Commission only forwards a small amount of complaints it receives to broadcasters for justification, several fairness doctrine proponents assert that the Commission fails to enforce its rules and, consequently, broadcasters are not reasonably deterred from airing controversial issues of public importance by operation of the fairness doctrine. We disagree. While it is true that we do not often determine, after review of a fairness doctrine complaint, that it is appropriate for us to request the broadcaster to explain how its programming comports with the fairness doctrine,¹⁵¹ this fact merely demonstrates that the vast majority of fairness doctrine complaints we receive lack colorable validity. Instead of the improper action ascribed by some commenters, we believe that the paucity of actionable fairness doctrine complaints is probative of the fact that most licensees comply with the fairness doctrine.

63. In addition, several supporters of the retention of the fairness doctrine argue that the record in this proceeding provides inadequate support of a “chilling effect” on the grounds that the NAB, in the appendix to its comments, “merely” provided 45 examples of the way in which the fairness doctrine chills broadcasters’ speech. These parties contend that the allegedly small number of examples are “wholly insufficient to suggest that the fairness doctrine has any inherent chilling effect on broadcasters.”¹⁵²

64. We find that this contention lacks merit for several reasons. First, the evidentiary support for our conclusion concerning the existence of a “chilling effect” is based, *inter alia*, on the pleadings of numerous parties, including individual broadcasters, corporations, industry groups, trade associations, non-profit corporations as well as the comments of the NAB. Second, even if the evidence of record were limited to the 45 examples contained in the appendix to NAB’s comments — which it is not — we do not believe that 45 examples of chill can be discounted on the grounds that they are merely isolated incidents that are unrepresentative of the industry as a whole. This is particularly true in light of the fact that, as noted above, an admission by a broadcaster that the

¹⁵¹ See, e.g., *American Security Council Education Foundation v. FCC*, 607 F.2d at 447.

¹⁵² MAP/TRAC Reply Comments, *supra* n.105 at 29. See also “Reply Comments of the United States Catholic Conference” at 8 [hereinafter cited as “USCC Reply Comments”].

fairness doctrine inhibits the presentation of controversial issues could be construed as involving a potential rule violation which broadcasters may be reluctant to acknowledge, especially in the record of the licensing regulatory agency.¹⁵³

65. In addition, several parties challenge some of NAB's examples on the grounds that they involve application of the personal attack or political editorializing rule.¹⁵⁴ Noting that these specific applications of the fairness doctrine are the subject of a separate rulemaking,¹⁵⁵ they assert that these examples lack evidentiary value as to the "chilling effect" of the general fairness doctrine. To the contrary, we believe that examples of a "chilling effect" which involve application of the personal attack and political editorializing components of the fairness doctrine contained in the comments of NAB and other parties are probative of the general proposition that intrusive content-based regulation like the fairness doctrine and its ancillary doctrines inhibit the presentation of controversial issues of public importance on broadcast frequencies.¹⁵⁶ In any event, while these examples do provide evidentiary support regarding the inhibiting effect of the

¹⁵³ Contending that some of the examples cited by NAB are overly vague, anonymous, or otherwise fail to demonstrate that the fairness doctrine in actuality inhibits the presentation of controversial issues of public importance, certain parties argue that the Commission should accord little, if any, probative value to these examples. Contrary to this assertion, we believe that many of the examples contained in NAB's Comments provide substantial and convincing proof of the existence of a "chilling effect" and that the examples set forth by NAB are not so vague as to lack probative value. While some of the sources are unnamed, we note that the examples set forth by anonymous sources are similar to those which are attributed to specific broadcasters. Moreover, as noted above at ¶ 58 *supra*, there are legitimate reasons, unrelated to the probity of the representations, why some broadcasters may desire anonymity with respect to their statements that they were inhibited, by the fear of incurring fairness doctrine obligations, in their presentation of controversial issues of public importance. Furthermore, as noted in ¶ 64 *supra*, our concern is with the evidence contained in the record as a whole rather than with whether each example described by NAB contains specific evidentiary documentation of a "chilling effect."

¹⁵⁴ See, e.g., MAP/TRAC Reply Comments, *supra* n.105 at 30; BCFM Reply Comments, *supra* n.91 at 68-69; ACLU Reply Comments, *supra* n.137 at 10.

¹⁵⁵ *Notice of Proposed Rule Making* in Gen. Docket No. 83-484, FCC 83-218 (released June 14, 1983).

¹⁵⁶ See, e.g., NAB Comments, *supra* n.79, App. Vol., App. D at 35-37, 40-41, 46 and 62 (Example Nos. 26, 28, 31, and 42). See also "Comments of KIPR/95 FM"; "Comments of KGRL 940-AM Radio"; CBS Comments, *supra* n.83 at 77-78, n.*; FEF Comments, *supra* n.83 at 71-72, citing *Freedom of Expression Act of 1983: Hearings Before the Senate Committee on Commerce, Science & Transportation*, 98th Cong. 2d Sess. 125-126 (1984).

doctrine, our conclusion as to the existence of a “chilling effect” is in no way dependent upon these examples.¹⁵⁷

66. Finally, in its Reply Comments, the Media Access Project and the Telecommunications Research and Action Center (“MAP/TRAC”) contend that many of the examples of “chilling effect” contained in the NAB’s Comments are merely “recycled material” which is of little evidentiary value. In support of this contention, MAP/TRAC recount that a number of these examples have been the subject of published books and articles, Commission proceedings or congressional testimony. With respect to the examples derived from the congressional hearings, MAP/TRAC assert that Congress, by rejecting or failing to enact legislation, found these examples to be unpersuasive.

67. We disagree. In our own view, the probity of these examples is not diminished merely because they have been published, formed the factual basis of an administrative proceeding or presented to Congress. To the extent that any evidentiary relevance attaches to the fact that the contents of a pleading has formed the subject matter of testimony presented under oath to the Nation’s lawmakers, this fact would appear to enhance rather than lessen its probative value. Furthermore, contrary to MAP/TRAC’s suggestions, the mere fact that Congress chose not to enact legislation does not constitute an affirmative determination on the part of the governing legislative body that the examples lack probity.¹⁵⁸

68. In sum, we find that the evidence, derived from the record as a whole, leads us to conclude that the fairness doctrine chills speech. As a result of this finding alone we no longer believe that the fairness doctrine, as a matter of policy, furthers the public interest and we have substantial doubts that the fairness doctrine comports with the strictures of the First Amendment. Because the fairness doctrine inhibits the presentation of controversial and important issues, in operation, it actually disserves the purpose it was designed to achieve. In our view, an elimination of the doctrine would result in greater discussion of controversial and important public issues on broadcast facilities. While we believe that the existence of a “chilling effect is sufficient to support our policy conclusion, it is not the only basis upon which we make

¹⁵⁷ In this regard, we note that none of the evidence of record demonstrating the existence of a “chilling effect” that is described in this section involves an application of the personal attack rule or the political editorializing rule.

¹⁵⁸ MAP/TRAC Reply Comments, *supra* n.105 at 27–28.

this determination. In the following sections we shall discuss other detriments attributable to the fairness doctrine.

*C. The Administration of the Fairness Doctrine Operates to
Inhibit the Expression of Unorthodox Opinions*

69. While the fairness doctrine has the laudatory purpose of encouraging the presentation of diverse viewpoints, we fear that in operation it may have the paradoxical effect of actually inhibiting the expression of a wide spectrum of opinion on controversial issues of public importance.¹⁵⁹ In this regard, our concern is that the administration of the fairness doctrine has unintentionally resulted in stifling viewpoints which may be unorthodox, unpopular or unestablished.

70. First, the requirement to present balanced programming under the second prong of the fairness doctrine is in itself a government regulation that inexorably favors orthodox viewpoints.¹⁶⁰ As we stated in our *1974 Fairness Report*, it is only “major”¹⁶¹ or “significant”¹⁶² opinions which are within the scope of the regulatory obligation to provide contrasting viewpoints. As a consequence, the fairness doctrine makes a regulatory distinction between two different categories of opinions: those which are “significant enough to warrant broadcast coverage [under the fairness doctrine]”¹⁶³ and opinions which do not rise to the level

¹⁵⁹ Governmental policy which has the effect of inhibiting the expression of specific points of view presents grave First Amendment concerns. As the United States Supreme Court has stated:

the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.

FCC v. Pacifica Foundation, 438 U.S. at 745.

¹⁶⁰ Justice William Brennan has noted that the fairness doctrine may operate to disfavor viewpoints outside the mainstream of public opinion:

Under the Fairness Doctrine, a broadcaster is required to present only “representative community views and voices on controversial issues” of public importance. Thus, by definition, the Fairness Doctrine tends to perpetuate coverage of those “views and voices” that are already established, while failing to provide for exposure to the public to those “views and voices” that are novel, unorthodox or unrepresentative of prevailing opinion.

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 190 (1973), quoting *Democratic National Committee*, 25 FCC 2d 216, 222 (1970) (Brennan, J., dissenting) (emphasis in original).

¹⁶¹ *1974 Fairness Report*, 48 FCC 2d at 15.

¹⁶² *Id.*

¹⁶³ *Id.*

of a major viewpoint of sufficient public importance¹⁶⁴ that triggers responsive programming obligations. While the broadcaster in the first instance is responsible for evaluating the “viewpoints and shades of opinion which are to be presented,”¹⁶⁵ we are obligated to review the reasonableness of the broadcaster’s evaluation. As a consequence, the fairness doctrine in operation inextricably involves the Commission in the dangerous task of evaluating the merits of particular viewpoints. This evaluation has serious First Amendment ramifications. As the Supreme Court has stated:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . .¹⁶⁶

71. Second, as Chief Judge David Bazelon has stated, our own administrative enforcement of the doctrine provides some support for the contention that some “controversial viewpoint[s] [are] being screened out in favor of the dreary blandness of a more acceptable opinion.”¹⁶⁷ Broadcasters who have been denied or threatened with a denial of the renewal of their licenses due to fairness doctrine violations have generally not been those which have provided only minimal coverage of controversial and important public issues. Indeed, some licensees that we have not renewed or threatened with non-renewal have presented controversial issue programming far in excess of that aired by the typical licensee.¹⁶⁸ In a number of situations it was the licenses of broadcasters who aired opinions which many in society found to be abhorrent or extreme which were placed in jeopardy due to allegations of fairness doctrine violations.¹⁶⁹ In conclusion, we are

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

¹⁶⁷ *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d at 78 (Bazelon, C. J. dissenting).

¹⁶⁸ A discussion of our decision not to renew the license of WXUR on the basis, *inter alia*, of failing to comply with the fairness doctrine is described in detail at ¶¶ 54-55, *supra*. As noted below, in the name of the fairness doctrine we silenced WXUR, a station which had provided an enormous amount of controversial issue programming during its term of license. Similarly, in *Capitol Broadcasting Co.*, 2 RR 2d 1104 (1964), the Commission deferred action on the renewal applications of WRAL during a pendency of an inquiry into the station’s compliance with the fairness doctrine notwithstanding the fact that the station’s editorials, voiced by its Vice-President, Jesse Helms, presented views “on a great number of controversial issues of national and regional importance.” *Id.* at 1106 (emphasis added).

¹⁶⁹ See, e.g., *Lamar Life Broadcasting Co.*, 38 FCC 1143 (1965), *rev’d sub nom. Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (FCC refusal to grant a full term license to a station which espoused

extremely concerned over the potential of the fairness doctrine, in operation, to interject the government, even unintentionally, into the position of favoring one type of opinion over another.¹⁷⁰ To the extent that the doctrine has this effect it both disserves the interest of the public in an unencumbered marketplace of ideas and contravenes the fundamental purposes of the First Amendment.

D. In Operation the Fairness Doctrine Places the Government into the Intrusive and Constitutionally Disfavored Role of Scrutinizing Program Content

72. Although we have traditionally attempted to minimize our role in evaluating program content in administering the fairness doctrine,¹⁷¹ the doctrine has the inexorable effect of interjecting the Commission into the editorial decisionmaking process.¹⁷² In evaluating whether or not a broadcaster has met his or her balanced programming obligations under the fairness doctrine,¹⁷³

racially segregationist viewpoints); *Brandywine-Main Line Radio, Inc.*, *supra* n.75 (FCC refusal to grant a license renewal to an evangelist station; the Hearing Examiner in *Brandywine* stated that the licensee's "style of presentation over the air — sometimes so racy as to make the gorge rise — was not what men of refined tastes would deem expedient. . . . *Brandywine-Main Line Radio, Inc.*, 24 FCC 2d at 130). See also *Trinity Methodist Church, South v. Federal Radio Commission*, 62 F.2d 850, 851 (D.C. Cir.), *cert. denied*, 284 U.S. 685 (1932) (Federal Radio Commission denied license renewal in a situation in which "the station had been used to attack a religious organization . . . [and where] the broadcasts [aired by the licensee] were sensational rather than instructive")

¹⁷⁰ In its Comments, the Office of Communication of the United Church of Christ — a party which intervened in opposition of a grant of renewal in the *Lamar Life* case — argues that in the 1960s extreme right wing broadcasters with odious racial and religious views gained an inordinate amount of influence in large sections of the country. Observing that these broadcasters were subject to fairness doctrine challenges, the United Church of Christ states that "[i]f the doctrine was successfully used to moderate abuses of that period, it served its purpose. . . ." "Comments of the Office of Communication of the United Church of Christ, the Unitarian Universalist Association, the Communication Commission of the National Council of the Churches of Christ in the U.S.A., Everett C. Parker and Al Swift" at 51 [hereinafter referred to as "UCC Comments"]. In our view, use of the fairness doctrine to suppress any point of view, however abhorrent, contravenes the purpose of the doctrine and raises serious constitutional implications.

¹⁷¹ See, e.g., *1974 Fairness Report* at 8. See *American Security Council Education Foundation v. FCC*, 607 F.2d at 445.

¹⁷² See *Notice*, *supra* n.1 at ¶ 71.

¹⁷³ Both prongs of the fairness doctrine have the potential to interject the government into the decisionmaking process as to the content of programming. The first prong of the fairness doctrine sanctions governmental intrusion by enabling the Commission to prescribe directly the coverage of a specific

we are obligated to determine whether or not the broadcaster made a reasonable determination as to whether or not the programming presented controversial issues of public importance, and if so, we must assess whether or not the broadcaster provided reasonable opportunities for the presentation of contrasting viewpoints. In evaluating the adequacy of the responsive programming, we have had to draw conclusions as to the reasonableness of the selected program formats and spokespersons.

73. Moreover, in making these assessments, we must necessarily take into account the amount of time in which a specific viewpoint was broadcast. Our staff often performs this task by mechanistically weighing the minutes and even the seconds of time devoted to each expression of opinion.¹⁷⁴ In addition, we must assess the frequency of the broadcast and the degree of audience exposure. Further, because the opportunity to present responsive programming may lose its utility if the controversial issue of public importance triggering the obligation subsequently becomes moot, we must also make judgments as to the timeliness of the opportunity for the discussion of contrasting viewpoints. The minute and subjective scrutiny of program content resulting from the enforcement of the fairness doctrine is at odds with First

controversial issue of public importance whether or not the broadcaster, in the exercise of his or her journalistic judgment, would choose to cover the issue. As noted *supra* at n.59, however, we impose affirmative programming obligations on broadcasters under the first part of the fairness doctrine only in very rare instances. Because it is the second prong of the doctrine that typically involves the government into the editorial decisionmaking process, this section will address the intrusion resulting from the enforcement of that prong of the doctrine.

¹⁷⁴ At the *en banc* hearing, James C. McKinney, Chief of the Mass Media Bureau, described the detailed scrutiny of program content that necessarily results from the enforcement of the fairness doctrine:

[I]t might be interesting for you to know the process that we go through here at the agency at the lower staff level before the Commissioners get [a case] for final decision. We . . . sit down with tape recordings [and] video tapes of . . . what has been broadcast on a specific station. We compare that to newspapers [and] other public statements that are made in the community. We try to make a decision as to whether the issue is controversial and whether it is of public importance in that community, which may be 2000 miles away. . . . [W]hen it comes down to the final analysis, we take out stop watches and we start counting [the] seconds and minutes that are devoted to one issue compared to [the] seconds and minutes devoted to the other side of that issue. . . . [I]n the final analysis we start giving our judgment as what words mean in the context of what was said on the air. What was the twist that was given that specific statement, or that commercial advertisement? Was it really pro-nuclear power or was it pro some other associated issue?

Hearings on the Fairness Doctrine; Panel IV (Statement of James C. McKinney) (February 8, 1985).

Amendment principles.¹⁷⁵ For example, in *Miami Herald*, the United States Supreme Court expressed concern that a governmentally mandated right of reply statute applicable to newspapers constituted an unwarranted intrusion on the editorial freedoms of journalists

because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper, and the decisions made as to the limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of free press as they have evolved to this time.¹⁷⁶

E. The Fairness Doctrine Creates the Opportunity For Intimidation of Broadcasters by Governmental Officials

74. Notwithstanding our recent efforts to reduce unnecessary regulatory burdens on licensees,¹⁷⁷ the broadcast industry is one which is characterized by pervasive regulation. The fact of this pervasive regulatory authority, including the intrusive power over program content occasioned by the fairness doctrine, provides governmental officials with the dangerous opportunity to abuse their opposition of power in an attempt either to stifle opinion with which they disagree or to coerce broadcasters to favor particular viewpoints which further partisan political objectives. In this regard, Chief Judge Bazelon has observed that “the potential to subject the ‘fairness’ theory to political abuse is

¹⁷⁵ Justice William O. Douglas has expressed concern over the intrusive nature of the fairness doctrine:

[T]he prospect of putting government in a position of control over publishers is to me an appalling one, even to the extent of the Fairness Doctrine. The struggle for liberty has been a struggle against Government. . . .

The Court in today’s decision by endorsing the Fairness Doctrine sanctions a federal saddle on broadcast licensees that is agreeable to the traditions of nations that never have known freedom of press and that is tolerable in countries that do not have a written constitution containing prohibitions as absolute as those in the First Amendment.

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. at 162-63 (Douglas J., concurring).

¹⁷⁶ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at 258.

¹⁷⁷ See, e.g., *Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076 (1984) [hereinafter cited as “*Television Deregulation*”]; *Report and Order* in MM Docket No. 84-19, FCC 84-156 (released May 9, 1984), 55 RR 2d 1389 (1984), *recon. denied*, FCC 85-225 (released May 8, 1985) (Elimination of Regional Concentration Rule) [hereinafter cited as “*Regional Concentration*”].

inherent in the operation of the doctrine.”¹⁷⁸

75. Political officials have not been loathe to criticize the manner in which broadcasters have aired controversial matters of public concern¹⁷⁹ and at times the criticism has been accompanied by overt pressure to influence the manner in which these issues are covered.¹⁸⁰ For example, a White House official during the Nixon Administration suggested to the President’s Chief of Staff that the Administration respond to the alleged “unfair coverage” of the broadcast media by showing “favorites within the media,” establishing “an official monitoring system through the FCC” and making “official complaints from the FCC.”¹⁸¹ The attempts to coerce broadcast journalists, moreover, have not been restricted to specific partisan viewpoints or politicians of a particular political party. As described in the *Notice*, a government official in another Administration was reported to state that the:

massive strategy [of the Administration] was to use the fairness doctrine to challenge and harass the right-wing broadcasters and hope that the challenges would be so costly to them that they would be inhibited, and decide that it was too expensive to continue.¹⁸²

We believe that the potential for the fairness doctrine to be abused in order to further partisan political purposes¹⁸³ has

¹⁷⁸ *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d at 78 n.62 (Bazelon, C. J., dissenting).

¹⁷⁹ Chief Judge Bazelon has stated that:

In the past years, networks have come under repeated attacks from government spokesmen who did not like the way television reported a variety of hot public issues. These attacks did not focus on inaccuracies but on the “bias” or lack of “fairness” in the presentation.

Id. at 78.

¹⁸⁰ An internal memorandum of one high level official of the Nixon Administration reveals that the President directed his staff on twenty-one occasions during a single thirty-day period to take “specific action relating to what could be considered unfair news coverage.” Memorandum to H. R. Haldeman from Jeb S. Magruder, “The Shot-gun Versus the Rifle” (Oct. 17, 1969), *reprinted in* D. Bazelon, “FCC Regulation of the Telecommunications Press,” 1975 *Duke L.J.* 213, 247-51 (1975).

¹⁸¹ *Id.* at 248.

¹⁸² *Notice*, *supra* n.1 at 78.

¹⁸³ Even where there has been no explicit threats by governmental officials, a mere perception that such abuse could occur may itself have an inhibiting effect. Broadcasters may be inhibited from airing viewpoints distasteful to those in power to avoid potential retaliation. As Chief Judge David Bazelon has observed:

the tremendous stakes in the highly concentrated television medium make the networks particularly sensitive to the prevailing political winds at the FCC, in Congress, and in the White House. And the government has fostered network sensitivity to government wishes by making clear that the failure to

dangerous policy ramifications. As Justice William O. Douglas has stated:

the regime of federal supervision under the Fairness Doctrine is contrary to our constitutional mandate and makes the broadcast licensee an easy victim of political pressures and reduces him to a timid or submissive segment of the press whose measure of the public interest will now be echoes of the dominant political voice that emerges after every election.¹⁸⁴

76. Several parties contend that we should not be concerned that the fairness doctrine has the potential to be used as a vehicle for governmental officials to improperly affect the viewpoints aired over broadcast frequencies because such governmental officials have other means, such as the license renewal process and Internal Revenue Service audits, by which to improperly attempt to exert control over broadcasters.¹⁸⁵ We disagree. While the commenters are correct in their assertion that governmental abuse may be effectuated by other mechanisms, we do not have plenary power to safeguard against all types of potential governmental abuse. Certainly the mere fact that alternative means of intimidation may be available does not provide justification for use to blithely ignore the fact that the fairness doctrine provides the dangerous potential for governmental abuse. As Chief Judge Bazelon has stated, “[w]ithout the FCC lever to manipulate, we could hope that there would be less chance that the licensees would be forced to kowtow to the wishes of an incumbent politician.”¹⁸⁶

*F. The Fairness Doctrine Imposes Unnecessary Economic Costs
Upon Broadcasters and the Commission.*

77. In addition to the detriments described above, a further consequence of the fairness doctrine is the economic burdens imposed upon broadcasters and the Commission. As described above, the doctrine places significant economic costs upon a licensee. Such costs are incurred, for example, in negotiating with the public regarding responsive programming obligations, in

respond to the government's concept of appropriate program content would jeopardize the all-valuable license. I am reminded by one broadcaster who observed: “We live or die . . . by the FCC gun.”

Bazelon, “First Amendment and the New Media,” *supra* n.74 at 78 (ellipsis in original).

¹⁸⁴ *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 164-65 (Douglas, J., dissenting).

¹⁸⁵ See, e.g., Geller/Lampert Comments, *supra* n.83 at 10-11 n.4.

¹⁸⁶ Bazelon, “FCC Regulation,” *supra* n.180 at 239.

defending fairness doctrine challenges in both administrative and judicial forums, in complying with the requirement to broadcast controversial issues of public importance, and in airing alternative viewpoints to these controversial issues.¹⁸⁷

78. In addition to these economic burdens, the administration and enforcement of the doctrine imposes regulatory costs upon the Commission. We receive thousands of inquiries and complaints concerning the fairness doctrine annually,¹⁸⁸ each of which requires an individualized evaluation or response by our staff. In the course of assessing the merits of a complaint, the Commission's staff may seek further information from the Complainant. If it determines that the complainant has established a *prima facie* case, the staff may request justification from the licensee, thereby precipitating potentially costly administrative litigation, which, when terminated, is subject to judicial review, with its attendant costs.¹⁸⁹ Contrary to the position of some commentators,¹⁹⁰ therefore, we do not believe that the economic burdens incurred by the Commission in administering the fairness doctrine are *de minimus*.

79. In evaluating the propriety of a policy, the costs associated with the rule are to be balanced against its benefits. As a consequence, the significant economic costs associated with the administration of the fairness doctrine are a necessary factor in a considered evaluation of whether or not retention of the fairness doctrine comports with the public interest. By this assertion we do not imply that the administrative costs standing alone would be sufficient to justify the elimination of the doctrine. To the contrary, these costs might be justified were it demonstrated that the doctrine increased the amount of controversial issue programming and that its retention was necessary to assure that the public had access to the marketplace of ideas. In a situation in

¹⁸⁷ See Section III, B.1, *supra*.

¹⁸⁸ For example, in 1984 our staff received 6,787 inquiries and complaints regarding the fairness doctrine.

¹⁸⁹ The United States Court of Appeals has recently determined that a complainant whose fairness doctrine claim is denied by the Commission has the right to seek judicial review (*Maier v. FCC*, *supra* n.125) and it is possible that this determination will increase the amount of appellate litigation, with its attendant costs, involving the fairness doctrine. Because appellate fairness doctrine litigation necessarily entails the involvement of Commission, the United States Department of Justice and the courts, the administrative expenses of each of these governmental agencies must be taken into account in assessing the economic burdens associated with the fairness doctrine.

¹⁹⁰ See, e.g., MAP/TRAC Comments, *supra* n.50 at 134; "Comments of the American Civil Liberties Union" at 11 [hereinafter cited as "ACLU Comments"].

which there are no counterveiling justifications, however, we believe that even a moderate amount of administrative costs may constitute substantial justification for the elimination of regulation. For example, we have recently stated that regulatory costs are a significant criterion in justifying repeal of a rule "especially when the other factors considered indicate that the need for the rule has been effectively eliminated and that the rule imposes significant costs on both the public and the broadcast industry."¹⁹¹ We find that these factors are applicable with respect to the fairness doctrine because, as discussed, the doctrine "chills" the broadcast of controversial issue programming and, as explained below, is not required to assure that the public has access to diverse viewpoints.

80. For the reasons set forth above, we find that the fairness doctrine, in operation, has the effect of inhibiting the presentation of controversial issues of public importance. We also believe that the doctrine operates to favor the expressions of orthodox viewpoints and to require unwarranted scrutiny by the Commission into program content. In addition, we find it provides a vehicle by which governmental officials can intimidate broadcasters for partisan political purposes. Moreover, we determine that the doctrine, in operation, imposes significant economic costs upon the Commission and the broadcasting industry. As a consequence, on the basis of the record in this proceeding, we conclude that there are a number of significant detriments associated with the fairness doctrine. In the following section we will evaluate, in light of the current communications marketplace, whether or not there is any need for us to retain the doctrine.

G. Need for the Fairness Doctrine In Light of the Increase in the Amount and Type of Information Sources in the Marketplace

81. Our conclusions regarding the disutility of the fairness doctrine find further support by examining the current amount of

¹⁹¹ *Memorandum Opinion and Order* in MM Docket No. 84-19 FCC 85-225 (released May 8, 1985) at ¶ 17. It is well-established that if the benefits of retaining a policy are minimal or non-existent, even a relatively small administrative burden may be sufficient to justify repeal. For example, in assessing whether or not to eliminate the regional concentration rule, one factor which we considered was the regulatory costs associated that rule. Finding that the administration of that rule had resulted in a staff analysis of 71 construction permits or assignment applications annually, we determined that "this expenditure of staff time . . . constitute[d] an appreciable burden on the Commission" (*id.*) despite the fact that there only were three reported cases involving the regional concentration rule over a two-year period. *Id.*

diverse and antagonistic sources of information available in the marketplace. As we observed in the *Notice*, significant increases in the number and variety of information sources attenuates the need for a system of government imposed "fairness" with its corollary duty to discover and present controversial issues of public importance. The Commission's last assessment of the information marketplace, and its necessary relationship to the legal and policy underpinnings of the fairness doctrine, occurred in 1974. At that time the Commission concluded:

The effective development of an electronic medium with an abundance of channels through the use of cable or otherwise is still very much a thing of the future. *For the present*, we do not believe that it would be appropriate — or even permissible — for a government agency charged with the allocation of the *channels now available* to ignore the legitimate First Amendment interests of the public. (*emphasis added*)¹⁹²

82. More than a decade has passed since this examination. During this time, we have witnessed explosive growth in various communications technologies. We find the information marketplace of today different from that which existed in 1974, as many of the "future" electronic technologies have now become contributors to the marketplace of ideas. As will be discussed below, the growth of traditional broadcast facilities, as well as the development of new electronic information technologies, provides the public with suitable access to the marketplace of ideas so as to render the fairness doctrine unnecessary. Moreover, we find that the dynamics of the information services marketplace overall insures that the public will be sufficiently exposed to controversial issues of public importance.¹⁹³ Accordingly, we no longer believe it appropriate to continue a system of government imposed obligations requiring licensees to discover and "fairly" address controversial issues of public importance. We believe that elimination of the fairness doctrine would not only promote discussion of such issues, but also pay greater fidelity to fundamental First Amendment values.¹⁹⁴

83. Our analysis of the growth in the information services marketplace and the impact of this development on the underpinnings of the fairness doctrine shall begin with a discussion on the nature and scope of that market. We shall then evaluate the

¹⁹² 1974 *Fairness Report*, 48 FCC 2d at 6.

¹⁹³ See *WNCN Listener's Guild v. FCC*, 450 U.S. 582, 594 (1981); *Office of Communications of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983) [hereinafter cited as "*UCC v. FCC*"].

¹⁹⁴ See *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. at 795. (the public interest necessarily invites reference to First Amendment principles).

current status of this marketplace. Special emphasis will be given to the growth of information sources since the Supreme Court's decision in *Red Lion Broadcasting* and our previous evaluation of the communications marketplace in the *1974 Fairness Report*. As a final matter, we will address the availability of these information sources and the incentives to provide coverage to controversial issues of public importance.

1. *Nature and Scope of the Information Services Marketplace*

84. The Commission has previously addressed this specific issue in the context of a television station licensee's programming obligations. In our decision deregulating the programming guidelines for commercial television, we noted that the relevant information marketplace includes a variety of information sources such as cable television, Low Power Television (LPTV), Multipoint Distribution Service (MDS), Multichannel Multipoint Distribution Service (MMDS), Satellite Master Antenna Service (SMATV), and other electronic technologies.¹⁹⁵ Moreover, the Commission, in formulating its policy concerning a licensee's responsibility to provide programming directed at children, stated that broadcasters could consider the programming alternatives available on both cable and public television in deciding how to meet their own nondelegable duty.¹⁹⁶ This policy was later affirmed by the United States Court of Appeals.¹⁹⁷

85. The Commission has also addressed the issue of determining the relevant information marketplace in fashioning its rules regarding concentration of ownership. For example, we took particular note of the rise in the multiplicity of nonbroadcast media voices when eliminating the regional concentration of control rules.¹⁹⁸ More recently, the Commission addressed this issue in a proceeding revising its national multiple ownership rules.¹⁹⁹ In this context the Commission noted:

¹⁹⁵ *Television Deregulation*, 98 FCC 2d at 1086 and 1138.

¹⁹⁶ *Report and Order* in MM Docket No. 19142, 96 FCC 2d 634 (1984), *aff'd sub nom. Action for Children's Television v. FCC*, 756 F.2d 899, 901 (DC. Cir. 1985) (per curiam) [hereinafter cited as "*ACT v. FCC*"].

¹⁹⁷ *ACT v. FCC*, 756 F.2d at 901.

¹⁹⁸ See *Regional Concentration*, *supra* n.177.

¹⁹⁹ *Report and Order* in Gen. Docket No. 83-1009, FCC 84-350, 49 Fed. Reg. 31877 (August 9, 1984), *recon. granted in part, Memorandum Opinion and Order*, FCC 84-638, 50 Fed. Reg. 4666 (February 1, 1985), *appeal docketed sub nom. National Association of Black Owned Broadcasters v. FCC*, No. 85-1139 (D.C. Cir. filed March 4, 1985).

The record in this proceeding supports the conclusion that the information market relevant to diversity includes not only TV and radio outlets, but cable, other video media and numerous print media as well. In the *Notice*, we took account of the fact that these other media compete with broadcast outlets for the time that citizens devote to acquiring the information they desire. That is cable, newspapers, magazines and periodicals are substitutes in the provision of such information.²⁰⁰

That the various media are in fact information substitutes in the marketplace of ideas is further reflected in our local cable and television, newspaper and broadcast, radio and television cross-ownership rules.²⁰¹

86. Against this background, the issue in this proceeding is whether or not there are inherent differences among various media outlets so as to prevent substitutability with respect to the presentation of controversial issues of public importance. We find nothing in this record which would cause us to arrive at a conclusion different from these prior decisions.²⁰² Accordingly, for the purpose of analyzing the fairness doctrine, we believe it is appropriate to consider traditional broadcast services, new electronic media and print as all part of the information services marketplace.

87. Several commenters argued that broadcasting, particularly television, is such a dominant information source that there are no other realistic information alternatives.²⁰³ These commenters frequently point to studies indicating that television is both the primary and most believed source of information in the country.²⁰⁴ We do not believe that the purported dominance of one media voice necessarily detracts from the significance of other voices with respect to the availability of antagonistic and diverse sources of information. The success of one particular medium in

²⁰⁰ *Id.* at 31880.

²⁰¹ See 47 C.F.R., § 73.3555(b) [one to a market]; 47 C.F.R. § 76.501 [co-located cable-broadcast TV cross-ownership]; and 47 C.F.R. § 73.3555(c) [co-located newspaper-broadcast cross-ownership.]

²⁰² Indeed, as we will discuss, *infra*, growth in the television and radio services alone may obviate the need for the fairness doctrine. See ¶ 104, *infra*.

²⁰³ See, e.g., "Comments of General Motors Corporation, International Paper Company and Campbell-Ewaid Company on Notice of Inquiry" at 10, [hereinafter cited as "GM Comments"]; "Comments of the Democratic National Committee, Democratic Congressional Campaign Committee and Democratic Senatorial Campaign Committee at 7-8, [hereinafter cited as "DNC Comments"].

²⁰⁴ Commenters generally cite to the *Roper Study* for the proposition that broadcasting, especially television, is the most utilized and the most believed source of news and informational programming. See The Roper Organization Inc., "Public Attitudes Toward Television and Other Media in Time of Change" May 1985 [hereinafter cited as the "*Roper Study*"].

attracting large audiences does not necessarily provide an appropriate justification for imposing governmentally mandated fairness. Moreover, the data do not suggest that other media voices are somehow unavailable. Studies demonstrating the alleged dominance of television broadcasting are based on data in which television was selected as one of several information sources used by the respondents.²⁰⁵ Such data merely serve to demonstrate the interchangeability of information options.²⁰⁶

88. Similarly, we are not persuaded by those who argue that newspapers and broadcast facilities are in different information markets because newspapers must be read as opposed to television or radio which may be casually watched or monitored.²⁰⁷ For the purposes of the policies adopted herein, we can find no important regulatory distinction in the fact that an individual watches television, listens to the radio or reads a newspaper. That individuals edit and process information from the various media using different senses or while performing different tasks does not suggest that the information sources exist in separate isolated corners within the marketplace of ideas. In this regard, we believe that our regulatory concerns are best limited to considerations involving the *availability* of information sources. Concerns involving the manner in which the individuals mentally process the information from these outlets generally should not be of regulatory significance.²⁰⁸

89. A related argument concerns the fact that broadcasting, unlike almost all other media sources, is subject to substantial and direct government regulation.²⁰⁹ We do not believe that a

²⁰⁵ In this regard, the *Roper Study* acknowledges that multiple answers have been accepted when people have named more than one medium. *Id.* at 3.

²⁰⁶ Indeed, it appears that reliance on a particular media voice may depend on the type of issue *e.g.*, national, local etc. For example, a recent study published by the American Society of Newspaper Editors found that 50 percent of the respondents trusted newspapers more than television in trying to understand a difficult local news story. Only 37 percent of all respondents said they would trust television more in understanding local news. *Editor and Publisher*, Apr. 13, 1985, at 9.

²⁰⁷ See MAP/TRAC Comments, *supra* n.50 at 75.

²⁰⁸ Furthermore, we disagree with MAP/TRAC's contention that television broadcasting is unique because it has a captive audience. *Id.* at 76 n.76. MAP/TRAC's own analysis regarding the ability to listen to broadcasting while resting, working or driving is inconsistent with the captive audience hypothesis. Moreover, reliance on the Supreme Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. at 749, as evidence of the captive audience theory is misplaced. The Supreme Court has acknowledged that the decision is limited to situations involving children and indecent language. See *FCC v. League of Women Voters*, 104 S.Ct. at 3118.

²⁰⁹ See, *e.g.*, MAP/TRAC Comments, *supra* n.50 at 61.

system of government licensing affects the substitutability of information among the various media voices. While such a system may influence entry into the information services marketplace, a licensing scheme, in and of itself, does not provide a proper distinction for the purpose of assessing the impact of broadcasting as a diverse information voice.²¹⁰ Moreover, as we observed when adopting our co-located newspaper cross-ownership rules, nonregulated information sources may be considered in formulating Commission policy.

90. In addition, we do not believe that purported price differences among the various information sources necessarily place them in separate information markets. While programming from traditional advertiser based broadcast facilities has been considered a “zero priced good,” there is no evidence in the record suggesting that the alleged price differentials between these facilities and other “pay” media are significant enough to preclude interchangeability among information systems.²¹¹ Indeed, the monthly cost of a daily newspaper may be comparable to or even less than the monthly cost of basic cable service.

91. Several commenters suggested that newer technologies such as pay cable, STV, MDS, DBS are not adequate information substitutes with respect to the provision of issue related programming. As will be discussed *infra*, we believe there are sufficient incentives to insure the presentation of programming that addresses controversial issues of public importance. These incentives exist not only for traditional broadcast facilities, but also for the newer electronic technologies.²¹²

²¹⁰ In this regard, we note that even assuming costs associated with the limitations of the Commission allocations scheme, the actual barriers to entry in terms of capital costs, may be lower for radio and television broadcasting than for daily newspapers. See Wirth, Michael, *Economic Barriers to Entry Daily Newspapers vs. Television Stations vs. Radio Stations*, August 1984, cited in NAB Comments, *supra* n.79 App. Vol., App. C.

²¹¹ We note that while there are no subscription fees for over-the-air broadcasting, there may be costs involved in viewing “free” over-the-air television. Such costs would take the form of opportunity costs lost while watching unwanted program material.

²¹² See ¶¶ 129–131, *infra*. Some Commenters also argued that the newer electronic technologies will not provide coverage to local controversial issues. We find this argument unpersuasive. Existing fairness obligations regarding the coverage of controversial issues of public importance do not necessarily require that the issue be solely of local importance. In this regard, controversial issues confronting a particular community may be national in scope and may be sufficiently addressed by “national programming.” Moreover, we note our prior decisions in which we observed that programming addressing local issues need not be produced at the local level. See *Television Deregulation*, 98 FCC 2d at 1085, citing *WPIX, Inc.*, 68 FCC 2d 381, 402 (1978)

92. In sum, we find the record in this proceeding supports the conclusion that the various print and electronic media exist in a widely diverse and competitive information marketplace. We now turn to a consideration of the current availability of these diverse media outlets.

2. Status of the Information Services Marketplace

93. As we observed in the *Notice*, there has been explosive growth in the communications marketplace since the inception of the fairness doctrine in 1949. Of particular significance is the development of the marketplace since the Supreme Court's decision in *Red Lion Broadcasting* in 1969 and our subsequent analysis of the market in the *1974 Fairness Report*.²¹³ In the following analysis, we will focus on the major participants in the information services marketplace: (a) over-the-air broadcasting, (b) substitute electronic technologies and (c) the print media.

(a) Broadcasting

94. The growth and development of radio broadcasting since the inception of the fairness doctrine has been dramatic. The total number of radio stations has increased by 280 percent since the *1949 Fairness Report*. Moreover, there has been a 48 percent increase in the number of radio stations since the Supreme Court's decision in *Red Lion* and a 30 percent increase since the Commission's *1974 Fairness Report*. During the period the most significant growth occurred in the FM service where there has been a 113 percent increase since *Red Lion* and a 60 percent increase since our *1974 Fairness Report*.

Number of Radio Stations

	1949	1969	1974	1985
AM	1877	4256	4407	4787
FM	687	2330	3094	4979
Total	2564	6595	7501	9766

Source: 1949, 1969, 1974 (on-air stations) data from *Television and Cable Factbook*, Cable and Services Volume No. 52 (1984); 1985 data from FCC release No. 5080, June 11, 1985.

²¹³ See *Red Lion Broadcasting Co. v. FCC*, *supra* n.10; *1974 Fairness Report*, *supra* n.3.

95. Of particular significance is the fact that the number of radio voices available in each local market has grown.²¹⁴ In this regard, we note that competition resulting from an increase in the number of radio outlets was the primary factor in our decision to deregulate the program guidelines, commercial limitations and formal ascertainment requirements for commercial radio.²¹⁵ Moreover, there has also been a fundamental change in the structure of the radio market. Once predominantly an AM only service, radio is now composed of two very competitive services. For example, at the time of the *1974 Fairness Report* there were over a thousand more on-air AM stations than FM stations. Since that time, however, FM has eclipsed AM as the largest radio service. Because of its higher fidelity, the growth of FM constitutes a significant improvement in the quality of radio service to the public. The development of radio can also be seen in the diversity of its program distribution systems. At the present time, there are approximately 11 national radio networks and 90 regional radio networks.²¹⁶

96. We also note that the number of radio outlets will continue to increase with the further development of spectrum efficient technologies. Recently, the Commission allocated 689 new FM channels and adopted new procedures to assist in the development of these allotments.²¹⁷ In addition, we have recently adopted new application procedures which are designed to streamline the processing of these new FM allotments as well as the existing 152 vacant FM allotments.²¹⁸ With respect to AM service, the Commission in 1980 acted in limit the protection from interference afforded Class I-A clear channel stations so as to increase spectrum availability for new AM radio services.²¹⁹ More recently,

²¹⁴ Data submitted by NAB demonstrates that generally the growth of radio voices has generally occurred throughout the various radio markets. See NAB Comments, *supra* n.79 App. Vol., App. A at 19-63. These data confirm the Commission's previous conclusions regarding overall growth in radio markets. See *Inquiry and Notice of Proposed Rule Making* in BC Docket No. 79-219, 73 FCC 2d 457, 548-551 (1979).

²¹⁵ *Report and Order* in BC Docket No. 79-219, 84 FCC 2d 968 (1981), *recon. denied*, 87 FCC 2d 797 (1981), *rev'd on other grounds sub nom. UCC v. FCC*, *supra* n.193 (hereinafter cited as "Radio Deregulation").

²¹⁶ *Broadcasting/Cablecasting Yearbook*, (1985) at F1-61.

²¹⁷ See *Report and Order* in Docket No. 80-90, 53 FCC 2d 1550 (1983); *First Report and Order* in MM Docket No. 84-231, 50 Fed. Reg. 3514 (January 25, 1985); *Second Report and Order* in MM Docket No. 84-231, FCC 85-124 (released April 12, 1985).

²¹⁸ See *Universal Filing Period, Public Notice*, FCC No. 4699 (May 22, 1985). See also *Report and Order* in MM Docket No. 84-750, FCC 85-125, 50 Fed. Reg. 19936 (May 13, 1985).

²¹⁹ See *Clear Channel Broadcasting in the AM Broadcast Band*, 78 FCC 2d 1345

the Commission in various proceedings has adopted policies making more efficient use of existing spectrum as well as enlarging that portion of the spectrum available for AM broadcast use.²²⁰

97. Equally significant has been the dynamic growth of over-the-air television broadcasting. The statistics presented below show the development of this medium.

Number of Television Stations

	1949	1969	1974	1985
VHF (Total)	51	577	605	654
Commercial	—	499	513	541
Educational	—	78	92	113
UHF (Total)	0	260	333	554
Commercial	0	163	184	369
Educational	0	97	149	185
Total	51	837	938	1208

Source: 1949, 1969 and 1974 (on-air stations) data from *Television Factbook*, Cable and Services Volume No. 52 (1984); 1985 data from FCC publication No. 5080 June 11, 1985.

98. As the above data demonstrate, there has been a 44.3 percent increase in the overall number of television stations since the Supreme Court's decision in *Red Lion Broadcasting*. This represents a 13.3 percent increase in VHF stations and a dramatic 113 percent increase in UHF stations. Television growth since the Commission's *1974 Fairness Report* has also been significant, amounting to a 28 percent increase in the overall number of television stations with 66.4 percent increase in UHF stations.

99. The continued growth in television broadcasting has led directly to an increase in signal availability in local markets.

(1980), *recon. denied*, 83 FCC 2d 216 (1980), *aff'd sub nom. Loyola University v. FCC*, 670 F.2d 1222 (D.C. Cir. 1982).

²²⁰ See, e.g., *Report and Order* in MM Docket No. 84-281, FCC 85-224 (released May 7, 1985) (foreign nighttime AM clear channels); *Report and Order* in MM Docket No. 84-752, FCC 85-150 (released April 24, 1985) (AM rules and international agreements); *Notice of Proposed Rule Making* in MM Docket No. 85-39, FCC 85-75 (released March 12, 1985) (AM application criteria); *Second Notice of Inquiry* in Gen. Docket No. 84-647, FCC 84-644 (released January 11, 1985) (preparation for ITV conference); *Report and Order* in BC Docket 82-538, FCC 83-412, 48 Fed. Reg. 42944 (September 30, 1983), *recon. denied in part*, FCC 84-591 (released December 4, 1984) (AM daytime operations).

Stations Receivable Per TV Household

Number of Stations Receivable

	1-4	5-6	7-8	9-10	11-14	15-19	20+
1984	4%	11%	21%	22%	24%	15%	3%
1972	17%	22%	30%	21%*	—	—	—
1964	41%	33%	18%	8%*	—	—	—

* 9+ stations

Source: *Nielson Report on Television*, 1985 at 2.

As of 1984, 96 percent of the television households received five or more television signals. This figure represents a significant increase in actual signal availability since 1972, where only 83 percent of the television households received five or more signals. The increase is even more dramatic compared to 1964 when only 59 percent of television households were capable of receiving 5 or more stations. Today, only 4 percent of the television households receive fewer than five signals. These statistics demonstrate a significant growth in signal availability throughout the country. Of particular significance is the fact that these figures are based on over-the-air reception and do not include the enhanced signal availability achievable with cable television. The significance of cable television as a factor in increasing the number of available signals will be discussed, *infra*. These data generally confirm statistics supplied by several commenters which demonstrate an increase in signal availability in both large and small markets.²²¹

100. Increases in the number of outlets and signal availability does not necessarily provide a complete picture of the fundamental structural changes occurring in the television marketplace. For

²²¹ A study of signal availability submitted by NAB generally confirms this conclusion. NAB examined the growth of television signals in large markets (ADI 1-50), medium markets (ADI 50-100) and small markets (ADI 101+). Of particular interest is the increase in signal availability in small markets. Of the thirty-one small markets surveyed, seventeen had both an increase in signal availability since 1974 and a projected increase by 1990. Four markets showed an increase in signal availability since 1974 but had no projected increases. Ten markets exhibited no growth in signal availability between 1974 and 1984. However, seven of these markets anticipated increases in signal availability by 1990. Only three markets exhibited both no growth between 1974-1984 and no projected growth. However, one of these markets had four available signals and the remaining two markets had achieved significant cable penetration. See NAB Comments, *supra* n.79 App. Vol., App. A at 48-63.

example, UHF television, once thought to have occupied second class status, is now a significant voice in the marketplace.²²² Indeed, the growth of this service — 113 percent since *Red Lion* — is evidence of its economic viability. Concomitant with the growth in UHF stations has been the increased importance of independent television. As the Commission observed in its television deregulation decision, the growth of UHF independent television stations has added an important new voice in the information marketplace.²²³ Since 1970, the number of independent television stations has grown from 90 to 214 stations, an increase of 107.7 percent.²²⁴ Moreover, the growth in independent television stations has not been confined to a few large markets. As of 1984, independent stations were located in 98 different markets and reaching 82 percent of all television households.²²⁵

101. The impact of the rise of independent television stations can be seen in the steady decline of the network's audience share. As the Commission previously observed, the overall network audience share declined from 90 percent to 80 percent in 1983.²²⁶ This trend continues as the overall network share dropped from 80 percent in 1983 to 76 percent in 1984.²²⁷ In television households without cable television, the network share of the audience declined from 89 percent in 1983 to 85 percent in 1984. During this time period, non-network television usage in these households increased from 17 percent in 1983 to 21 percent in 1984. Moreover, non-network television stations were able to maintain their share of the television audience even in households subscribing to either pay cable or basic cable service.²²⁸

102. Further structural changes can be seen in the development

²²² We note that while there always be physical differences between UHF and VHF services, these differences do not necessarily mean that UHF stations will not be a viable force in the television marketplace. See *Report and Order* in Gen. Docket No. 78-391, 90 FCC 2d 1121, 1124 (1982). Moreover, cable television has enhanced the ability to receive UHF stations thereby making it comparable to VHF television in markets that have been wired.

²²³ See *Television Deregulation*, 98 FCC 2d at 1083 (1984).

²²⁴ The growth in independent television stations has occurred primarily in the UHF television services. In 1970 there were 59 UHF independents compared to 155 in 1984. *Id.* at 1139 [1970 data]; Data of 1984 taken from *Broadcasting*, Jan. 7, 1985, at 82.

²²⁵ See *Broadcasting*, Jan. 7, 1985, at 82.

²²⁶ *Television Deregulation*, 98 FCC 2d at 1139.

²²⁷ *Nielson Report on Television*, (1985) at 12.

²²⁸ In households subscribing to pay cable services, the audience share of non-network stations increased from 16 percent in 1983 to 18 percent in 1984. During this same period the audience share of these stations remained stable — 20 percent — for homes subscribing only to basic cable service. *Id.*

of new program distribution systems among group owners.²²⁹ We believe these alternative systems will not only provide new programming sources, but also enhance the economic viability of local independent television stations. Moreover, our recent modification to the natural multiple ownership rules is expected to foster the development of these new systems, thereby enhancing diversity at the local level.²³⁰ In this regard, the development of these stronger voices may facilitate the ability of these stations to address controversial issues of public importance.²³¹

103. We also note that additional growth can be achieved by utilizing vacant allocations and improved spectrum efficient technologies. Currently, there are a total of 54 vacant VHF channels and 462 vacant UHF channels.²³² Of these vacant allocations, 34 are commercial VHF channels and 109 commercial UHF channels. These vacancies appear in both large and small markets. For example, in the top 50 markets there are 32 commercial UHF vacancies. Moreover, 19 of these UHF vacancies are located within fifty-five miles of their respective titled ADI cities. There are also 20 noncommercial HF vacancies and 353 noncommercial UHF vacancies available nationwide. In addition, the Commission and others have conducted several studies demonstrating the technical feasibility of various UHF improvements, including enhanced reception, thereby reducing the impact of the traditional UHF "taboos".²³³ Such improvements have the potential of increasing the number of UHF stations available in each market. These technological improvements combined with the number of vacant channels suggest that there is sufficiently available spectrum to anticipate continued growth in the number of television broadcast facilities.

104. Given the significant development of both radio and television, we believe it is no longer necessary to utilize a

²²⁹ For example, as of January 1985, Gannett Broadcasting Group, Hearst Broadcasting, Metromedia Inc., Storer Communications and Taft Broadcasting (prior to its merger with Gulf Broadcasting), representing 32 stations reaching 45 percent of television households had established a consortium to produce programmings. See *Broadcasting*, Jan. 7, 1985, at 86.

²³⁰ See *Memorandum Opinion and Order*, 50 Fed. Reg. at 4670.

²³¹ We also note that the changes in the national multiple ownership rules will assist in the acquisition of those stations which were formerly devoted to subscription television. *Broadcasting*, Jan. 7, 1985, at 86 and 90.

²³² *Television Channel Utilization*, FCC No. 3723, Apr. 9, 1985.

²³³ See, e.g., *Program to Improve Television Reception*, Georgia Institute of Technology, September 1980; J. B. O'Neill, *Television Receiver Noise Figure Study*, North Carolina State University, February 1980.; A. Stillwell, and R. Wilmotte, *Spectrum Requirements of UHF Television with Current and Improved Tuning*, FCC Office of Plans and Policy, 1978.

mechanism of government imposed "fairness" in order to insure appropriate coverage of controversial issues of public importance. As the above data amply demonstrate, there are a sufficient number of over-the-air television and radio voices to insure the presentation of diverse opinions on issues of public importance.²³⁴ Our decision in this proceeding is guided to some extent by the underlying policies expressed in the radio and television deregulation proceedings.²³⁵ In both decisions, the Commission found that the growth of the broadcast medium created sufficient economic incentives to attenuate the need for each licensee to provide "well balanced something for everyone programming." Similarly, we believe that the growth in both radio and television broadcasting provide reasonable assurance that a sufficient diversity of opinion on controversial issues of public importance will be provided in each broadcast market. In this regard, we note that even if there has been no increase in alternate electronic information sources, the growth and development of both the radio and television markets by themselves make the fairness doctrine an unnecessary regulatory mechanism.

(b) *Substitute Electronic Technologies*

105. In addition to traditional over-the-air television and radio broadcasting, we find that there exist numerous alternative electronic technologies making a significant contribution to the marketplace of ideas. The importance of these technologies, especially cable television, in the policy making context was recently recognized by the United States Circuit Court of Appeals.²³⁶ We believe that in the context of this proceeding consideration should be given to the contributions of cable television, low power television (LPTV) multichannel multipoint distribution service (MMDS), video cassette recorder (VCR), satellite master antenna systems (SMATV) and other electronic media including recent advancements in satellite technology.

106. Universally recognized as a significant non-over-the-air

²³⁴ This diversity is illustrated further by the combined coverage of both television and radio signals. For example, in a separate proceeding CBS claims that its television station in New York City encompasses 196 radio stations within its Grand B Contour. Moreover, CBS asserts that its New York television station must compete with 278 radio stations which provide service to some portion of the area covered by its Grade B contour. See "CBS Reply Comments" filed with *In re Application of Turner Broadcasting System, Inc.*, File No. BTCCT-850418 *et al.*, June 1985 at 60.

²³⁵ See *Radio Deregulation*, *supra* n.215; *Television Deregulation*, *supra* n.177.

²³⁶ *ACT v. FCC*, 756 F.2d at 901.

electronic medium, cable television has developed from a means of improving reception into a major industry providing video programming. Early data show that in 1952, three years after the 1949 *Fairness Report*, there were 70 operating cable systems with an estimated 14,000 subscribers.²³⁷ At the time of the Supreme Court's decision in *Red Lion* there were 2,260 systems in operation with an estimated 3.6 million subscribers.²³⁸ By the time of our 1974 *Fairness Report*, there were 3,158 operating cable systems with a reported 8.7 million subscribers.²³⁹ As of 1985 there are 6,600 operating cable systems in 18,500 communities with approximately 1,600 franchises that have been approved but not built.²⁴⁰ According to recent A. C. Neilson estimates, U.S. cable households now number 38,673,270 placing national cable penetration at 43.3% of all television households.²⁴¹ In comparative terms, the number of cable systems in operation has increased 195 percent since *Red Lion* and 111 percent since the Commission's 1974 *Fairness Report*. Growth in subscribership amounts to an astronomical 975 percent since the *Red Lion* decision and 345 percent increase since the 1974 *Fairness Report*. Moreover, cable television will continue to expand in the future. According to a recent study by Arthur D. Little Inc., the number of cable subscribers will increase to 48 million by 1990.²⁴² In addition, industry revenue is expected to double from 8.4 billion in 1984 to 16.5 billion in 1990. During this period after tax revenues are expected to triple from \$600 million in 1984 to 1.7 billion in 1990.²⁴³

107. The importance of cable's development, however, is not limited to increases in the number of systems. Indeed, there has been a significant change in the nature of cable service. For example, at the time of the *Red Lion* decision only 1 percent of all cable systems had the capacity to carry more than 12 channels.²⁴⁴ As of April 1, 1984, 58 percent of the cable systems exceed 12

²³⁷ *Television and Cable Factbook*, Cable & Services Volume No. 52 (1984) at 1735.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Broadcasting/Cablecasting Yearbook*, (1985) at D-3.

²⁴¹ *Broadcasting*, June 17, 1985 at 10.

²⁴² *Prosperity for Cable TV: Outlook 1985-1990*, Arthur D. Little Inc., cited in *Broadcasting*, June 10, 1985 at 32. This may be a conservative estimate. As we have noted elsewhere, some analysts expect cable penetration to be 60 percent by 1990, reaching 58 million subscribers. See *Television Deregulation*, 98 FCC 2d at 1138. Another source has estimated that cable penetration will reach 54 percent by 1990. *Cablefile*, (1985) at III-26.

²⁴³ *Id.*

²⁴⁴ *Notice*, supra n.1 at 37 n.47 citing B. M. Compaine, C. H. Sterling, T. Guback and J. K. Noble, Jr., *Who Owns the Media* (2nd ed. 1982) at 418.

channels. Most importantly, however, systems limited to 12 channels or less comprise only 18.63 percent of total cable subscribers.²⁴⁵ The significance of cable television is also demonstrated by its ability to increase the number of viewing options available to the public. The following table illustrates the importance of cable by comparing the number of stations receivable per television household to the number of channels receivable with cable television.

Stations and Channels Receivable

Per TV Household in 1984

	1-4	5-6	7-8	9-10	11-14	15-19	20+
Number of Channels Receivable (includes cable)	3%	5%	9%	9%	29%	16%	29%
Number of Stations Receivable (absent cable)	4%	11%	21%	22%	24%	15%	3%

Source: Nielson Report on Television, (1985) at 2.

With the inclusion of cable television, the number of households capable of receiving more than six television signals increases from 85 percent of all television households to 92 percent of all television households. Similarly, the percentage of television households capable of receiving more than ten television signals increases from 42 percent to 74 percent. The most dramatic increase in signal availability appears in households receiving 20 or more signals. Absent cable, these households comprise only 3 percent of all television households as compared with 29 percent of all television households when cable is considered. The importance of increased channel capacity is enhanced by the ready availability of a wide variety of cable networks which provide a significant array of diverse programming. As one commenter has noted, there are approximately twenty-eight basic cable networks

²⁴⁵ *Television and Cable Factbook*, Cable & Service, Volume No. 52, 1984 at 1726.

not including four super stations.²⁴⁶ Many of these networks have highly specialized program formats including news channels such as the Cable News Network, the Financial News Network, and public affairs programming such as C-Span.²⁴⁷ In addition, there are approximately 10 pay cable networks in operation.

108. Apart from the growth in the number of cable systems, we find that the pattern of development in small markets to be particularly relevant to the objectives of this proceeding. The record in this proceeding clearly demonstrates that cable services are an important media voice in small markets. Cable penetration rates in these markets are far in excess of the national average and significantly higher when compared with larger broadcast markets.²⁴⁸ The high penetration levels in these small markets suggest that there is a significant degree of substitutability between cable and over-the-air television broadcasting.

109. We also note that the Cable Communications Policy Act of 1984 will play an important role in expediting further development of cable technology.²⁴⁹ Congress intended to establish a national policy that encourages the growth and development of cable television as well as insuring that cable systems are responsive to the needs and interests of the local communities they serve.²⁵⁰ Under the Act, a franchising authority is able to establish and designate channels for public, educational or government (PEG) use as well as commercial access channels for systems with 36 or more activated channels.²⁵¹

110. Another developing voice in the information services market is Low Power Television (LPTV). These stations are over-the-air television broadcast facilities, generally limited to 10 watts for VHF and 1,000 watts for UHF stations. These facilities were nonexistent at the time of the *Red Lion* decision and our

²⁴⁶ See NAB Comments, *supra* n.79 App. Vol., App. A at 4.

²⁴⁷ Additional growth in cable networks can be expected. For example, the Discovery Channel recently commenced operation offering a basic cable service of educational, non-fiction, science and nature programming free to cable operators. *Multichannel News*, June 24, 1985 at 1.

²⁴⁸ For example, an analysis of NAB's data concerning 31 of the smallest television markets (100+) reveals a combined average subscription rate of approximately 57 percent, almost fourteen percentage points higher than the national average. See NAB Comments, *supra* n.79 App. Vol., App. A.

²⁴⁹ Cable Communications Policy Act of 1984, Pub. L.No. 98-549, 98 Stat. 2779 (1984).

²⁵⁰ See House Committee on Energy and Commerce, H.R. Rep. No. 931, 98th Cong. 2d Sess. at 19 (1984); See also *Report and Order* in MM Docket No. 84-1296, FCC 85-179 (released Apr. 19, 1985) at 28-37.

²⁵¹ *Id.* at 30.

1974 Fairness Report. Stations of this power were translators, limited to the rebroadcast of signals from full service stations. In 1982, the Commission authorized these stations to originate programming.²⁵² There are currently 126 licensed low power UHF stations and 215 low power VHF stations.²⁵³ It is predicted that this source will eventually add an additional 4000 television stations to the marketplace. Moreover, the most significant administrative problems inhibiting initial development of this new service have been rectified with the establishment of new processing procedures designed to expedite the development of this medium.²⁵⁴

111. LPTV significantly expands the information marketplace. Allocation policies have emphasized placing these facilities in smaller markets where there are fewer over-the-air full service television facilities. With lower entry and operating costs, LPTV can be an important source of local programming in rural areas. In larger markets, LPTV will be able to target its audience to specific communities or ethnic groups.²⁵⁵ A recent economic study provides some evidence that this service appears to be commercially viable in certain areas of the country.²⁵⁶

112. At the time of the *1974 Fairness Report*, multipoint distribution service (MDS) was just beginning to develop as a communications service. Used primarily to provide subscription programming via microwave transmissions, there were approximately 438,578 MDS subscribers out of a potential audience of 13.1 million at the end of 1984.²⁵⁷ Confined to offering a single pay channel, MDS subscription declined slightly from 1983 levels.

113. Expectation of growth in MDS will likely involve the development of multichannel MDS systems. With the reallocation of 8 channels from Instructional Fixed Television Service, multichannel MDS will be able to offer multiple channels as

²⁵² See *Report and Order*, in BC Docket No. 78-253, FCC 82-107, 47 Fed. Reg. 21468 (1982).

²⁵³ FCC release No. 5080, June 11, 1985.

²⁵⁴ See *Report and Order* in MM Docket No. 83-1350, FCC 84-492 (adopted October 18, 1984).

²⁵⁵ *Legal Times*, Dec. 8, 1984, at 1; *Wall Street Journal*, Oct. 23, 1984, at 1.

²⁵⁶ The study, conducted by Kompas Beil Associates, indicates that LPTV may already be a viable service in some areas. Of the stations initially responding to its survey, 16 stations were non-profit religious stations, 8 were operating as subscription television, 10 were operating as non-profit educational stations. Sixteen stations were operating on a commercial basis with fourteen of these stations reporting a profit. Two of the stations were temporarily off the air with copyright problems. *Videography*, Apr. 1985 at 72.

²⁵⁷ Paul Kagen Associates, Inc., *Multicast Newsletter*, Apr. 17, 1985.

opposed to a single viewing option.²⁵⁸ Added to this are leases available from ITFS operators leading to MMDS systems of up to twenty two channels. As of February 1985, there were 16,499 applications on file with the Commission.²⁵⁹ The advantage of this service is that construction costs and time delays are greatly reduced, relative to cable, since wiring to a headend is not necessary. Estimates of subscribership growth by 1990 range between 6 to 12 million subscribers.²⁶⁰

114. Satellite Master Antenna Systems (SMATV) are similar to cable systems except that they are built in individual apartment complexes, condominiums, hotels and trailer parks. These "private" cable systems did not exist at the time of the *Red Lion* decision or our *1974 Fairness Report*. The Commission's decision not to regulate these systems, coupled with preemption of state and local regulation, has facilitated the development of this service.²⁶¹ According to the National Satellite Cable Association about 600,000 to 800,000 homes have been wired with this service.²⁶² Because of lower capital and construction costs, SMATV systems have become increasingly popular in both rural and urban areas that are currently unserved by cable television.²⁶³

115. Sales of video cassette recorders continue to have a major impact on the information marketplace. As with many other new technologies, VCR's were not readily available at the time of the *1974 Fairness Report*. The impact of this technology on other electronic video technologies has been significant. By the end of 1985 it is estimated that there will be 23.3 million VCR homes representing 27.4 percent of all TV households.²⁶⁴ A more recent study of VCR penetration reported that sales are running about one million a month and will reach critical mass penetration of one third of all homes by early 1986. According to the report the term "critical mass" is used to describe the penetration level that

²⁵⁸ See *Report and Order* in Gen. Docket 80-112, 94 FCC 2d 1203 (1983).

²⁵⁹ *Broadcasting*, Feb. 11, 1985, at 56.

²⁶⁰ *Television Deregulation*, 98 FCC 2d at 1140.

²⁶¹ See *Memorandum, Opinion Declaratory Ruling and Order* in in CSR 2347, 95 FCC 2d 1223 (1983), *recon. denied*, FCC 84 206 (May 14, 1984), *affd. sub nom. New York State Commission on Cable Television v. FCC*, 749 F.2d 805 (D.C. Cir. 1984).

²⁶² *New York Times*, Dec. 5, 1984, at 30. A more conservative estimate was provided by Paul Kagen Associates who estimated subscribership at 290,000. Paul Kagen Associates, *SMATV News*, Apr. 25, 1984.

²⁶³ *New York Times*, Nov. 13, 1983, at 47; See also *New York Times*, Dec. 19, 1982, at 1.

²⁶⁴ *Television/Radio Age*, May 27, 1985, at c7 (citing Paul Kagen Associates).

establishes the technology as a mass medium.²⁶⁵ Further estimates place VCR usage at 67.9 million homes representing 68 percent of all television households by 1990.²⁶⁶

116. We take particular note of the development of video recordings as a means of disseminating issue related video programming.²⁶⁷ We find this to be a significant development in the information marketplace. To the extent VCR's do not utilize spectrum, anyone who desires to communicate by television may do so by means of a VCR. In this regard, we agree with NBC that VCR's have the potential to become the "electronic handbills" or indeed even the electronic newspaper of the future.²⁶⁸ Moreover, our own empirical analysis of the relationship between VCR's and television reveals that a VCR is both a substitute and a complement to over-the-air and cable television.²⁶⁹ In other words, VCR's act not only as a means of time shifting programming, but also as an independent source of programming. Moreover, the ability to reschedule video programming gives viewers the opportunity to acquire additional information from other sources. By time shifting, viewers are able to reallocate their time so as to increase the number of potential viewing options.²⁷⁰ We believe that the flexibility afforded the public by VCR's, represents an important qualitative development in the information services marketplace.

117. The above mentioned electronic technologies are the most prominent alternatives to over-the-air broadcasting in today's marketplace. There are other electronic services, however, that have the potential of becoming substitute information sources in the marketplace of ideas. We do not, however, find them to be significant contributors to the marketplace at this time.

118. The direct to home satellite services (DBS) is still in the beginning stages of development. Using the Ku satellite band,

²⁶⁵ *Broadcasting*, July 8, 1985, at 14 (citing a study conducted by Young & Rubicam USA).

²⁶⁶ *Id.*

²⁶⁷ UCC notes in its Comments that there are currently 72 titles considered public affair by the publishers. Similar categories such as "Civil Rights" (54 titles) and "Documentaries" are also included. See UCC Comments, *supra* n.170 at 3.

²⁶⁸ See NBC Comments, *supra* n.86 at 88.

²⁶⁹ J. Levy and P. Pitsch, *Statistical Evidence of Substitutability Among Video Delivery Systems*, FCC Office of Plans and Policy, April 1984. See also J. Levy and F. Setzer, *Measurement of Concentration in Home Video Markets*, FCC Office of Plans and Policy, December 23, 1982.

²⁷⁰ According to Neilson data, 59 percent of all recordings are made with the television set turned off, 17 percent occurs while viewers are watching a different channel and 24 percent of viewers record from the channel they are watching. *Neilson Report on Television*, (1985) at 13.

this service generally provides programming directly to households. Households using this service either rent or purchase a small one meter-earth station. The first direct broadcast satellite services was authorized by the Commission in 1982.²⁷¹ Of the eight original applicants, three have been granted orbital and channel assignments and launch authority. In 1984, the Commission granted six additional applications for DBS service.²⁷² One of these grantees has been given launch authority as well as its orbital and channel assignment. Currently, the Commission has pending before it six DBS applications seeking either to modify existing grants or apply for new allocations.²⁷³ It appears, therefore that despite the recent setbacks, there is a continued interest in the development of DBS service.²⁷⁴

119. Another important element prompting the development of satellite direct service is the continued growth in the home earth station market. Latest reported data indicate that there are approximately one million existing earth stations and estimates of growth range between 40,000 to 80,000 per month.²⁷⁵ Moreover, the Cable Communications Policy Act of 1984, which clarified the legality of receiving satellite signals, may provide an additional spur to this already expanding market.²⁷⁶ Because of the poten-

²⁷¹ See *Direct Broadcast Satellite Services*, 90 FCC 2d 676 (1982) recon. denied, FCC 83-241, (released May 19, 1983), rev'd, *United States Satellite Broadcasting Company, Inc. v. FCC*, 740 F.2d 1177 (D.C. Cir. 1984); *Satellite Television Corporation*, 91 FCC 2d 953 (1982); *CBS, Inc.*, 92 FCC 2d 64 (1982). See also *GTE Satellite Corporation*, 90 FCC 2d 1009 (1982) recon. denied, FCC 83-271 (released June 23, 1983). Of the eight original grantees, four were able to demonstrate due diligence in proceeding with the development of their respective DBS systems. See *CBS, Inc.*, FCC 84-477 (released October 10, 1984). Two of the parties failing to meet the due diligence requirements have re-applied to the Commission for DBS authorization.

²⁷² See *Satellite Syndicated Systems Inc.*, FCC 84-608 (released December 16, 1984).

²⁷³ See *Public Notice* "DBS Applications Accepted for Filing" Rep. No. DBS 2-B (released April 4, 1985). Three of these applicants are existing grantees seeking additional channels. Two of the three applicants seeking new DBS authorization were previously granted such authority but failed previously to meet the Commission's due diligence requirements.

²⁷⁴ Earlier this year, U.S.C.I. terminated service to its approximately 10,000 subscribers. *DBS Newsletter*, April 1985 at 1. This DBS service was not a Commission licensee but rather utilized Canada's Telesat Anik C-II satellite. While this system did not prove to be a commercial success, it did demonstrate the technical feasibility of Ku band direct satellite service. See *Broadcasting*, July 8, 1985 at 52.

²⁷⁵ See *Broadcasting*, July 8, 1985, at 52.

²⁷⁶ Cable Communications Policy Act of 1984, Pub. L. No. 98-549, §5(b), 98 Stat. 2779 (1984). This section amended section 705 of the Communications Act by allowing the reception of any satellite cable programming for private viewing

tially enormous market, some traditional cable programmers have suggested scrambling their signals to provide a direct to home satellite service from their C band satellites.²⁷⁷ Facilitating the development of this system is the oversupply of transponders which will lower the costs of transmission making this form of program particularly attractive.²⁷⁸ While the development of a C-band direct system is still in the planning stage, there appears to be significant movement towards developing this service.²⁷⁹

120. Satellite technology has also played a significant role in enhancing existing information services. For example, satellites have allowed local television stations to increase their capability to gather news. Satellite news gathering (SNG) has become an important element in providing regional coverage.²⁸⁰ In addition, satellite technology has become an important part of the syndication market.²⁸¹ The nationwide access afforded by this technology increases the opportunities for another source of programming through ad-hoc networking, thereby increasing viewpoint diversity in local markets.

121. An additional alternative technology is subscription television (STV). STV is a pay service that sends over-the-air television signals, in a scrambled mode, to its subscribers. The number of STV outlets has declined in recent years due primarily to increased cable penetration. As of June 30, 1984 there were approximately 701,042 STV subscribers and 19 STV channels operating in 17 markets.

122. Additional information technologies are continuing to be developed. The Commission has recently authorized the use of FM Radio subcarriers.²⁸² Subcarriers may be utilized for a variety of different functions such as "radio talking books", commodities information, stock quotes and news. The Commission has also

if: (1) the programming involved is not encrypted and, (2) a marketing system has not been established.

²⁷⁷ Descramblers for the reception of HBO, which scrambles part of its programming, are already being manufactured. Approximately 25,000 headend descramblers have been produced and parts have been ordered for 100,000 consumer units which will be distributed to wholesalers next fall. See *Broadcasting*, July 8, 1985, at 83.

²⁷⁸ *Id.* at 46.

²⁷⁹ See *Broadcasting*, July 1, 1985, at 87; *Broadcasting* July 8, 1985, at 52.

²⁸⁰ See *Broadcasting*, July 8, 1985, at 60.

²⁸¹ *Id.* at 58. In this regard, we note that continued development of satellite technologies will facilitate the development of new program distribution systems. See ¶102, *supra*.

²⁸² *Report and Order* in BC Docket No. 82-536, FCC No. 83-1154, 48 Fed. Reg. 28445 (June 22, 1983); *Second Report and Order* in BC Docket No. 82-536, 97 FCC 2d 23 (1984), *recon. denied*, FCC 84-313, 98 FCC 2d 433 (1984).

authorized the use of teletext by television licensees.²⁸³ This system uses the vertical blanking interval for transmitting pages of text which are formatted on the users screen with the use of a decoder. Videotext is also a potential source of information. At the present time, this service has approximately 500,000 subscribers.²⁸⁴ As a final matter home computer systems have played a significant role in adding to the information services marketplace. However, we do not find these services to be significant contributors to media diversity at this time.

(c) *Print Media*

123. As we observed in the *Notice* the overall number of broadcast facilities exceeds the total number of daily newspapers in the United States. This does not mean, however, that the print media is not a significant contributor to the information marketplace. As of 1984, there were 1,701 daily newspapers in the country.²⁸⁵ During this period, average circulation increased to 62,544,503, an increase of 157,426 from 1983 levels.

124. In analyzing the information marketplace, however, we agree with those commenters who felt that the *Notice* gave insufficient consideration to the importance of other print sources such as weekly and even monthly newspapers and magazines. According to the *Notice*, the total number of periodicals has increased from 6,960 in 1950 to 10,688 in 1982. As commenters such as MAP and UCC point out, these newspapers are significant source of information, especially local information, which is available to consumers in each market.²⁸⁶ The viability of newspapers as an important information source is further illustrated by the volume of advertising appearing in each medium. According to this criterion, advertising expenditures for newspapers exceeded both television and radio.²⁸⁷ Moreover, the com-

²⁸³ *Report and Order* in MM Docket No. 81-741, 48 Fed. Reg. 27054 (June 13, 1983).

²⁸⁴ *Broadcasting*, July 1, 1985, at 64.

²⁸⁵ *Editor and Publisher Yearbook*, (1984) at VIII. The figures are based on 1983 data and represent a decline of 10 newspapers when compared with 1982 figures. However, this decline was due to the merger of 10 daily papers and therefore, does not evidence a net decrease in the number of daily newspapers. During this period, 8 daily newspapers were discontinued but this was offset by new entries into the market. *Id.* at V.

²⁸⁶ See MAP/TRAC Comments, *supra* n.50 at 86-90; UCC Comments, *supra* n.170 at 13.

²⁸⁷ In 1983, the total advertising volume for the various media was approximately \$20.1 million for newspapers, \$16 million for television, \$5.2 million for radio

bined advertising revenues for newspapers and magazines were greater than the combined total for television and radio. We believe that these data provide important evidence relative to the strength of newspapers and magazines as significant contributors to the marketplace of ideas.

3. *Availability in the Information Market*

125. Several parties have argued that the increases in the number of information outlets do not necessarily attenuate the need for the fairness doctrine.²⁸⁸ Specifically, these parties state that overall increases in information service outlets are not necessarily sufficient to provide each market with diverse and antagonistic sources of information. The argument is predicted on two assumptions. First it assumes that the growth of information sources nationwide has had no impact on local markets. Second it assumes that these sources will not provide coverage to controversial issues of public importance. As noted below, we find the data upon which these assertions are based, flawed, and we are not persuaded by the logic of the arguments.

126. On the record before us, we find that the nationwide development of these diverse information sources has had a direct impact on the availability of information in each media market. For example, even in small markets such as El Paso, Texas (ADI market No. 104), there are a significant number of media voices. According to data submitted by NAB, this market has seven television stations, twenty seven radio stations, two MDS channels, thirty thousand VCR's and cable penetration at 47 percent.²⁸⁹ The most detailed refutation of this position appeared in a study conducted by Prof. Ralph Jennings.²⁹⁰ The study sampled ten percent of the 3,926 communities in the United States which have at least one commercial or public radio station. It then inventoried each community's broadcast, newspaper, cable and multipoint distribution system and "examined the extent to which the communities share in the national communications wealth."

and 4.1 million for magazines. *Television and Cable Factbook*, Services Volume No. 52 (1984) at 14.

²⁸⁸ See, e.g., "Comments of Black Citizens for a Fair Media, Citizens Communication Center, League of United Latin American Citizens, National Association of Better Broadcasting [hereinafter cited as "BCFM Comments"]; UCC Comments, *supra* n.170.

²⁸⁹ NAB Comments, *supra* n.79 App. vol., App. A. at 49.

²⁹⁰ R. Jennings, *Diversity of Communications Facilities in American Communities*, cited in UCC Comments, *supra* n.10 at App. B, and USCC Reply Comments, *supra* n.152 [hereinafter cited as "Jennings Study"].

We have carefully reviewed the data contained in the study and disagree with the methodology employed therein. At the outset, the study does not appear to provide a representative sampling of media markets throughout the United States. Rather, the study focuses primarily on small markets. Recognizing this problem, the study attempts to enlarge its sample by including 72 larger communities. However, the study itself recognizes that even with these communities the sample does not reflect the characteristics of the population as a whole.²⁹¹

127. A second concern involves use of the “community” as the basic unit of analysis. The study assumes that a community is not being served unless a broadcast facility (or other information source) is located within the geographic boundaries of the community. As CBS correctly points out, the relevant inquiry is not what stations are licensed to a community, but rather what broadcast signals the community can actually receive.²⁹² In this regard, we note that the Commission has recognized that a broadcast licensee may serve communities which lie outside the strict geographic boundaries of its community of license.²⁹³ Moreover, such methodology may underestimate the availability of broadcast facilities and other information services such as cable and local newspapers.²⁹⁴

128. On the record before us, we cannot find that there are a insufficient number of voices in local markets to warrant continuation of the fairness doctrine. As we observed previously, increases in signal availability for traditional broadcasting facilities — television and radio — by themselves attenuate the need for a government imposed obligation to provide coverage to controversial issues. The existence of a plethora of alternate

²⁹¹ *Id.* at 10.

²⁹² “Reply Comments of CBS, Inc.” at 22 [hereinafter cited as “CBS Reply Comments”].

²⁹³ See, e.g., *Report and Order* in B.C. Docket No. 82-374, FCC 83-487, 54 RR 2d 1343 (1983), *recon. denied*, 56 RR 2d 797 (1984); *Report and Order* in B.C. Docket No. 82-320, 93 FCC 2d 436 (1983), *recon. denied*, FCC 84-335 (released July 31, 1984).

²⁹⁴ The following example illustrates the potential problems inherent in the study’s analysis. The study reports the following cities as not having cable television service in their community: Birch Tree, Missouri and Marshall, North Carolina. However, each of these towns is served by a cable system in which the corporate headquarters of the cable system is located outside of the community. See *Television and Cable Factbook*, Services Volume No. 52 (1984) at 997 and 1151. Similar concerns exist with respect to local newspapers. For example, the study reports that the town of Weston, Massachusetts did not have a local newspaper. However, the town is served by a weekly newspaper that covers local issues, but it is published in a neighboring town. See *Wayland/Weston Town Crier* (Weston Edition), July 3, 1985 at 1.

electronic voices, as well as numerous locally oriented print voices, augments this argument. Further support for this conclusion can be found from the homogeneity of the various media systems. Thus, in communities with few television stations one can expect to find higher cable subscribership. For example, the Jennings study found that cable was available in 82 percent of the communities surveyed. Similarly, in large urban areas with no cable systems, there are generally numerous television outlets. Moreover, data submitted by NAB confirms fungibility of the various information service technologies.²⁹⁵

129. Several commenters have argued that absent the fairness doctrine there will be no incentive for broadcasters to provide coverage to controversial issues of public importance. These parties also assert that the new electronic technologies are unable to address these types of issues, particularly at the local level. We are not persuaded by these arguments.

130. We note that other information systems, such as the print media, devote a significant amount of time to controversial issues in the absence of a government imposed obligation to do so. For these media, the incentive to cover such issues is not the fear of government sanction, but rather economic necessity. Similar incentives exist for over-the-air broadcasting. Our experience with industry performance persuades us that radio and television broadcasters would be sufficiently motivated to provide coverage to controversial issues of public importance in the absence of fairness doctrine obligations. Indeed, assuming *arguendo* that television is the most relied upon information source, then there is a strong market incentive to cover such issues in response to the demand.²⁹⁶ As we have observed in other proceedings, marketplace forces are the primary determinants of information oriented programming.²⁹⁷ Moreover, given our previous analysis regarding the chilling effect of the fairness doctrine, we believe it reasonable

²⁹⁵ See NAB Comments, *supra* n.79 App. Vol., App. A at 48-63.

²⁹⁶ Evidence of a marketplace demand for programming covering controversial issues of public importance can be seen in the employment patterns of news staffs after our television and radio deregulation decisions. A recent study of the effects of deregulation conducted by RTNDA found that: "[M]ost radio stations have not changed their news or public affairs staffing or programming as a result of deregulation. Most TV stations also plan to continue business as usual. News cutbacks have come mainly at radio stations in major markets where changes have drawn attention and accusations against deregulation. But while some news directors may have lost staff members because the FCC lifted its minimum requirements, other [sic] say they are doing a better job because of the greater freedom." *RTNDA Communicator*, May 1985 at 1.

²⁹⁷ See generally, *Deregulation of Television*, *supra* n.177; *Deregulation of Radio*, *supra* n.215.

to expect an increase in the coverage of these types of issues. In any event, there is no reason to believe that there will be a decline in the coverage of controversial issues of public importance.

131. Apart from the incentives of traditional broadcast facilities, we believe that other media systems will provide sufficient amounts of programming covering controversial issues of public importance. Cable television, for example, is already providing various informational programming such as CNN and the Financial News Network. Moreover, many cable systems are originating their own programming and have local community access channels. Increased availability of VCR's will also provide an important outlet for discussion of issues in each market. Most importantly, local newspapers will remain as an important source of locally oriented information.²⁹⁸ All of these sources will make significant contributions to the marketplace of ideas.

H. The Fairness Doctrine Can Not Be Justified on the Basis that It Protects Either Broadcasters or the Public from Undue Influence.

132. As noted above,²⁹⁹ the Commission historically justified the retention of the fairness doctrine on the sole basis that affirmative regulatory intervention was necessary to vindicate the interest of the public in obtaining access to diverse viewpoints on controversial issues of public importance. Our evaluation of the fairness doctrine both in terms of its efficacy and its continued need in the communications marketplace today is based upon this expressed regulatory objective. Several participants in this proceeding, however, have argued that the retention of the doctrine furthers other regulatory goals. Specifically, these parties argue that there are legitimate "protective" functions which are promoted by the continued existence of the doctrine. In this section we will assess the merits of these arguments.

133. Several commenters contend that retention of the fairness doctrine is useful as a "protection against outside pressures"³⁰⁰ by groups within the community which would otherwise exert

²⁹⁸ In light of our conclusion that sufficient incentives exist to provide coverage to controversial issues among the traditional broadcast media, reliance on alternate electronic technology systems to provide coverage to such issues is not a necessary element in our decision. We note, however, that these information sources are significant contributors of issue oriented information. In this regard, their performance makes the elimination of the fairness doctrine even more compelling.

²⁹⁹ See ¶¶ 4, 23, *supra*.

³⁰⁰ "Comments of the United States Catholic Conference" at 19 [hereinafter cited as "USCC Comments"].

undue influence on the editorial decisionmaking of broadcasters. Absent the fairness doctrine, these parties contend that broadcasters will simply “cave-in” to the pressures of advertisers,³⁰¹ political action committees,³⁰² or other powerful groups in the community³⁰³ who do not wish to have particular controversial viewpoints expressed.³⁰⁴

134. We take issue with the assumption that intrusive governmental regulation is necessary to “protect” broadcasters from groups which allegedly attempt to influence their programming decisions. The First Amendment forbids governmental intervention in order to “protect” print journalists and we believe that broadcast journalists are in no greater need of “protection” than their counterparts in the print media. We think it telling, in this regard, that broadcasters themselves are not seeking this protection. Moreover, the framework of broadcast regulation is predicated in large part upon reliance on the editorial discretion of

³⁰¹ See, e.g., *id.*; DNC Comments, *supra* n.203 at 17; See also USCC Reply Comments, *supra* n.152 at 9.

Indeed, without providing any support for its assertion, the Democratic National Committee (“DNC”) argues that “the potential fear [of broadcasters] of offending a power group in the community that buys advertisements was the reason the Fairness Doctrine was adopted in the first place.” *Id.* at 17. As described above, the articulated reason for the establishment of the fairness doctrine was to further access by the public to diverse viewpoints on controversial issues of public importance. Our historic justification of this doctrine was not based upon an expressed concern that regulatory intervention was necessary to counterbalance the alleged influence exerted by advertisers—or any other group—on licensees with respect to their decisions concerning the broadcast of controversial issue programming.

³⁰² DNC Comments, *supra* n.203 at 15-16.

³⁰³ The most expansive articulation of this argument was expressed by Ecumedia. In its Reply Comments, it stated that the fairness doctrine provided broadcast journalists with the means to deflect pressure exerted by “external sources including politicians, public officials, corporations, advertisers, organized community groups and outspoken individuals [as well as] [i]nternal pressure from station management or parent companies. “Reply Comments of Ecumedia,” at 19. [hereinafter cited as “Ecumedia Reply Comments”].

³⁰⁴ For example, asserting that the fairness doctrine operates as an effective “insulating” mechanism, DNC argues that:

The Fairness Doctrine actually protects a broadcaster who does not want to take this safe course of cozy relations with its community’s financial elite

Many broadcasters go to great lengths to present issues of public importance and offer their audiences balanced coverage. For them, the Fairness Doctrine has been a valuable shield. When pressured by demands from established powers in its community to suppress coverage of an unpopular issue or to support their political points of view, a broadcaster today can simply point to his or her responsibilities under the Doctrine.

DNC Comments, *supra* n.203 at 18.

broadcast journalists. As the Supreme Court has stated, the Communications Act “manifest[s] the intention of Congress to maintain a substantial measure of journalistic independence for the broadcast licensee.”³⁰⁵ Consequently, consistent with their public interest responsibilities, broadcasters are accorded wide discretion under the Communications Act with respect to their programming decisions.³⁰⁶ We are not convinced that broadcasters have been unduly pressured by groups within the community in the past. Moreover, in our view, the speculative notion that, absent the fairness doctrine, they will be unable to resist undue pressure in the future is a wholly inadequate basis upon which to justify the continued existence of rules which intervene in the editorial decisionmaking process of broadcast journalists. Rather, we deem it appropriate to rely, as we have in the past, upon the good faith judgment of the licensee regarding the selection of programming material.³⁰⁷

135. In addition, several commenters, in support of the fairness doctrine, argue that the doctrine serves to safeguard the public against unwarranted influence by what they perceive as biased broadcast reporting.³⁰⁸ Although the commenting parties differ among themselves in their perception of the bias to which they object,³⁰⁹ they believe that retention of the fairness doctrine is

³⁰⁵ *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. at 116. Indeed, the Supreme Court, in addressing the editorial discretion of broadcast journalists under the Communications Act, has recognized that “[f]or better or worse, editing is what editors are for; and editing is selection and choice of material.” *Id.* at 124.

³⁰⁶ The Court has asserted that:

In the delicate balancing historically followed in the regulation of broadcasting Congress and the Commission could appropriately conclude that the allocation of journalistic priorities should be concentrated in the licensee rather than diffused among many. This policy gives the public some assurance that the broadcaster will be answerable if he fails to meet its legitimate needs.

Id. at 125.

³⁰⁷ Reliance upon the editorial discretion of broadcast licensees also furthers First Amendment principles. As the United States Supreme Court has stated:

Indeed, if the public’s interest in receiving a balanced presentation of views is to be fully served, we must *necessarily* rely in large part upon the editorial initiative and judgment of the broadcasters who bear the public trust.

FCC v. League of Women Voters of California, 104 S.Ct. at 3117 (emphasis added).

³⁰⁸ See, e.g., “Comments of the American Legal Foundation” at 10-14 [hereinafter cited as “ALF Comments”].

³⁰⁹ There appears to be a sharp divergence of opinion among the commenters making this argument as to the precise nature of the alleged “bias.” For example, one party asserts that the bias of the broadcast media is liberal (*Id.* at

appropriate to prevent broadcasters from presenting biased or one-sided programming. The argument apparently is predicated upon the presumption that the requirement to provide "balanced" controversial issue programming is not merely a means to assure access to the marketplace of ideas but is itself a valid regulatory objective.

136. Balance may be a laudable editorial goal, but there are grave dangers when the government tries to strike that balance. First, as we have just noted above, determining what constitutes balanced programming is a very subjective endeavor. Second, as we have described, having the government attempt to achieve balance by means of enforcing the fairness doctrine results in a chilling effect to the ultimate detriment of the listening public. Third, there are the inherent dangers of an arm of the federal government influencing the content of programming in an attempt to guarantee balance. Further, the First Amendment does not require and may well not permit a neat apportionment, dictated by the government, in the marketplace of ideas, with equal space assigned to every viewpoint. As the Supreme Court noted in *First National Bank v. Bellotti*:

[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people can not evaluate the information and arguments advanced by appellants, it is a danger contemplated by the Framers of the First Amendment.³¹⁰

The fact that a particular viewpoint may have the capability to be extremely influential or offensive does not mean that it is accorded a lesser degree of First Amendment protection than the expression of less influential or more reasonable opinions.³¹¹ Therefore, we do not believe that the "protection" of the viewing and listening public against even allegedly one-sided presentations

11); another participant argues that the media is biased "toward the business and commercial community." "Comments of the Maine Nuclear Referendum Committee" at 1. Still another commenter contends that the broadcast media unduly favors the views of the alleged "Zionist/Israeli lobby." Letter to the Chairman, Federal Communications Commission from Richard Hill and Donald W. Harris (Oct. 20, 1984).

³¹⁰ *First National Bank of Boston v. Bellotti*, 435 U.S. at 791-92.

³¹¹ As the Supreme Court has asserted, "[t]he Constitution 'protects expression which is eloquent no less than that which is unconvincing.'" *Id.*, quoting *Kingsley International Pictures Corp. v. Regents*, 360 U.S. at 689.

affords a justifiable basis for the retention of the fairness doctrine.³¹²

I. Summary

137. We believe the fairness doctrine is an unnecessary and detrimental regulatory mechanism. While we recognize that the fairness doctrine has been a central tenet of broadcast regulation for more than fifty years, we believe that we have a statutorily mandated duty to reassess the propriety of even long standing policies in light of changes in the broadcast marketplace and evidence that the policy may not further the public interest. After careful evaluation of the evidence of record, our experience in enforcing the fairness doctrine, and fundamental constitutional principles, we find that the fairness doctrine disserves the public interest.

138. Three factors form the basis for this determination. First, in recent years there has been a significant increase in the number and types of information sources. As a consequence, we believe that the public has access to a multitude of viewpoints without the need or danger of regulatory intervention.

139. Second, the evidence in this proceeding demonstrates that the fairness doctrine in operation thwarts the laudatory purpose it is designed to promote. Instead of furthering the discussion of public issues, the fairness doctrine inhibits broadcasters from presenting controversial issues of public importance. As a consequence, broadcasters are burdened with counterproductive regulatory restraints and the public is deprived of a marketplace of ideas unencumbered by the hand of government.

140. Third, the restrictions on the journalistic freedoms of broadcasters resulting from enforcement of the fairness doctrine contravene fundamental constitutional principles, accord a dangerous opportunity for governmental abuse and impose unnecessary economic costs on both the broadcasters and the Commission. Finally, we believe the record in this proceeding raises significant

³¹² Justice Douglas has stated that:

The implication that the people of the country—except the proponents of the theory—are mere unthinking automatons manipulated by the media, without interests, conflicts, or prejudices is an assumption which I find quite maddening. The development of constitutional doctrine should not be based on such hysterical overestimation of media power and underestimation of the good sense of the American public.

Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. at 152 n.3.

issues regarding the constitutionality of the fairness doctrine in light of First Amendment concerns.

IV. Modifications Short of Repeal and Alternatives to Current Enforcement of the Fairness Doctrine

141. In addition to those comments which favored complete repeal or retention of the fairness doctrine, a number of proposals were offered to modify the doctrine's scope or otherwise limit its application.³¹³ For example, several commenters urged elimination of or limitation on the scope of the *Cullman* doctrine corollary to the fairness doctrine.³¹⁴ Specifically, ABC proposed that ballot proposition advertising and advertising by independent political committees should be exempted from the *Cullman* doctrine. In lieu of *Cullman*, ABC recommended an approach modeled on the Commission's *Zapple* doctrine,³¹⁵ under which reasonable amounts, but not free, response time would be required as a means of achieving the Commission's fairness objectives. It was also urged by some commenters that all advertising be exempted from application of the fairness doctrine. Additionally, a two year moratorium on enforcement of the fairness doctrine was proposed as a means of empirically evaluating the impact of the doctrine on broadcast speech.

142. Beyond the above suggestions, the record reflects a number of proposals which have been previously considered by the Commission in connection with its fairness doctrine requirements. In this regard, Henry Geller again recommended that the current contemporaneous, case-by-case review of fairness doctrine complaints should be abandoned in favor of examining fairness compliance solely at renewal. It was also proposed that broadcast licensees be permitted to satisfy their fairness doctrine obligations by providing on-air "access" time to the public.

143. While these various proposals may present possibilities in

³¹³ Several parties addressed elimination or retention of the Personal Attack Rule. However, as we stated in the *Notice* in this proceeding, our review here is limited to the fairness doctrine and does not include the Personal Attack Rule, which is the subject of a separate, pending proceeding. *Notice, supra* n.1 ¶ 9 n.10 and *Repeal or Modification of the Personal Attack and Political Editorial Rules*, 48 Fed. Reg. 28295 (June 21, 1983).

³¹⁴ For a discussion of the *Cullman* doctrine and its evolution, see n.119 *supra*.

³¹⁵ *Nicholas Zapple*, 23 FCC 2d 707 (1970). The *Zapple* doctrine requires that if supporters, or spokesmen, for one political candidate appear on a broadcast station, supporters for opposing candidates must be afforded similar treatment. However, the doctrine only applies to major political parties during formal campaign periods and does not require the provision of free time.

terms of reducing the intrusive impact of the fairness doctrine, we do not believe it is appropriate to consider them at this time, given our intention to defer action on the fairness doctrine generally, pending review of the record in this proceeding by Congress.

V. Agency Authority to Modify or Repeal the Fairness Doctrine

144. Given our policy conclusions as to the continued undesirability of the fairness doctrine, the question arises whether we have the authority to eliminate or substantially modify the fairness doctrine. In this regard, issues pertaining to our statutory authority were clearly raised in the *Notice*³¹⁶ and addressed by numerous commenting parties in this proceeding. As we observed in the *Notice*, we do not believe that Congress explicitly codified the fairness doctrine prior to the 1959 Amendments to the Communications Act. Nor do we find that the fairness doctrine necessarily inheres in the public interest standard of the Communications Act. The 1959 amendments to the Communications Act pose a more difficult question. For the reasons we have earlier stated, however, we need not reach this question.³¹⁷ Rather, we will afford Congress an opportunity to review the record adduced in this proceeding. In order to provide a full and complete record in connection with such review, we have set forth below the arguments in this proceeding with respect to codification of the fairness doctrine.

A. Pre-1959 Period

145. We begin our examination of the legal authority of the Commission to eliminate or modify the fairness doctrine in the period prior to the 1959 amendments to ascertain whether or not the doctrine was codified either explicitly within the Communications Act or implicitly as part of the general obligation of broadcasters to serve the public interest.³¹⁸ In this regard, we note at the outset that neither the Radio Act of 1927 nor the Communications Act of 1934 contained any explicit provisions indicating that Congress intended to mandate that broadcasters

³¹⁶ See *Notice*, *supra* n.1 at ¶¶ 96-120.

³¹⁷ See ¶ 7, *supra*.

³¹⁸ For a detailed examination of the pre-1959 period See *Staff Study of the House Committee on Interstate and Foreign Commerce, Legislative History of the Fairness Doctrine*, 90th Cong., 2d Sess. (Comm. Print. 1968) [hereinafter cited as "Manelli Report"].

provide fairness in their coverage of controversial issues of public importance.

146. Indeed, in 1927 Congress specifically addressed the question of whether or not there was a need to statutorily require fairness in the discussion of controversial issues of public importance. When enacting Section 18 of the Radio Act of 1927,³¹⁹ the forerunner of Section 315 of the present Communications Act, Congress had before it in the House of Representatives language in the bill, H. R. 9971 of the 69th Congress, that would have required broadcasters to provide equal access to "both the proponents and opponents of all political questions or issues."³²⁰ At the same time, the Senate was considering a provision recommended to it by its Commerce Committee which would have prohibited broadcasters from discriminating in the use of their facilities "for the discussion of any question affecting the public."³²¹ Neither of these provisions survived the House-Senate Conference. The Conferees rewrote the radio bill without the proposed fairness-type language.³²² Since there was no explanation in the Conference Report as to why the fairness-type language was excluded, we must conclude that Congress did not desire to explicitly mandate a fairness type obligation on broadcasters at that time.

147. Section 18 of the Radio Act of 1927 became Section 315 of the Communications Act of 1934. Yet, before it was enacted into law, attempts were made in the Senate to enlarge the scope of this section to impose a fairness standard on any discussion of public questions to be voted upon at an election. Specifically, the language proposed in the Senate would have required that:

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

³¹⁹ Section 18 of the Radio Act of 1927 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. . . .

(44 Stat. 1170).

³²⁰ 67 Cong. Rec. 5,560-61 (1926).

³²¹ S. Rep. No. 772, 69th Cong., 1st Sess. (1926).

³²² H. R. Rep. No. 1886, 69th Cong., 2d Sess. (1927).

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.³²³

In the House, the Committee on Interstate and Foreign Commerce reported a substitute bill that did not contain the provision providing for "equal opportunity" in the discussion of public questions.³²⁴ Minus the proposed fairness-type language, the Conference Committee incorporated Section 18 verbatim as Section 315 of the Communications Act of 1934.³²⁵ Once again attempts to include fairness-type language explicitly into the Communications Act had failed.

148. The 1952 amendments were the last revisions to Section 315 of the Communications Act prior to 1959. The 1952 Amendments to the Communications Act added another provision to section 315 which provided for uniformity of charges for political time vis-a-vis other uses. While in the House of Representatives, an amendment was offered to alter Section 315 to extend the "equal opportunity" provision to include statements made by authorized spokesmen of candidates,³²⁶ this language was omitted from the bill by the Conferees.³²⁷ Given these various attempts to legislatively mandate some form of fairness standard, it is apparent that, prior to 1959 at least, Congress had steadfastly refused to statutorily require broadcasters to provide fairness in the coverage of controversial questions and issues of public concern.

149. Despite the lack of legislative support for a mandatory fairness obligation, as evidenced in these early expressions of legislative intent by Congress in not explicitly codifying the fairness doctrine,³²⁸ the Federal Radio Commission and later the

³²³ See S. Rep. No. 781, 73d Cong., 2d Sess. (1934) This same "fairness" type provision in H. R. 7716, had been introduced during the 72d Congress, H. Rep. No. 2106, 72d Cong., 2d Sess. 6 (1933). This bill was passed by Congress, but subjected to a pocket veto by President Hoover. See *Manelli Report, supra* n.318.

³²⁴ H. R. Rep. No. 1850, 73d Cong., 2d Sess. (1934).

³²⁵ See H. R. Rep. No. 1918, 73d Cong., 2d Sess. 49 (1934).

³²⁶ 98 Cong. Rec. 7415 (1952).

³²⁷ H. R. Rep. No. 2426, 82d Cong., 2d Sess. (1952). This omission was particularly relevant since by this time the Commission had developed the fairness doctrine pursuant to the public interest standard of the Communications Act.

³²⁸ Indeed, as pointed out in the *Manelli Report, supra* n.318, some of the failures to enact fairness type legislation "cast serious doubts 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." *Id.* The United States Supreme Court, however, has admonished that "unsuccessful attempts at legislation are not the

Federal Communications Commission imposed fairness obligations upon broadcasters. As early as 1929, the Federal Radio Commission in *Great Lakes Broadcasting Co.*,³²⁹ declared that “[i]n so far as a program consists of discussions of public questions, public interest requires ample play for the free and fair competition of opposing views, and the Commission believes that the principle applies . . . to all discussions of issues of importance to the public.”³³⁰ The Federal Communications Commission followed its predecessor by requiring that licensees cover both sides of controversial issues.³³¹ These decisions culminated in the issuance of the definitive statement of the fairness doctrine obligations for broadcasters. It was in the 1949 *Report of Editorializing by Broadcast Licensees*,³³² that the Commission fully set forth the two prong requirements of the fairness doctrine.

150. The fairness doctrine, as enunciated by the Commission in the 1949 *Fairness Report*, was not developed pursuant to any specific command in the Act requiring that a broadcaster “devote a reasonable percentage of time to the coverage of controversial public issues” or that the broadcaster provide fairness in the coverage of such issues. Rather, it was promulgated pursuant to the “expansive” powers delegated by Congress under the Act in order that the Commission might regulate the “field of enterprise the dominant characteristic of which was the rapid pace of its unfolding.”³³³ In particular, the fairness doctrine developed under the general authority of the Commission to devise regulations to insure licensees broadcast in the “public interest, convenience, and necessity.”³³⁴ Based upon its perceptions of the communica-

best guides to legislative intent.” *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 381 n.11.

³²⁹ 3 FRC 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930).

³³⁰ *Id.* at 33.

³³¹ See *Young People's Association for the Propagation of the Gospel*, 6 FCC 178(1938). Moreover, the Commission in *Mayflower Broadcasting Corp.*, 8 FCC 333 (1941), gave an even more expansive meaning to the public interest standard while at the same time giving a more restrictive view of broadcasters' latitude under that standard. Specifically, the Commission determined that “as one licensed to operate in the public domain the licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively and without bias These requirements are inherent in the conception of public interest set up by the Communications Act as the criterion of regulation.” *Id.* at 340. While this decision was overturned because of its specific edict against editorializing by broadcasters, its interpretation of the public interest standard was carried forward in subsequent Commission cases.

³³² See 1949 *Fairness Report*, *supra* n.6.

³³³ *National Broadcasting Company v. United States*, 319 U.S. at 219.

³³⁴ See 47 U.S.C. §§ 303, 307(a), 309(a), 310(d). According to the United States

tions field in 1949, the Commission determined that “the public interest requires that the licensee must operate on a basis of overall fairness, making his facilities available for the expression of contrasting views of all responsible elements in the community on the various issues which arise.”³³⁵ Thus, the Commission from the inception of the fairness doctrine has recognized that the sole statutory basis for the doctrine was the general duty of licensees to serve the public interest.³³⁶

151. Proponents of the fairness doctrine contend that the Commission can not eliminate the doctrine because it is an inherent and necessary element of the general public interest standard.³³⁷ We believe, however, that the obligations of licensees under the public interest standard, including the fairness doctrine, were never meant to be unsusceptible to change. Nor do we conclude that the sole power to make such alterations in Commission policies promulgated pursuant to the general public interest standard rests with Congress. This conclusion is aptly supported by the United States Supreme Court which has long recognized that the public interest standard is not inflexible, but is subject to the “rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors.”³³⁸ Over the years the Commission has often exercised its expert judgment and administrative experience to change policies once viewed by the Commission to be in the public interest. Given that the Commission is the expert agency in the field, courts have upheld the Commission’s elimination of policies which were based solely on the public interest standard.³³⁹ In so doing, the courts have generally relied heavily on the Commission’s judgment regarding the best means to implement the broad public interest standard.³⁴⁰ Indeed, the United States Supreme Court has posited that the Commission

Supreme Court the public interest criterion “serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.” *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

³³⁵ 1949 *Fairness Report*, at 1250.

³³⁶ *Id.* at 1254.

³³⁷ See, e.g., BCFM Comments, *supra* n.288 at 6-12; Geller/Lampert Comments, *supra* n.83 at 7-10; GM Comments, *supra* n.203 at 36-40; MAP/TRAC Comments, *supra* n.50 at 13-19; and Mobil Comments, *supra* n.128 at 12-17.

³³⁸ *FCC v. Pottsville Broadcasting Co.*, 309 U.S. at 138.

³³⁹ See, e.g., *FCC v. WNCN Listeners Guild*, *supra* n.193.

³⁴⁰ See *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. at 810 and *FCC v. WNCN Listeners Guild*, *supra* n.193; see also *UCC v. FCC*, *supra* n.193 and *Chisholm v. FCC*, 538 F.2d 349, 357 (D. C. Cir 1976).

should not hesitate to abandon existing policies “[i]f time and changing circumstances reveal that the ‘public interest’ is not served by application of the regulations.”³⁴¹

152. As we have already determined, as detailed above, the fairness doctrine no longer serves the public interest. Accordingly, if the only statutory basis for the fairness doctrine was the general public interest standard, the Commission upon a rationally based and clearly articulated finding would possess sufficient authority to abolish the doctrine.

B. The 1959 Amendments to the Communications Act

153. In 1959 Congress once again amended Section 315 of the Communications Act.³⁴² Primarily, the purpose of these amendments was to create an exemption from Section 315(a)'s equal opportunity requirement for certain types of news programs. After accomplishing its primary purpose in enacting the amendments, Congress set forth at the end of Section 315(a) a new proviso which apparently references the general fairness doctrine. In the *Notice*,³⁴³ we offered three possible scenarios as to the possible statutory implications of the language espoused in the 1959 Amendments to the Communications Act. One construction of the amendments is that they were an explicit codification of the fairness doctrine in its entirety. The second possible interpretation is that the 1959 amendments only codified the fairness doctrine with respect to the political broadcasting realm to ensure that the purposes of the equal opportunities requirements would not be defeated by abuse of the newly created exemptions. A final construction is that Congress at that time did not codify the fairness doctrine at all, but merely acknowledged and preserved the Commission's policy in this area without statutorily mandating its continuance.³⁴⁴ According to the arguments of the different commenting parties, evidence supporting all three propositions can be found in the statutory language of Section 315, as amended in the 1959 amendment to the Communications Act, its legislative history, subsequent court and legislative interpretations, as well as our own past interpretations.

³⁴¹ *National Broadcasting Co. v. United States*, 319 U.S. at 225.

³⁴² See *Act of September 14, 1959*, §1, P.L. 66-274, 73 Stat. 556, amending 47 U.S.C. §315(a).

³⁴³ See *Notice*, *supra* n.1 at ¶ 99.

³⁴⁴ While different permutations of these constructions of the statutory implications of the 1959 amendments exist, we believe these three to be the most plausible.

1. The Statutory Language

154. We begin with the language in the statute itself. In this regard, we note that the United States Supreme Court has specifically concluded that “in determining the scope of a statute, one is to look first at its language” and “[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”³⁴⁵ Of peculiar relevance to our inquiry is the last sentence of Section 315(a) which provides that:

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.³⁴⁶ (emphasis added)

Although this language appears clearly to reference the fairness doctrine obligation, its precise statutory implications are unclear. In this connection, several parties argued that this language could be read as a Congressional enactment of the fairness doctrine since its wording is quite similar to the language found in the second prong of the fairness doctrine as enunciated in the 1949 *Fairness Report*. Contrarily, other commenters took the position that Congress is amending Section 315 desired to make clear that it had not disturbed the Commission’s fairness doctrine policy, but did not mandate its continuance. Major commenting parties have advanced strong arguments on both sides of this controversy as to the precise meaning to be accorded this language.³⁴⁷ Commenters, such as the National Telecommunications and Information Administration (NTIA), assert that “[o]n its face Section 315(a), as amended in 1959, indicates that Congress understood the Fairness Doctrine to be embodied in the Federal Communica-

³⁴⁵ *North Dakota v. United States*, 460 U.S. 300, 312 (1983), quoting *Consumers Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). See also *United States v. Yermian*, 104 S. Ct. 2936 (1984) and *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

³⁴⁶ 47 U.S.C. §315(a) (1984).

³⁴⁷ Some Commenters contend that the language in the last sentence of Section 315(a) specifically addresses itself to fairness regarding “controversial issues” in general. See, e.g., MAP/TRAC Comments, *supra* n.50 at 48. Other parties point out the Congress spoke in terms of the obligation as being “under this Act” this they contend provides support for the argument that the fairness doctrine is merely a Commission policy developed pursuant to delegated authority under the general public interest standard of the act and not to anything directly in the Act. See, e.g., CBS Comments, *supra* n.83 at 110-111.

tions Act.”³⁴⁸ Likewise, other proponents have found the language in the last sentence of section 315(a) to “plainly” mean that Congress intended to codify the fairness doctrine.³⁴⁹

155. On the other hand the RTNDA contends that “[o]n its face this language provides only that the amendments should not be construed to *relieve* broadcasters of fairness obligations; it neither states nor implies that Congress intended to change in any way the nature of the statutory authorization for the doctrine.”³⁵⁰ Moreover, opponents of the fairness doctrine argue that if Congress had intended this language to codify the fairness doctrine, it would have made its intent clear, as it has done in many other enactments.³⁵¹ Because the “plain” language of the statute has been interpreted to stand for more than one proposition, we examined the legislative history of the 1959 amendments to ascertain congressional intent.³⁵²

2. Legislative History

156. Congress in the 1959 amendments to Section 315 was responding in an expedited fashion to overturn the Commission’s *Lar Daly* decision and avoid its possible ramifications.³⁵³ In *Lar Daly*, the Commission had rules that Section 315’s “equal opportunities” requirements applied to appearances of political candidates on newscasts.³⁵⁴ Subsequently, broadcasters warned that if Congress did not act to correct this novel Commission

³⁴⁸ “Comments of the National Telecommunications and Information Administration” at 5 [hereinafter cited as “NTIA Comments”].

³⁴⁹ See, e.g., MAP/TRAC Comments, *supra* n.50 at 31-34; Geller/Lampert Comments, *supra* n.83 at 4; and Ecumedia Reply Comments, *supra* n.39 at 7-9.

³⁵⁰ RTNDA Comments, *supra* n.141 at 13. Similarly, NBC argues that this language was merely a “savings clause” in that Congress “left pre-existing law—the Commission’s authority to interpret the ‘public interest’ standard of the Federal Communications Act—undisturbed.” NBC Comments, *supra* n.86 at 102. See also CBS Comments, *supra* n.83.

³⁵¹ See NBC Comments, *supra* n.86 at 105 (NBC points out that Congress made explicit the codification of a Commission policy when it enacted §317 requiring the public announcement of any sponsorship of a political or other controversial broadcast.) See also CBS Comments, *supra* n.83 at 111.

³⁵² As the United States Circuit Court of Appeals for the District of Columbia Circuit has stated, “[c]onstruing a statutory term, however, requires more than a superficial and isolated examination of the statute’s plain words. Ascertaining congressional intent requires us to examine the ‘context in which the words are set—the statute’s purpose, structure, and history’” *Multi-State Communications, Inc. v. FCC*, 728 F.2d 1519, 1522 (D.C. Cir. 1984) quoting *Natural Resources Defense Council, Inc. v. EPA*, 725 F.2d 761, 769 (D.C. Cir. 1984). See also *Viacom International, Inc. v. FCC*, 672 F.2d 1034, 1040 (2d Cir. 1982).

³⁵³ *Lar Daly*, 26 FCC 715 (1959).

³⁵⁴ *Id.*

interpretation of Section 315 the result might be a blackout of radio and television news coverage of political campaigns, including the upcoming national political conventions.³⁵⁵ To prevent such an occurrence, Congress moved swiftly to enact legislation providing exemptions for news-type programming. Congress was mainly concerned with overturning the Commission's decision. Consequently, both the original bills drafted in the House of Representatives and Senate dealt primarily with correcting through legislation the *Lar Daly* decision.³⁵⁶ Accordingly, the legislative history lacks clear record evidence demonstrating a reasoned consideration of the fairness doctrine which would indicate an intent by Congress to codify the doctrine. While there do exist scattered references to the obligations of broadcasters under the public interest standard to present both sides of controversial public issues by some members of Congress, there was no significant discussion of the Commission's fairness doctrine.

157. However, the Senate Committee Report—probably in response to concerns voiced by the Commission and the Department of Justice—provided that:

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.³⁵⁷ (emphasis added).

This language appears to suggest that the Senate Committee did not wish to abrogate the Commission's policy developed pursuant to the Commission's delegated authority under the general public interest standard of the Act. It is argued that this language implies that the Senate did not intend to change the broadcasters

³⁵⁵ See, e.g., 105 Cong. Rec. 14,447 (1959) (Remarks of Senator Hartke).

³⁵⁶ See S. Rep. No. 562, 86th. Cong., 1st Sess. (1959) and H. R. Rep. No. 802, 86th. Cong., 1st Sess. (1959).

³⁵⁷ S. Rep. No. 562 at 13. The Senate Committee specifically included a letter from the Department of Justice suggesting that Congress in amending section 315 should not abolish fairness obligations. Specifically, the Department of Justice stated that "care should be taken lest present requirements of fair treatment of public issues be weakened." The Department added that "under existing law, the Commission has held that a licensee's statutory obligation to serve the public interest includes the broad all-encompassing duty of providing a fair cross-section of opinion in the station's coverage of public affairs and other matters of controversy. This general fairness standard is presently applicable to political broadcasting not coming within the coverage of section 315." *Id.* at 19 (citations omitted).

existing statutory obligation to provide fairness in the coverage of controversial issues of public importance. This does demonstrate that the Senate was ambivalent, at least initially, as to whether the fairness doctrine was a Commission policy that was grounded in the statutory obligation of broadcasters to serve the public interest. It may also suggest that Senate concerns focused primarily upon the doctrine's role in ensuring fair coverage of candidates should the "news" exemption to Section 315 be enacted.

158. When the bill came up for debate in the Senate, a floor amendment was offered by Senator Proxmire. This amendment would have added to section 315 a new provision providing that:

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 equal an opportunity to be heard as is practically possible.³⁵⁸

Upon a recommendation by Senator Pastore the phrase "as equal an opportunity" found in the last part of the Proxmire amendment was revised to read "as fair an opportunity."³⁵⁹ Senator Pastore in offering this alternation explained that this new language "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 situation must bring to light all sides of a controversy in the public interest" ³⁶⁰ While Senator Pastore had referred to the Proxmire amendment as "surplusage,"³⁶¹ he nonetheless stated that he understood "the amendment to be a statement or codification of the standards of fairness . . ." and that the Commission was "obliged by existing

³⁵⁸ 105 Cong. Rec. 14,457 (1959). Senator Proxmire in offering his amendment stated that the purpose of the amendment was to put into the Act the declaration made on page 13 of the Committee Report and thus a part of the statute make it binding. *Id.* While we believe the language found on page 13 of the Senate Committee Report, *supra* n.356, only sought to preserve the Commission's existing policy, the language proposed by Senator Proxmire appears to be more of an explicit codification of the fairness doctrine.

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ Senator Pastore stated that he believed "we have already accomplished the purpose of the Senator's amendment. We have expressed it in the report." *Id.* at 14,457.

law and policy to abide by the standards of fairness.”³⁶² Thus, it appears that at least some of the Senators viewed the Proxmire amendment as an attempt to codify the fairness doctrine.³⁶³

159. Unlike the Senate bill, the bill reported out of the House of Representatives dealt almost exclusively with correcting the situation brought about by the Commission’s *Lar Daly* decision.³⁶⁴ No specific amendment with respect to the general fairness doctrine was passed by the House of Representatives. The House members did, however, reject in a floor vote an amendment which would have required broadcasters to provide “equal opportunities” to opposing “representatives of any political or legislative philosoph[ies].”³⁶⁵

160. Because of differences in the bills reported out of the House of Representatives and Senate, the respective bills were sent to a House-Senate Conference.³⁶⁶ Within this Conference, the language of the Proxmire Amendment was altered by the Conferees to its present form.³⁶⁷ In the Conference Report³⁶⁸ the Conferees, in referring to their inclusion of language which referenced the fairness doctrine, explained in a short statement 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

³⁶² 105 Cong. Rec. at 14,462.

³⁶³ There is still some doubt as to whether the Proxmire amendment if enacted would have codified the fairness doctrine in its entirety, especially in light of the fact that the majority of what little debate there was on the amendment centered on questions relating to fairness in the political broadcasting realm. See *Notice, supra* n.1 at ¶ 110.

³⁶⁴ However, it should be noted that in the House Committee debates there is evidence that members believed that broadcasters were already subject to a statutorily required fairness obligation. For example, Representative Cellar stated that:

broadcast licensees would continue to remain subject to their present statutory duty to operate in the public interest. Under this general, overall standard of licensee responsibility, the Commission requires a licensee to be fair in the presentation of opposing views on controversial public issues.

105 Cong. Rec. 16,227 (1959).

³⁶⁵ *Id.* at 16,245.

³⁶⁶ H.R. Rep. No. 1069, 86th Cong., 1st Sess. (1959). The non-inclusion of any fairness doctrine language in the House of Representatives was not the sole difference between the two bills.

³⁶⁷ The United States Supreme Court in *Red Lion Broadcasting Co. v. FCC, supra* n.10 in dictum stated that the original Proxmire language “constituted a positive statement of doctrine and was altered to the present merely approving language in the conference committee.” *Id.* at 383-84 (footnote omitted) See ¶ 166, *infra*.

³⁶⁸ H.R. Rep. No. 1069, 86th Cong., 1st Sess. (1959).

the Communications Act of 1934.”³⁶⁹ Thus, there was no discussion in the Conference Report explaining why the Proxmire language was altered. Moreover, the Conference Report failed to explain whether the original intent of the Proxmire amendment had been retained in this new proviso. In this connection, we also note that the Conference Report explains that there was nothing in the language inconsistent with the House substitute. In light of the fact that the House bill did not contain any fairness language, the lack of a major discussion of the inclusion of fairness doctrine language suggests that this provision was not viewed as being controversial. However, we are not certain as to the reason this was not a controversial issue. In this regard, it appears that there are several plausible rationales for the lack of discussion on this provision in the Conference Report. First, it could be that Congress was merely making explicit what it already considered to be a statutory obligation under the public interest standard. Second, there is a possibility that because Congress was only preserving a Commission policy and not mandating its continuance there was no need for a discussion.³⁷⁰ Further, if the provision was largely understood as intended only to ensure fair treatment of candidates in programming exempted from Section 315’s equal opportunities provisions, there may have been general agreement that the proviso was desirable. Finally, it should be noted that, at the time, the fairness doctrine was enforced only at renewal, and some legislators believed it has little practical effect on licensees.³⁷¹

161. In the post-Conference debates in both Houses, the Conferees in introducing the revised version of the bill made an effort to explain that the Proxmire amendment had been retained, at least in spirit. In particular, Representative Harris stated that:

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.³⁷²

³⁶⁹ *Id.* at 5.

³⁷⁰ Parties, such as MAP/TRAC, have argued that this language proves that Congress intended to codify the fairness doctrine. See MAP/TRAC Comments, *supra* n.50 at 29-34. Other parties point out it is mere recognition of the Commission’s policy pursuant to the public interest standard in the Act. See CBS Comments, *supra* n.83 at 111.

³⁷¹ See Notice, *supra* n.1 at ¶ 112.

³⁷² 105 Cong. Rec. 17,778 (1959). In addition, Representative Harris, stated that the Conferees “went further than that to be sure that there was no advantage taken by the broadcasting industry or anyone else and reaffirmed the ‘standard

Likewise, in the Senate debates, Senator Pastore pointed out that “while 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.”³⁷³

162. These statements may lend some support for the proposition that a byproduct of the 1959 Amendments was a codification of the fairness doctrine. In the House of Representatives, however, the dialogue between Representatives Avery and Harris lends support to the contrary position that Congress intended solely to preserve the fairness doctrine. Specifically, Representative Avery questioned whether or not the “standard of fairness still prevails in the basic Act irrespective of any changes that were made in Section 315” and that “it applies not only to political candidates, but issues and editorializing by licensees as well.”³⁷⁴ In response, Representative Harris agreed that the standard remained and added that the conferees “discussed this particular item” and “agreed that the standard of fairness must prevail, and applies to the programs which will be exempted from the equal-time requirements of Section 315.”³⁷⁵ As demonstrated by these discussions, the majority of the debate on the fairness doctrine in both Houses centered around assuring that despite the new amendment the doctrine remained in the context of political broadcasting. This is understandable since the reason for Congress’ action was overturning the *Lar Daly* decision.

163. While this appears to have been the focus of most of the debates, in the Senate at least one Senator believed that the fairness doctrine was being codified in its entirety. Specifically, Senator Scott pointed out that:

[W]e have maintained very carefully the spirit of the Proxmire amendment, and I ought to point out...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

of fairness’ established under the Communications Act.” *Id.*

³⁷³ *Id.* at 17,830.

³⁷⁴ *Id.* at 17,779.

³⁷⁵ *Id.*

controversial . . . and it is intended that no one point of view shall gain control over the airwaves to the exclusion of another point of view.³⁷⁶

Senator Case, however, did immediately afterwards endorse everything that Senator Scott stated and everything stated in the Conference Report.³⁷⁷ None of the other Senators offered any remarks on the correctness of Senator Scott's statement.

164. We also found other statements in the legislative history which suggested that some members did believe that the fairness doctrine should not be a mandatory obligation. In particular, we note the statement of Representative Brown who expressed regret that the final bill "does not go quite as far as I would like toward giving freedom of information over the radio and television such as is enjoyed by the press of the Nation."³⁷⁸ While there are a few statements throughout the legislative history discussing the fairness obligation, there is no evidence that clearly demonstrates an intent by Congress to codify the doctrine. Although as NBC observes "[t]he legislative discussion of the fairness doctrine cannot achieve what the statutory language fails to do,"³⁷⁹ neither the statutory language nor the legislative history of section 315 provides a satisfactory answer to the question of congressional intent.

3. Judicial Interpretations of the 1959 Amendments.

165. As CBS points out the question of whether or not Congress has enacted the fairness doctrine as a statutory mandate has never been directly considered by any court.³⁸⁰ In *Red Lion Broadcasting Co. v. FCC*,³⁸¹ the United States Supreme Court in upholding the personal attack and political editorializing rules did however provide dictum pertaining to the statutory implications of the 1959 Amendments to the Communications Act. Proponents and opponents alike have cited the *Red Lion* decision as supporting their respective positions concerning the statutory nature of the fairness doctrine. While the Court did examine the legislative history of Section 315, it failed to reach a clear conclusion as to whether the doctrine was codified. In this regard, we note that after citing the language at the end of

³⁷⁶ *Id.* at 17,831.

³⁷⁷ *Id.* at 17,832.

³⁷⁸ *Id.* at 17,781.

³⁷⁹ "Reply Comments of National Broadcasting Company, Inc." at 21. [hereinafter cited as "NBC Reply Comments"].

³⁸⁰ See CBS Comments, *supra* n.86 at 124.

³⁸¹ 395 U.S. 367 (1969).

Section 315(a) the Court stated:

[t]his language makes it very plain that Congress, in 1959, announced that the phrase “public interest,” which had been in the Act since 1927, imposed a duty on broadcasters to discuss both sides of controversial public issues.³⁸²

As proponents of the fairness doctrine contend this language suggests that the Court “viewed Congress’ action as a codification of the FCC’s interpretation that the fairness doctrine was an inextricable element of the ‘public interest’ section of the Act.”³⁸³ In addition, the *Red Lion* Court stated that “[h]ere, the Congress has not just kept its silence by refusing to overturn the administrative constructio, but has ratified it with positive legislation.”³⁸⁴

166. Although this language implies that the *Red Lion* Court believed the 1959 amendments to be an explicit codification of the fairness doctrine, other language found in the decision just as equally suggests that it was only codified with respect to the political broadcasting realm or not at all. In particular, the Court stated that Congress “knowingly preserved the FCC’s complementary efforts.”³⁸⁵ In this connection, we note that preservation of a Commission policy indicates that it is not a mandatory obligation of broadcasters and does not foreclose our discretion to later reevaluate that policy. Moreover, the Court in referring to the Proxmire amendment states that:

[t]his amendment, which Senator Pastore, a manager of the bill and a ranking member of the Senate Committee, considered “rather surplusage,” constituted a *positive statement of doctrine* and was altered to the present *merely approving language* in the Conference Committee.³⁸⁶ (emphasis added).

Commenters who argue that the fairness doctrine is not statutory,

³⁸² *Id.* at 380.

³⁸³ MAP/TRAC Comments, *supra* n.50 at 35–36. This proposition is supported by the Court’s subsequent statement that the congressional action in 1959 was a vindication of the “FCC’s general view that the fairness doctrine inhered in the public interest standard.” *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 380.

³⁸⁴ *Id.* at 381–82 (footnote omitted). The NTIA cites *Black’s Law Dictionary* for the proposition that “[r]atification means the adoption of the act of another as one’s own act, with the resulting responsibility for the consequences of that act.” Reply Comments of the National Telecommunications and Information Administration” at 14 [hereinafter cited as “NTIA Reply Comments”]. In light of the subsequent statements made in the *Red Lion* decision, we are not certain what the Court reference to the doctrine having been ratified meant.

³⁸⁵ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 385.

³⁸⁶ *Id.* at 383–84 (citations omitted).

contend that this language proves that the Court viewed the proviso as not mandating, but merely endorsing the Commission's then existing policy.³⁸⁷ For example, CBS contends that the Court's analysis in *Red Lion* "made clear that the doctrine was not being displaced by the exemptions to the equal time provisions, it did not deprive the Commission of the power later to determine that the public interest would be better served by the doctrine's rescission."³⁸⁸

167. Four years later the United States Supreme Court in *Columbia Broadcasting System v. Democratic National Committee*³⁸⁹ also in dictum addressed the statutory implications of the 1959 Amendments to the Communications Act. However, the Court once again used ambiguous terminology in referring to the fairness doctrine. Therein, the Court stated that "[i]n 1959, Congress amended §315 of the Act to give *statutory approval* to the Fairness Doctrine."³⁹⁰ Standing alone this language could suggest that the Court understood the 1959 amendments to codify the fairness doctrine. Contrarily, this same statement could stand for the proposition that Congress was recognizing and approving the doctrine, but not mandating its retention. Moreover, in the same footnote the Court while discussing Congress' enactment of § 312(a) states that "[t]his amendment essentially codified the Commission's prior interpretation of § 315(a) as requiring broadcasters to make time available to political candidates."³⁹¹ If the Court had meant to suggest that the fairness doctrine was codified, it could have stated that the fairness doctrine had been codified as it did in reference to § 312(a). We are not certain if the Court's choice of the term "statutory approval" was meant to suggest that the fairness doctrine is not statutory. Moreover, Justice William Brennan joined by Justice Thurgood Marshall in a dissenting statement determined that:

The statutory authority of the Commission to promulgate this doctrine and related regulations derives from the mandate to the "Commission from time to time, as public convenience, interest, or necessity requires," to promulgate "such rules and regulations and prescribe such restrictions and

³⁸⁷ See RTNDA Comments, *supra* n.141 at 21.

³⁸⁸ See CBS Comments, *supra* n.83 at 125 (footnote omitted).

³⁸⁹ 412 U.S. 94 (1973). (The Court upheld the Commission's determination that the public interest would not be served by requiring broadcasters to accept editorial advertisements).

³⁹⁰ *Id.* at 113 n.12 (emphasis added).

³⁹¹ *Id.*

conditions . . . as may be necessary to carry out the provisions of [the Act] . . . ”³⁹² (citations omitted)

That these Justices concluded that the “Fairness Doctrine was recognized and implicitly approved by Congress in the 1959 amendments to § 315 of the Act,”³⁹³ suggests, as evidenced by the above statement, that they did not necessarily view it as having been mandated by section 315 of the Act. We have no evidence as to whether the other Justices agreed with this interpretation.

168. Because the United States Supreme Court so far has not given a definitive answer on whether or not the fairness doctrine has been explicitly codified into the Communications Act, we examined the cases in the United States Circuit Courts of Appeal. While some of these courts have, in passing, discussed the statutory nature of the fairness doctrine, none has specifically addressed in a reasoned decision the question of whether or not the fairness doctrine is codified. The Courts, which in dictum state that the fairness doctrine was codified in 1959, generally do not discuss the rationale behind their conclusions. Indeed, many of these Courts have adopted — without any discussion as to its correctness — the Commission’s interpretation on whether or not the fairness doctrine was codified as part of the Communications Act.³⁹⁴ Other Courts have relegated their discussion of the statutory nature of the fairness doctrine to a sentence or two in a footnote.³⁹⁵

169. At least one Court has specifically determined that the fairness doctrine has not been codified. The United States Circuit Court of Appeals for the First Circuit in *Public Interest Research Group v. FCC*³⁹⁶ in upholding the Commission’s determination that the fairness doctrine would only apply to commercial advertisement that spoke in an obvious and meaningful way to public issues stated, in dictum, that the “fairness doctrine is *not a*

³⁹² *Id.* at 185 n.16. (Brennan, J., dissenting).

³⁹³ *Id.* at 185 n.15. (citations omitted).

³⁹⁴ See, e.g., *Green v. FCC*, 447 F.2d 323, 327 n.6 (D.C. Cir. 1971) (the Court cited the FCC’s ruling *In re Obligations of Broadcast Licensees Under the Fairness Doctrine*, 23 FCC 2d 27, 28 (1970) and *Brandywine — Mainline Radio, Inc., v. FCC*, 473 F.2d 16 (D.C. Cir. 1972), cert. denied 412 U.S. 922 (1973) (The Court quoted the FCC’s opinion in *Committee for the Fair Broadcasting of Controversial Issues*, 25 FCC 2d 283, 291 (1970). In this regard, we note that both of these Commission decisions cited by the courts found the fairness doctrine to have been codified in the 1959 Amendments.

³⁹⁵ See, e.g., *Maier v. FCC*, 735 F.2d at 225 n.5 and *Banzhaf v. FCC*, 405 F.2d at 1095 n.49.

³⁹⁶ 522 F.2d 1060 (1st Cir. 1975).

creature of statute but was evolved over the years by the Commission under the 'public interest' standard of the Communications Act."³⁹⁷ Moreover, the Court declared that Congress only "acknowledged and generally endorsed the Commission's adoption of fairness standards."³⁹⁸

170. In *Straus Communications, Inc. v. FCC*,³⁹⁹ the court found that the fairness doctrine "received explicit statutory recognition in the 1959 amendments."⁴⁰⁰ The precise ramifications of Congress giving "statutory recognition" are unclear. Moreover, the Court made this statement without any substantive discussion indicating its meaning.

4. Commission Interpretations of the 1959 Amendments

171. Although some Courts have relied upon Commission interpretation of the fairness doctrine's statutory nature, the Commission itself has not steadfastly found the doctrine to have been codified. Over the years, the Commission has reassessed the implications of the 1959 amendments to the Communications Act. While some Commission decisions have without much discussion assumed that Congress codified the doctrine in 1959,⁴⁰¹ other Commission determinations have found that Congress only "ratified] the Commission's then-existing policy concerning application of the Fairness Doctrine to news broadcasts."⁴⁰² And still other Commission decisions have been ambivalent on whether the

³⁹⁷ *Id.* at 1066 (emphasis added). Complainants in this case had specifically argued that the fairness doctrine was codified. However, the Court concluded that Congress had delegated under the general public interest standard the enforcement of the fairness doctrine.

³⁹⁸ *Id.* (citations omitted).

³⁹⁹ 530 F.2d 1001 (D.C. Cir. 1976).

⁴⁰⁰ *Id.* at 1007 n.11. See also *American Security Council Education Foundation v. FCC*, 607 F.2d 438 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980). The District of Columbia Circuit Court of Appeals therein stated that "[i]n 1959, Congress confirmed the Commission's view that the fairness doctrine was part of the public interest standard" *Id.* at 443 n.12.

⁴⁰¹ See *Study of Fairness Doctrine*, 30 FCC 2d 26, 26-27 (1971) and *1974 Fairness Report*, *supra* n.3. It should be once again pointed out that the *1949 Fairness Report*, *supra* at n.6, found the doctrine to be statutory solely under the general public interest standard.

⁴⁰² *Report and Order* in BC Docket No. 81-741, FCC 83-120, 53 RR 2d 1309 (1983). See also *Notice of Proposed Rule Making* in MM Docket No. 83-331, FCC 83-130 (released May 25, 1983). (Commission stated that Fairness Doctrine was "statutorily approved" by Congress). We also note that then Chairman Richard E. Wiley in a separate statement to the reconsideration of the *1974 Fairness Report* concluded that "The literal wording of the statute indicates only that the Commission's fairness policies were left undisturbed. . . ." *Memorandum Opinion and Order on Reconsideration of the Fairness Report*, 58 FCC 2d at 700 (separate statement of Chairman Wiley).

doctrine was codified.⁴⁰³ Thus, the Commission has never definitively concluded that the fairness doctrine was codified in 1959.

5. *Subsequent Congressional Interpretations of the 1959 Amendments*

172. Finally, we examined subsequent statements by Congress, including the statements of key figures in the 1959 amendment to section 315, to ascertain Congressional views on the statutory nature of the fairness doctrine. Once again we discovered there was evidence both supporting the codification proposition and opposing it. We begin with those statements suggesting that Congress in 1959 codified the fairness doctrine. In particular, Senator Pastore during congressional hearings in 1963 on further amending the equal time provision, implied that section 315 codified the fairness doctrine and that if there were any changes made to section 315, "there ought to be a restatement on the fairness doctrine."⁴⁰⁴ Moreover, Senators Pastore and Proxmire in a 1975 hearing on bills to eliminate the fairness doctrine, gave their beliefs that the doctrine had been codified in 1959. Specifically, in his opening statement, Senator Proxmire explained that:

Although the fairness doctrine dates back to 1949 in a sophisticated form, it was not until 1959 that it was recognized in the United States Code. I had a hand in putting it there.⁴⁰⁵

This conclusion was expanded upon by Senator Pastore who simply stated "we codified [the fairness doctrine] in 1959."⁴⁰⁶

173. There also exists subsequent legislative statements suggesting that even Congress itself was not certain whether the fairness doctrine has been codified.⁴⁰⁷ In this connection, we note that in 1968, less than ten years after the amendments to section 315, a study of the legislative history of the fairness doctrine was prepared for the Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce,⁴⁰⁸

⁴⁰³ See *Notice of Proposed Rule Making* in MM Docket No. 83-670, 94 FCC 2d 678, 706 n.50 (1983).

⁴⁰⁴ *Equal Time: Hearings on S.251, S.252, S.1696, and H.J. Res. 247 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 88th. Cong., 1st Sess. 59 (1963). See also NTIA Comments, *supra* n.348 at 9.

⁴⁰⁵ *Fairness Doctrine: Hearings on S.2, S. 608 and S.1178 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 94th. Cong., 1st. Sess. 13 (1975).

⁴⁰⁶ *Id.*

⁴⁰⁷ See, e.g., *Notice supra* n.1 at ¶ 111 n.157.

⁴⁰⁸ *Manelli Report, supra* n.318.

(Manelli Report). The Manelli Report, after an exhaustive study of the legislative history, concluded that "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."⁴⁰⁹ In addition, the Manelli Report contended that Congress "intended neither approval nor disapproval of it (fairness doctrine), but merely intended to ensure that Section 315 would not interfere with it."⁴¹⁰ The Senate also issued a staff study in 1968 which determined that "Section 315 is a congressional enactment and the 'fairness doctrine,' although a qualifying reference to it appears in section 315, is not."⁴¹¹ However, it did find that the "public interest, convenience, and necessity, requires each broadcast licensee to devote a reasonable percentage of his broadcast time to the presentation of programs dealing with issues of interest in the community served by the particular station."⁴¹²

174. As demonstrated by the conflicting evidence found in the record, reaching a conclusion as to whether or not Congress has mandated our retention of the fairness doctrine is a difficult determination. We believe it unnecessary, however, to reach a definitive conclusion on this matter given our determination to defer action concerning the fairness doctrine pending review by Congress of the record compiled in this proceeding.

VI. Conclusion

175. Based on the voluminous record compiled in this proceeding, our experience in administering the doctrine and our general expertise in broadcast regulation policy determinations, we believe that as a policy matter the fairness doctrine no longer serves the public interest. Moreover, the development of the information services marketplace makes unnecessary any governmentally imposed obligation to provide balanced coverage of controversial issues of public importance. Furthermore, we have found that far from serving its intended purpose, the doctrine has a chilling effect on broadcaster's speech. Accordingly, we have questioned the permissibility of the doctrine as a matter of both policy and constitutional law.

176. Notwithstanding these conclusions, we have decided not to

⁴⁰⁹ *Id.* at 28.

⁴¹⁰ *Id.* at 29.

⁴¹¹ *Staff Report of the Senate Committee on Commerce*, 90th. Cong., 2d Sess. 4 (Comm. Print. 1968).

⁴¹² *Id.*

eliminate the fairness doctrine at this time. The doctrine has been a longstanding administrative policy and a central tenet of broadcast regulation in which Congress has shown a strong although often ambivalent interest. Indeed, while Congress has not yet chosen to eliminate the doctrine legislatively, several members of Congress have recently sponsored bills seeking to abolish the fairness doctrine and its related policies.⁴¹³ Congress also has held hearings to determine whether or not it should enact legislation to eliminate the doctrine.⁴¹⁴ In addition, we recognize that the United States Supreme Court in *FCC v. League of Women Voters of California*⁴¹⁵ has similarly demonstrated an interest in our examination of the constitutional and policy implications underlying the fairness doctrine. Because of the intense Congressional interest in the fairness doctrine and the pendency of legislative proposals, we have determined that it would be inappropriate at this time to eliminate the fairness doctrine. Given our decision to defer to Congress on this matter, we also believe that it would be inappropriate for us to act on the various proposals to modify or restrict the scope of the fairness doctrine. It is also important to emphasize that we will continue to administer and enforce the fairness doctrine obligations of broadcasters and to underscore our expectation that broadcast licensees will continue to satisfy these requirements.

177. Accordingly, IT IS ORDERED, THAT this proceeding IS TERMINATED.

178. IT IS FURTHER ORDERED, THAT the motions requesting acceptance of late-filed pleadings ARE GRANTED.

179. IT IS FURTHER ORDERED, THAT the "Application for Review" filed by the Media Access Project is DENIED.

180. IT IS FURTHER ORDERED, THAT the Secretary SHALL CAUSE this *Report* to be printed in the Federal Communications Commission Reports.

⁴¹³ See, e.g., S.1038, 99th Cong., 1st Sess. (1985); S. 22, 99th Cong., 1st Sess. (1985); H.R. 5585, 97th Cong., 2d Sess. (1982); and S. 22, 98th Cong., 1st Sess. (1983).

⁴¹⁴ See, e.g., *Freedom of Expression Act of 1983: Hearings on S.1917 Before the Committee on Commerce, Science, and Transportation*, 98th Cong., 2d Sess. (1984). Senator Bob Packwood also requested that a staff report prepared by the National Telecommunications and Information Administration be printed for use by the Senate Committee on Commerce, Science, and Transportation. *Print and Electronic Media: The Case for First Amendment Parity Printed at the Direction of Senator Bob Packwood for the Committee on Commerce, Science, and Transportation*, 98th Cong., 1st Sess. (1983). This study examined in detail whether there should be first amendment parity between the print and electronic media.

⁴¹⁵ 104 S.Ct. 3106 (1984). See ¶ 15, *supra*.

181. IT IS FURTHER ORDERED, THAT the Secretary SHALL FORWARD copies of this *Report* to the appropriate Committees and Subcommittees of the House of Representatives and the Senate.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix

Parties Submitting Formal Comments in Gen. Docket No.

*84-282**

Accuracy in Media

American Advertising Foundation

American Association of Advertising Agencies

American Broadcasting Co. ("ABC")

American Cancer Society

American Civil Liberties Union ("ACLU")

American Heart Association

American Jewish Committee

American Jewish Congress

American Legal Foundation ("ALF")

American Newspaper Publishers Association

Antidefamation League of the B'nai B'rith

Arizona Television Co.

Ashville Musicians and Artists for a Sane Environment

Association of National Advertisers

Black Citizens for a Fair Media/Citizens Communications Center/League of
United Latin American Citizens/National Association of Better Broadcasting

*For purposes of compiling this list of parties filing comments and reply comments, a filing was considered "formal" if it included the correct docket number and the proper number of copies were submitted.

("BCFM et. al.")
CBS, Inc. ("CBS")
Committee for Community Access
Common Cause
Democratic National Committee
Eagle Forum
Elba Development Corp/Multimedia, Inc. and Providence Journal Co.
Forward Communications Co., *et al.*
Foundation for the Arts of Peace
Freedom of Expression Foundation ("FEF")
General Motors/International Paper Co./Campbell Ewald Co. ("General Motors *et al.*")
Henry Geller/Donna Lampert
Glass Packaging Institute
Robert C. Greene
KGRL 940 (Gary Capps)
KIPR 95.FM
KMAN (B. Thornton)
Pamela Magasich
Maine Nuclear Referendum Committee
Luther Martin
Media Action Project Telecommunications Research and Action Center
("MAP/TRAC")
Meredith Corp.
Midwest Family Group
Mobil Corp.
National Association of Broadcaster ("NAB")
National Broadcasting Co. ("NBC")
National Cable Television Association
National League of Cities
National Radio Broadcasters Association
National Rifle Association of American
National Telecommunications and Information Administration ("NTIA")
People for the American Way
Post-Newsweek
Public Broadcasting Service and National Association of Public Television

Stations

Public Media Center

Radio Television News Director Association

Society of Professional Journalists

Tribune Broadcasting Co.

United States Catholic Conference

Office of Communications of the United Church of Christ

Westinghouse Broadcasting and Cable ("Group W")

Yes to Stop Calloway Committee

*Parties Submitting Formal Reply Comments*Actors Equity Guild *et. al.*

American Arab Anti-Discrimination Committee

ABC

ACLU

American Federation of Labor and Congress of Industrial Organizations

ALF

Authors League of American

Byron Bailer

Toni Bean

BCFM, *et al.*

Eric Buchanan

Deborah Bynum

Laura Byrd

CBS

Center for Science in the Public Interest

Sharon Chambers

Choosing Our Future

Committee for Responsible Investment, Medical Mission Sisters

Department for Professional Employees, AFL-CIO

Ecumedia

Donise Edwards

Janis Ernst

Cheryl N. Freeman

FEF

Alyce F. Gaither

Henry Geller/Donna Lampert

General Motors *et al.*
Sidney Hall
John Harvey Kentucky Fair Tax Coalition
Catherine LaMarr
Andrew Lee
Mark Loud
Shari Mauney
MAP/TRAC
NAB
National Bar Association/National Association for the Advancement of Colored
People
NBC
National Coalition to Ban Handguns
NTIA
Kay Pierson
Robert Rivers
Rhonda Rhea
Rosemary Ryan, M.D. *et al.*
Safe Energy Alliance of Alabama
Jennifer Small
United States Catholic Conference
United States Public Interest and Research Group
Telecommunications Research and Action Center
Cheryl Thompson
Laurie Washington
Group W
Yvette Williams

August 7, 1985

STATEMENT OF MARK S. FOWLER, CHAIRMAN

Re: Fairness Doctrine Report

250 years ago this week, a publisher named John Peter Zenger was on trial. Zenger ran the Weekly Journal, a New York paper that had reprinted the letters of two Whig journalists who had argued in their essays for freedom of the press, that "freedom of speech is ever the symptom as well as the effect of good government." For this, and for being a critic of the British authorities, Zenger had been charged with seditious libel by the

102 F.C.C. 2d

Governor General of New York. He spent almost a year in jail awaiting trial. Although he was surely guilty under the prevailing laws at the time, the jury acquitted Zenger.

The lessons of the Zenger trial have never been lost on the United States, nor on this Commission. Today's report is linked to this country's tradition of people to criticize their government without recrimination or licensing.

Justice William O. Douglas foreshadowed this viewpoint in his own repudiation of the Fairness Doctrine 12 years ago. He said: "The Court . . . by endorsing the Fairness Doctrine sanctions a federal saddle on broadcast licensees that is agreeable to the traditions of nations that never have known freedom of press and that is tolerable in countries that do not have a written constitution containing prohibitions as absolute as those in the First Amendment."¹

This very week the British Broadcasting Corporation experienced a walk-out of its journalists. They did not strike over wages or seniority, but over the matter that concerns us today: their freedom of the broadcast press to cover a controversial issue of public importance in the manner they saw fit. Justice Douglas was right: there is a difference amongst the nations of this world that have a constitutional protection against restraints on press and those that, unhappily, do not.

So it is freedom, then, that is at the heart of this exemplary example of draftsmanship from the Mass Media Bureau. I have made the advancement of First Amendment rights an uppermost objective of my Chairmanship. I feel pride and satisfaction that we have a report that comprehensively reviews the operation and context of the Fairness Doctrine and considers the comments of all those who participated in our proceeding. It responds to the arguments of proponents and opponents of the Fairness Doctrine in a scholarly and responsible manner.

Today's report is an indictment of a misguided government policy. It is a recital of its shortcomings, both legal and practical. The First Amendment dictates: Choose between the right of the press to criticize freely and the authority of the government to channel that criticism. Today's order is a statement by this Commission that we should reverse course, and head ballistically toward liberty of the press for radio and television. Free speech and free government thrive together or they fail together. John

¹ *Columbia Broadcast System v. Democratic Nat'l Comm.*, 412 U.S. 94, 817-18 (1973) (concurring opinion).

Peter Zenger said that. William O. Douglas said that. And today, so do we.

August 7, 1985

Concurring Statement of FCC Commissioner James H. Quello

In re: Inquiry into the General Fairness Doctrine Obligations of Broadcast Licensees.

This *Report* contains a very well reasoned and persuasive indictment of the fairness doctrine. It presents conclusive evidence that the doctrine is unnecessary and that it does not further its purpose of encouraging the presentation of controversial issues of public importance. The *Report* strongly documents its ultimate conclusion that the fairness doctrine does not serve the public interest, and I fully support that conclusion.

I wish to emphasize, however, my determination that this record compels the conclusion that Congress intended to codify the fairness doctrine as part of the 1959 amendments to the Communications Act.¹ The Commission has long acquiesced in the view that the fairness doctrine was codified by these amendments,² and, thus, the burden of proof must rest with those who would urge that the agency itself has authority to eliminate the doctrine. In my view, nothing in the record contradicts the clear language of section 315(a) which states that licensees have an "obligation imposed upon them under [the Communications Act] to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."³

Since I believe that the doctrine has been codified, I concur in the decision to defer to Congress on this matter.

¹ See Act of September 14, 1959, Pub.L. No. 86-274, § 1, 73 Stat. 557 (amending 47 U.S.C. § 315(a) (1952)).

² See, e.g., *Fairness Report*, 48 F.C.C.2d 1, 1 (1974).

³ 47 U.S.C. § 315(a) (1984).

Application, Amendment of, Change of Ownership
 Application, Amendment of, Effect on Pending Application
 Application, Amendment of, Substantial Change
 Change, Major
 Ownership Changes

Review Board reversed ALJ's return of application to processing line as result of an amendment showing a change in ownership. Under Sec. 73.357(b) (as amended), changes in ownership interests do not constitute "major" changes unless they result in the original parties to the application retaining 50% or less of the ownership interests.

—*International B/c Consultants, Inc.*

MM Docket No. 84-157

FCC 85R-73

**BEFORE THE
 FEDERAL COMMUNICATIONS COMMISSION**

WASHINGTON, D.C. 20554

In re Applications of

International Broadcast Consultants, Inc.
 Gardnerville, Nevada

MM Docket
 No. 84-157
 File No.
 BP-811015AJ

Alegria I, Inc. Marina, California

MM Docket
 No. 84-159
 File No.
 BP-811015AJ

Elizabeth Waters, Phyllis Moore,
 Gloria McKinley and Verna Rolls,
 d/b/a Heritage Communications
 Yountville, California

MM Docket
 No. 84-160
 File No.
 BP-811015AK

For Construction Permit
 for a New AM Station