Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Repeal or Modification of the	)	MM Docket No. 83-484
Personal Attack and Political Editorial Rules	)	

ORDER AND REQUEST TO UPDATE RECORD

Adopted: October 3, 2000 **Released:** October 4, 2000

By the Commission: Commissioners Furchtgott-Roth and Powell dissenting and issuing separate statements

I. INTRODUCTION AND BACKGROUND

1. In this *Order and Request to Update Record*, issued in response to the D.C. Circuit Court of Appeals' (D.C. Circuit) decision in *Radio-Television News Directors Ass'n v. FCC* (*RTNDA*),[1] we suspend the political editorial and personal attack rules[2] for 60 days to enable us to obtain a better record on which to review the rules. The court recognized that we considered the record previously before us to be "old and possibly flawed" and encouraged us to "consider modern factual and legal developments."[3] This brief suspension, which we hope will provide useful data on the effect of the rules, will allow us "to work from a relatively clean procedural slate," as the court suggested.[4] In addition, we take this opportunity to make clear that much of the discussion in *Syracuse Peace Council*[5] accompanying the Commission's repeal of the fairness doctrine has been repudiated. We also ask those parties to this proceeding who believe that it is not possible to "distinguish[] political editorials and personal attacks …

[1] 184 F.3d 872 (1999).

[2] The political editorial rule provides that, if the licensee of a broadcast station runs an editorial supporting a legally qualified candidate for an elective office, the licensee must inform all other qualified candidates of the editorial and provide a reasonable opportunity for those candidates to respond. 47 C.F.R. § 73.1930. The personal attack rule provides that, if an attack is made on someone's integrity during a presentation of views on a controversial issue of public importance, the licensee must inform that person or group of the attack and provide a reasonable opportunity to respond. *Id*. § 73.1920. These rules as they apply to cable television system operators are also within the scope of this proceeding. The cable rules appear at 47 C.F.R. § 76.209(b), (c), and (d).

[3] 184 F.3d at 887 n.20 & 888 n.23.

[4] *Id*. at 888 n.23.

[5] Syracuse Peace Council against Television Station WTVH Syracuse, New York, *Memorandum Opinion and* Order, 2 FCC Rcd 5043 (1987) (*Syracuse Peace Council*), *recon. denied*, 3 FCC Rcd 2035 (1988), *aff'd sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

from subjects formerly covered by the fairness doctrine"[6] to consider whether the rules at issue should be extended to cover matters that previously were subject to the fairness doctrine.

2. The lengthy history of this proceeding was summarized by the D.C. Circuit last year in its opinion in *RTNDA*. In 1983, after the National Association of Broadcasters (NAB) filed a petition asking the Commission to repeal the political editorial and personal attack rules, the Commission issued a Notice of Proposed Rulemaking proposing to repeal or modify the rules.[7] The Commission subsequently stopped enforcing the related fairness doctrine in 1987 in *Syracuse Peace Council.* For nearly a decade after the repeal of the fairness doctrine, the Radio-Television News Directors Association (RTNDA) and the NAB ("the Broadcasters") did not vigorously press their attack on the political editorial and personal attack rules, but they renewed their challenge in 1996. Since then, the Commission has spent a considerable amount of time on this proceeding, but has twice deadlocked, despite significant changes in membership.[8]

3. After the second deadlock, the D.C. Circuit considered the Broadcasters' arguments concerning the validity of the rules. As a threshold matter, the court rejected the Broadcasters' contention that the Joint Statement of the two commissioners favoring retention of the rules should not be accorded deference as the decision of the Commission.[9] To the contrary, the court held that "a deadlocked vote on a proposal to repeal a rule constitutes reviewable, final agency action in support of the status quo," and that it was appropriate to "accord the Joint Statement the same respect normally accorded agency decisions in rulemaking proceedings."[10] The D.C. Circuit also rejected the Broadcasters' principal argument on the merits, which was that "the *Syracuse* order of its own force drags the political editorial and personal attack rules down with the fairness doctrine to which they were moored."[11] Rather, the court explained, in agreement with the Joint Statement, "there is nothing inherently inconsistent about preserving the two challenged rules despite abrogation of the fairness doctrine."[12] The court also declined to review the Broadcasters' contention that the rules unlawfully

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[6] 184 F.3d at 885.

[7] In the Matter of Repeal or Modification of the Personal Attack and Political Editorial Rules, MM Docket No. 83-484, *Notice of Proposed Rulemaking*, 48 Fed. Reg. 28295 (1983) (*1983 Notice*). The *1983 Notice* also sought comment on these rules as they apply to cable television system operators. *Id*. at 28301, n.31. The suspension adopted herein will apply to the cable as well as the broadcast rules and we welcome comments on the rules as they apply to cable operators as well as broadcasters.

[8] *See* Commission Proceeding Regarding the Personal Attack and Political Editorial Rules, *Public Notice*, 13 FCC Rcd 11809 (1998); Commission Proceeding Regarding the Personal Attack and Political Editorial Rules, *Public Notice*, 12 FCC Rcd 11956 (1997).

[9] On June 22, 1998, the Commission issued a Public Notice announcing a tie vote, with Chairman Kennard not participating, on whether to grant or deny repeal or modification of the rules. The Public Notice was accompanied by the Joint Statement of Commissioners Susan Ness and Gloria Tristani upholding the rules, and the Joint Statement of Commissioners Michael Powell and Harold Furchtgott-Roth repealing the rules. Commission Proceeding Regarding the Personal Attack and Political Editorial Rules, *Public Notice*, 13 FCC Rcd 21901 (1998).

[10] 184 F.3d at 880.

[11] *Id*. at 878.

[12] *Id*. at 887.

"chill protected expression, impose undue administrative burdens on broadcasters, and have been rendered obsolete by the proliferation of new media technologies and outlets."[13] At the same time, the court assumed that the rules "interfere with editorial judgment" to some extent, even though the record was not entirely clear on the extent of that interference.[14]

4. After rejecting the Broadcasters' principal argument, the court remanded the matter to the Commission, explaining that the Joint Statement had failed to square the rationale underlying the Commission's decision to repeal the fairness doctrine with the retention of the rules at issue. Generally, the court said that, "[a]fter 1987, the instant rulemaking should have involved distinguishing political editorials and personal attacks, which are regulated, from subjects formerly covered by the fairness doctrine but that have been deregulated, such as non-editorial political commentary, editorials on political issues aside from candidate endorsements, and non-personal attacks." The court found, however, that the Joint Statement was "mostly silent on this salient question, choosing instead to rebut specific attacks against the rules."[15] More specifically, the court noted that "the Joint Statement recognizes that the current rules are broader than their rationales suggest," explaining, for example, that "the fact that a national news network rarely covers local state assembly races may explain why a right of reply is necessary on a local network affiliate for a state assembly candidate maligned by that affiliate, but it does not follow that the local affiliate must also be the venue for a right of reply involving a presidential candidate."[16]

5. In addition, the court noted that, although the Joint Statement criticized the Broadcasters for relying on "old and possibly flawed data to show a chilling effect on editorializing, the FCC offered no updated or more credible information to the contrary."[17] Recognizing the staleness of the record, the court encouraged the Commission "to work from a relatively clean procedural slate, consider modern factual and legal developments, and obtain comments on specific proposals to modify the rules."[18] The court thus urged the Commission "to supplement its analysis" with evidence superior to that which had previously been supplied.[19] The court closed its opinion by directing the Commission to "act expeditiously."[20]

II. DISCUSSION

6. We have been struggling to implement the court's decision. This has been difficult because, as the court recognized, the Chairman had recused himself from this proceeding, two

[13] *Id*. at 881.

[14] *Id*.

[15] *Id*. at 885.

[16] *Id*. at 886 & n.17.

[17] *Id*. at 887 n.20.

[18] *Id*. at 888 n.23.

[19] *Id*. at 888.

[20] *Id*. at 889.

commissioners would repeal the rules, and the two remaining commissioners have authority to defend "the status quo" but questionable authority to take affirmative steps such as initiating a new rulemaking proceeding or proposing modifications of the rules.[21] In response to a petition filed by the Broadcasters seeking recall of the mandate or the issuance of a writ of mandamus, the D.C. Circuit on July 24, 2000, ordered that the petition be held in abeyance until September 29, 2000, while inviting the Broadcasters to "supplement their requests and seek whatever action they deem appropriate from the court" if the Commission has not acted by that date.[22] We understand, and share, the court's apparent frustration with the Commission's inability to resolve this matter.

7. On account of the continuing deadlock, the Chairman decided, after the court's order of July 24, to participate in this matter for the purpose of initiating a proceeding to update the record. The existing record is stale and devoid of empirical evidence, except for the 1982 survey criticized in the Joint Statement. In fairness to the Broadcasters, it is difficult to see how they could present evidence that is not susceptible to criticism that it is biased and self-serving, while the rules are in effect, concerning what they would do if the rules were not in effect. To develop a better record, therefore, we have decided to suspend the rules for 60 days following the adoption of this *Order* to create a better record upon which to review the rules at issue. Of course, elections will be held during the 60-day period, making it an ideal time to determine how broadcasters are affected by the political editorial rule. While less obvious, it is also an ideal time to obtain evidence regarding the effect of the personal attack rule, which was established in a series of cases in the early 1960s involving personal attacks on candidates and elected officials.[23]

8. If the Broadcasters intend to continue to challenge the rules, we request they present evidence 60 days after the suspension ends reporting on their actions while the rules were suspended, addressing how that evidence supports their contention.[24] For example, the Broadcasters have contended that elimination of the political editorial rule would lead to a dramatic increase in the number of editorials broadcasters present, on account of the alleged chilling effect of the rules. Suspension of the rule will permit us to test that prediction, and we request the Broadcasters to supply us with the information necessary to do so. More specifically, we will want information on the number of political editorials run during the suspension of the rules and comparative information concerning the number of editorials run during prior election cycles. To respond to the court's concerns, we also will need information concerning the nature of the elections on which licensees editorialize: are they, for example, state assembly races or the presidential election?[25] Whether other media outlets editorialized on these races would also be useful in determining whether the rules should be modified rather than eliminated or retained in full. For example, using the D.C. Circuit's example, it is possible that a right of reply may be warranted in state assembly races but not in presidential elections because the relative merits of the presidential candidates will be thoroughly aired by the media in any event but the relative merits of state

[21] *See* i*d*. at 880.

[22] *Radio-Television News Directors Association and National Association of Broadcasters v. FCC*, No. 98-1305 (D.C. Cir. July 24, 2000).

[23] *See, e.g.*, *Clayton Mapoles*, 23 RR 586 (1962).

[24] Parties will also have an opportunity to submit replies 15 days later.

[25] *See* 184 F.3d at 886 n.17.

assembly candidates will not be discussed by the media in any detail.

9. We ask the Broadcasters to present evidence relevant to the court's other concerns as well. For example, with respect to the political editorial rule, the court stated that "[i]f broadcasters want to use public resources overtly to push a private agenda by advocating a result in an election, a right of reply might be a minimally intrusive means of countering a licensee's government-granted monopoly on access to the resource," but questioned whether the same could not be said concerning "editorial[s] about tax policy," and directed us "to explain why editorials about candidates are particularly appropriate subjects for regulation."[26] To respond to the court's concerns, we need information concerning broadcasters' editorial practices more generally. Among other things, we are interested in whether and the extent to which broadcasters editorialize on topics unrelated to political campaigns and whether the rate of such editorials is increasing or decreasing. We also seek information regarding the factors relevant to a broadcaster's decision to editorialize. The Broadcasters are in the best position to provide such information and we expect them to do so.

10. In addition to providing information responsive to the court's concerns, we ask the Broadcasters to provide information relevant to issues raised in our prior decisions. For example, in their Joint Statement, Commissioners Ness and Tristani indicated their willingness to consider modifying the political editorial rule such that it might shift the burden to the candidates to request time from the station or "would only trigger an obligation to furnish time to major candidates or major party supporters."[27] A modification to include only major candidates or major party supporters would be consistent with the Supreme Court's recognition in *Arkansas Educational Television Ass'n v. Forbes*,[28] that broadcasters may in good faith decide that in some cases the inclusion of third-party candidates in debates detracts from their usefulness. These modifications also would be responsive to the Broadcasters' claims that the rule is burdensome, because it would reduce the burden. In any event, we ask the Broadcasters to report whether those licensees who editorialize while the rules are suspended decide to offer response time to some candidates but not others. We hope that parties will provide as objective and useful information as possible.

11. With respect to the personal attack rule, the Broadcasters similarly should attempt to obtain information that will be useful in evaluating the effect of the rule. However, we ask broadcasters to collect information regarding complaints concerning personal attacks that are received while the rule is suspended, and to compare the number and nature of the complaints made during those 60 days to a comparable period while the rule was in effect. We seek comment on ways that any undue burdens caused by the rule could be reduced. To assist us in evaluating whether the personal attack rule is overly burdensome, as argued by the Broadcasters, we seek information on what steps broadcasters take to comply with the notification requirements. For example, in their Joint Statement, Commissioners Ness and Tristani indicated their willingness to consider modifying the personal attack rule to eliminate the existing notification requirements and make the rule request-driven.[29]

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[26] 184 F.3d at 884 & n.13.

[27] Joint Statement of Commissioner Susan Ness and Commissioner Gloria Tristani, 13 FCC Rcd at 21917, ¶ 39.

[28] 523 U.S. 666 (1998).

[29] Joint Statement of Commissioner Susan Ness and Commissioner Gloria Tristani, 13 FCC Rcd at 21921, ¶ 50.

12. We encourage those groups that have advocated retention of the rule to do the same – that is, to collect evidence relating to personal attacks that they would have challenged had the rule not been suspended. In that connection, we note that some parties have argued that the rule should be expanded to cover situations to which it does not currently apply, and we would welcome any information regarding personal attacks made, for example, during "bona fide news interviews," which currently are not subject to the rule.[30] In addition, we would be particularly interested in learning of personal attacks made in connection with the upcoming elections.

13. In responding to this *Order*, we encourage the parties to present the sort of careful analysis the D.C. Circuit expects. Although we cannot rule out the possibility that the rules will be retained exactly as written or eliminated entirely, we believe we would profit most at this point from hearing arguments directed to how the rules should be modified to achieve their fundamental purposes with minimal burden, consistent with the D.C. Circuit's opinion in this case and our decisions in other cases.

14. Some parties, however, may contend that it is not possible to "distinguish[] political editorials and personal attacks … from subjects formerly covered by the fairness doctrine."[31] For that reason, we ask the Broadcasters, at the time they file their report on their actions while the rules were suspended, to report also on the effects of the repeal of the fairness doctrine, and we will invite the other parties to respond to that report. In last year's opinion, the D.C. Circuit described *Syracuse Peace Council* as "agency precedent for declining to use the FCC's power to redress a market failure in provision of balanced coverage of important issues," and directed us to provide "clear, cogent explanations" for requiring a right of reply in some situations but not others.[32] Previously, on account of our deadlock, we have been constrained to consider how to reconcile the political editorial and personal attack rules with our decision in *Syracuse Peace Council*. In that connection, those parties who believe that Section 315 of the Communications Act, as amended,[33] requires the Commission to enforce some obligation on broadcasters "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance" should comment on how their reading of the statute bears on the issues before us.

15. We therefore invite the Broadcasters, and the other parties as well, to consider the court's various statements to the effect that it is difficult to distinguish political editorials and personal attacks from "many issues of public concern,"[34] and to address whether it would be appropriate to extend the reach of the rules at issue. For example, the court noted that "a network has more freedom to endorse a ballot initiative than to endorse a candidate championing such an initiative," and concluded that "[t]he FCC has not articulated a basis for the distinction."[35] If those issues may not be distinguished on a

[30] 47 C.F.R. § 73.1920(b)(4).

[31] 184 F.3d at 885.

[32] *Id*. at 886.

[33] 47 U.S.C. § 315.

[34] 184 F.3d at 884.

[35] *Id*. at 884 n.13.

principled basis, it may be that a right of reply is warranted in both cases. In addition, we encourage the parties to consider whether the D.C. Circuit has identified a distinction between local and national issues that we ought to examine in more detail.[36] That is, as explained in the Joint Statement, the explosion in media outlets relied upon in *Syracuse Peace Council*, and particularly its reliance on cable channels, may be relevant to national issues but not to local issues.[37]

16. We do not intend to prejudge that or any other issue. Rather, while suspending the political editorial and personal attack rules, we ask the Broadcasters to report to us on the various matters discussed in this *Order*. With a fresh record, we will consider how to reconcile our decision in *Syracuse Peace Council* with the rules at issue. It is possible that we will decide to modify the rules at issue, or to modify our decision in *Syracuse Peace Council*, or both.

17. In that regard, it is appropriate to make clear that the dicta in *Syracuse Peace Council* regarding the appropriate level of First Amendment scrutiny has been rejected by Congress, this Commission, and the courts. Although the Commission based its decision in *Syracuse Peace Council* largely on its view that the standard of *Red Lion Broadcasting Co. v. FCC*[38] should be abandoned, the D.C. Circuit did not affirm on that basis.[39] Subsequently, in enacting the Children's Television Act of 1990 (CTA), Congress made clear that broadcasters should be subject to public interest obligations reviewed under the *Red Lion* standard,[40] and Congress's views on that matter are entitled to "great weight."[41] The Commission agreed that *Red Lion* sets the appropriate standard of review, as it made clear in its Order implementing the CTA, which expressly repudiated the dicta from *Syracuse Peace Council*.[42] Moreover, the D.C. Circuit not only applied but extended *Red Lion* in 1996 in *Time Warner Entertainment Co. v. FCC*.[43] In that case, the court upheld under the *Red Lion* standard the constitutionality of Section 335 of the Communications Act, as amended,[44] which requires operators of direct broadcast satellite (DBS) systems to set aside at least four percent of their channels for noncommercial educational programming.[45]

18. The fundamental error of the Commission's decision in the portion of *Syracuse Peace*

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[36] *See, e.g., id*. at 886 n.17 (distinguishing state assembly races from presidential elections).

[37] Joint Statement of Commissioner Susan Ness and Commissioner Gloria Tristani, 13 FCC Rcd at 21924, ¶ 59.

[38] 395 U.S. 367 (1969).

[39] *See Syracuse Peace Council v. FCC*, 867 F.2d at 682 & n.10 (Starr, J., concurring).

[40] S. Rep. No. 227, 101st Cong., 1st Sess. 10-11 (1989).

[41] *CBS v. DNC*, 412 U.S. 94, 102 (1973).

[42] *See* In the Matter of Policies and Rules Concerning Children's Television Programming, MM Docket No. 93-48, *Report and Order*, 11 FCC Rcd 10660, 10728-32 ¶¶ 146-56 (1996).

[43] 93 F.3d 957 (1996).

[44] 47 U.S.C. § 335.

[45] 93 F.3d at 975.

Council that has been repudiated was its confusion of the rationale underlying the fairness doctrine with the basis for public interest regulation of the broadcast spectrum. The fairness doctrine originated at a time when there were only three major television networks, and the proliferation of television stations and the development of cable television reasonably led the Commission to reevaluate the need for the fairness doctrine. The standard of *Red Lion*, however, was not based on the absolute number of media outlets, but on the fact that the spectrum is a public resource and "there are substantially more individuals who want to broadcast than there are frequencies to allocate."[46] As both the U.S. Supreme Court and the D.C. Circuit have explained, "[a] licensed broadcaster is 'granted the free and exclusive use of a valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.'"[47] The D.C. Circuit explained in remanding the political editorial and personal attack rules that application of the *Red Lion* standard does not mean that any particular obligation is therefore warranted. Rather, the Commission must provide a reasonable explanation as to why it chooses to impose certain public interest obligations and not others. But the long-standing basis for the regulation of broadcasting is that "the radio spectrum simply is not large enough to accommodate everybody."[48] Under our Nation's system for allocating spectrum, some are granted the "exclusive use" of a portion of this "public domain," even though others would use it if they could.[49] That is why "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish."[50]

19. Congress has directed us to ensure that broadcasters granted the exclusive use of a particular frequency serve the public interest.[51] Or, as the D.C. Circuit put it in this case, a broadcaster holds a "government-granted monopoly,"[52] and we are required by statute to ensure that the public receives a fair return from each broadcaster for its use of that public resource. Unlike the DBS operator in *Time Warner*, who was required both to pay millions of dollars for the spectrum it won at auction and to set aside at least four percent of its capacity for noncommercial educational programming, broadcasters have obtained their spectrum for free and are not subject to such a set-aside requirement. We therefore request the parties to address this difference in treatment.

20. Under the relevant constitutional standard, a key factor in deciding whether to retain the rules at issue here or impose any other requirement is the extent to which the requirement interferes with the editorial judgment of broadcasters. As the U.S. Supreme Court has repeatedly recognized, the Commission has long "'walk[ed] a tightrope'" designed to permit broadcasters "to exercise 'the widest

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[46] 395 U.S. at 388.

[47] *CBS v. FCC*, 453 U.S. 367, 395 (1981) (quoting *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966)).

[48] *NBC v. FCC*, 319 U.S. 190, 213 (1943); *see id*. at 226 ("Unlike other modes of expression, radio inherently is not available to all").

[49] *CBS v. FCC*, 453 U.S. at 395.

[50] *Red Lion*, 395 U.S. at 388.

[51] *See* 47 U.S.C. § 309(a) (broadcast applications); §309(k)(1)(A) (renewals).

[52] 184 F.3d at 884.

journalistic freedom consistent with'" the principle that it is "'the right of the viewers and listeners, not the right of the broadcasters which is paramount.'"[53] In this case, as explained above, the D.C. Circuit assumed that the rules at issue burden broadcasters to some extent, recognized that the Joint Statement had criticized the evidence previously presented on that point by the Broadcasters, but noted that the Commission had "offered no updated or more credible information."[54] A temporary suspension of the rules at issue, coupled with a proceeding that considers the other issues raised in this *Order*, should help us to respond to the court's concerns.

III. ADMINISTRATIVE MATTERS

21. *Request to Update Record.* Parties submitting evidence on the effect of the suspension of the rules as discussed above should submit such evidence 60 days after the suspension ends, and replies should be submitted 75 days after the suspension ends. Information may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24,121 (1998).

22. Information filed through the ECFS can be sent as an electronic file via the Internet to http://www.fcc.gov/e-file/ecfs.html. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, parties must transmit one electronic copy of the evidence to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, parties should include their full name, postal service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail information, parties should send e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form, <your e-mail address>." A sample form and directions will be sent in reply.

23. Parties who choose to file by paper should also submit information on diskette. These diskettes should be submitted to: Wanda Hardy, 445 Twelfth Street, S.W., Room 2-C221, Washington D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using WORD 97 or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the party's name, proceeding (including the docket number (MM Docket No. 83-484), type of pleading, date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase: "Disk Copy – Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, parties must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 445 Twelfth Street, S.W., Room CY-B402, Washington, D.C. 20554.

24. *Ex Parte Rules*. This proceeding will be treated as a "permit-but-disclose" proceeding, subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the rules, 47 C.F.R. § 1.1206(b), as revised. *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely

[53] *CBS v. FCC*, 435 U.S. at 394, 395 (quoting *CBS v. DNC*, 412 U.S. at 117, 110 and *Red Lion*, 395 U.S. at 390).

[54] 184 F.3d at 881, 887 n.20.

a listing of the subjects discussed. More than a one or two sentence description or the views and arguments presented is generally required. 47 C.F.R. § 1.1206(b)(2), as revised. Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b) of the Commission's rules.

25. *Initial Paperwork Reduction Act Analysis*. The actions taken in this *Order and Request to Update Record* have been analyzed with respect to the Paperwork Reduction Act of 1995 (PRA), and found to request new or modified reporting or recordkeeping by the public. It will be submitted to the Office of Management and Budget for emergency review under Section 3507 of the PRA.

26. *Additional Information*. For additional information on this proceeding, please contact Cyndi Thomas, Legal Branch, Policy and Rules Division, Mass Media Bureau, (202) 418-2130.

IV. ORDERING CLAUSES

27. Authority for issuance of this *Order and Request to Update Record* is contained in Sections 4(i), 303 and 315 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, 315.

28. Accordingly, IT IS ORDERED that Sections 73.1920 and 73.1930 of the Commission's rules, 47 C.F.R. §§ 73.1920, 73.1930 (broadcast personal attack and political editorial rules), and Sections 76.209(b), (c), and (d) of the Commission's rules, 47 C.F.R. §§ 76.209(b), (c), (d), (cable personal attack and political editorial rules) ARE SUSPENDED upon the adoption date of this *Order and Request to Update Record* through December 2, 2000. This action is taken pursuant to Sections 4(i), 303 and 315 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, 315.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Separate Statement of Commissioner Harold W. Furchtgott-Roth, Dissenting

I dissent from this Order and Request to Update Record. I do so for all of the reasons discussed thoroughly and persuasively by Commissioner Powell, particularly his analysis of the Commission's attempt to change the framework of this debate by rejecting portions of the *Syracuse Peace Council* decision. *See* Separate Statement of Commissioner Michael K. Powell, Dissenting ("Powell"), at pages 7-11.[1] I write separately to add just a few points for the record.

I. The Timing of this Order

When this Order issues, over thirteen months will have elapsed since the Court of Appeals's most recent directive to the Commission in RTNDA and NAB's suit for relief from the personal attack and political editorial rules. To be sure, the Court was not definitive about what it meant by "expeditious[]" action, *RTNDA v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999), but I would venture to say that it certainly intended that we complete any further rulemaking on remand within the year.[2]

Today, however, the Commission merely calls for more information, without closing out the proceeding or even offering any tentative conclusions about what it might do with the rules in the future. There is no reason to think that this call to update the record will be any more effective in remediating agency deadlock and producing resolution of the proceeding than the last such call. After the 1996 public notice seeking more information, the Commission deadlocked twice more, and RTNDA/NAB was forced to file a second petition for a writ of mandamus. There being also no specified end date in this Order for the termination of this proceeding, there are no self-evident limits to the length of time by which the Commission might further delay resolution of this matter.

It is true, as this item repeatedly notes in an attempt to justify the continuation of the rulemaking, that the Court of Appeals contemplated the possibility of further proceedings. The Court also made clear, however, that further proceedings should be initiated not as ends in themselves but for the purpose of "implement[ing] [the Court's] mandate" that the Commission "provide an adequate justification for retaining the [rules]." *Id.* at 889. That justification, of course, has yet to be provided -- much less by September 29, 2000, the date by which, according to Court's July 2000 Order, the Commission had to act or petitioners would be entitled to seek immediate judicial relief.

Furthermore, the gridlock that the Commission claims prevented it from acting before this late hour is entirely fictitious. There was no prior impossibility of action, as the Order disingenuously suggests. As soon as the *RTNDA* opinion was handed down, those Commissioners voting for retention of the rules were on clear notice that they could undoubtedly satisfy the remand order by providing a better explanation for their decision not to repeal the rules against the backdrop of the 1983 NPRM, the

[1] Regardless of whether the Commission has successfully freed itself from the supposed "*dicta*" in that adjudicatory decision, it fails to deal with the broad precedent that underlies that case, the 1985 Fairness Report. The exhaustive findings of fact and public policy conclusions in that study are still controlling.

[2] Under section 404(h), the Commission is obligated "to forthwith give effect" to adverse court decisions. Although the Communications Act contains no definition of how long that might be, the Supreme Court has held, in a case arising under the Suits in Admiralty Act, that the statutory term "forthwith" is "indicative of a time far shorter than 120 days." *Henderson v. United States*, 517 U.S. 654, 661 (1996). Clearly, that deadline passed long ago.

Fairness Report, and the *Syracuse Peace Council*. There is no reason that such a statement could not have been drafted (that is, apart from the simple legal and logical difficulty of defending that position, but that is another matter). As far as I know, however, no such draft was ever attempted. Nor did anybody ever approach me about the possibility of a Commission Order to update the record or to do anything else until early September of this year.

In short, based on my personal observations and those of my staff, absolutely nothing happened at this Commission in connection with the remand until the Court of Appeals issued its July 2000 Order in response to petitioners' motion to recall the mandate. It is misleading to give the impression that the Commission diligently has "been struggling to implement the court's decision," *supra* at para. 8, since it was issued.

Commissioner Powell explains why it is not clear that a majority of the Commission was required to act on this matter. *See* Powell at pages 2-3. Even assuming that was the case, however, I must observe that the facts pertaining to the Chairman's recusal were exactly the same in August of 1999 as they are now. Indeed, the primary basis for his participation (the difficulty of reassigning the project to another employee, given the impossibility of reassigning voting authority [3]) has existed ever since the current Commission was convened. How this factor could "now [be of] controlling importance,"[4] as opposed to at the outset of our considerations or even when this Commission's deadlock first became apparent, puzzles me. The Chairman has always been a voting Commissioner, and the rest of us split 2-2 on the repeal of the rules over two years ago. He could have reversed his recusal a year ago on grounds identical to those that he now cites, and the Commission could easily have filed an Order completing any additional rulemaking and providing the requisite justification for the ultimate action taken with the Court well before today. As things now appear to stand, the Court of Appeals has twice heard argument and written two opinions and the parties have twice briefed their motions and appeared for argument[5] in an attempt to resolve a deadlocked case in which, as it now turns out, the Chairman could have participated all along.

This is the sort of extended administrative delay that can effectively deprive a party of its right to judicial review. If administrative agencies are permitted to respond to judicial orders for agency action simply by calling for more information, they can effectively postpone action *ad infinitum*. Whenever a significant period of time elapses after the issuance of a notice of proposed rulemaking, the agency will always be able to claim that the record is stale and that new information must be collected before it can proceed to decide the matter. Of course, the record will only need updating because the agency itself failed to take action while the comments submitted in response to its original notice were still fresh.

Thus, to allow the agency to collect information, shelve it for years, and then complain when pressed to resolve the proceeding that the information has gathered too much dust to be of use, is to allow the agency to manufacture a perpetual justification for the avoidance of final action. It is also to drain the "right of review" in the Administrative Procedure Act, *see* 5 U.S.C. section 702, of much of its force.

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[3] See Statement of FCC Chairman William E. Kennard Concerning his Participation in the Personal Attack and Personal Editorial Rule Proceeding (Sep. 18, 2000), <www.fcc.gov/speeches/kennard/statements/2000>.

[4] *Id.*

[5] *See In re Radio-Television News Directors Association and National Ass'n of Broadcasters*, 1998 WL 388796 (D.C. Cir. May 22, 1998); *RTNDA v. FCC*, 184 F.3d 872 (D.C. Cir. 1999).

Less committed and resourceful parties than RTNDA and NAB would have dropped this case long ago, given the sheer expense of the litigation. No party should have to go to the lengths that these entities have in order to obtain a judicially reviewable, *i.e.*, final, answer from this agency in response to a petition for rulemaking.

I understand the high standard for the issuance of a writ of mandamus or an order under section 402(h) of the Communications Act. But if ever there were a case that presented the requisite extraordinary circumstances for such action, I should think this was it. It seems to me that, twenty years since the original petition for rulemaking was filed and after the passing of numerous court-established deadlines for agency action of various sorts, petitioners are now entitled to resolution of their claims.

II. The Merits of this Order

As Commissioner Powell demonstrates, the Commission's approach of requiring broadcasters to document an increase in their political speech during an election period in order to build a record for regulatory relief raises troubling questions of "forced speech" under the First Amendment. *See* Powell at pages 6-7. I write to make a related but slightly different point -- namely, that the Order is premised on a fundamental misunderstanding of "chilling effects" under the First Amendment.

The Commission assumes that a cognizable chilling effect is demonstrated only by proof that, in the absence of rules that supposedly deter protected speech, more such speech would necessarily occur. *See* Order at para. 8 (seeking to "test" assertion of chilling effect with "information on the number of political editorials run during the suspension of the rules and comparative information concerning the number of editorials run during prior election cycles"). But the First Amendment goal of eliminating "chilling effects" is not limited to the affirmative production of more speech in quantifiable terms. Rather, the goal is to allow potential speakers to make free and unencumbered choices about speech. Thus, chilling effects do not create First Amendment harms only when, as the Commission erroneously suggests, society would inevitably have more speech if the chill were lifted. Chilling effects create harm simply by skewing individual decisions about speech, thereby decreasing the likelihood that people will engage in protected speech.

As the Supreme Court has explained, "the fact that [a] statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities." *FEC v. Massachusetts Citizens for Life, Inc*., 479 U.S. 238, 255 (1986). First Amendment jurisprudence has never required parties seeking to establish a free speech violation to prove that they will in fact engage in more speech if the chilling effects of the contested law are eliminated. It is enough that the law in question warps individual choices about speech and might deter speech in the aggregate.

This is the case for a simple but important reason: individuals, even those who challenge burdens on their speech, possess a corollary First Amendment freedom *not* to speak at all if they so choose. The Supreme Court has repeatedly established that free speech rights under the First Amendment include the freedom not to say anything at all. " 'The essential thrust of the First Amendment is to prohibit improper restraints on the voluntary public expression of ideas.... There is necessarily ... a concomitant freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.' " Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 559 (1985) (quoting Estate of Hemingway v. Random House, 244 N.E.2d 250, 255 (1968)); *see also Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (freedom of expression "includes both the right to speak freely and the right to refrain from speaking at all"). Contrary to the essential premise of the Commission's "test," an individual need not waive his right to public silence in order to establish his entitlement to be liberated from a

governmental rule that impinges upon his speech in other ways.

Apart from the above-described constitutional difficulty, there are also empirical problems with the information that the Commission seeks. Even if the comments to update the record ultimately reveal the same or lesser amount of editorial speech during the suspension period than at other times, that evidence would not in itself refute the existence of a chilling effect on broadcasters' editorial speech. There are many reasons other than the existence of the political editorial rule why broadcasters might choose not to editorialize about political candidates. To name but a few obvious examples, the groaning lack of mass market demand for such content or the concern that a station seeking to appeal to broad audiences might alienate viewers who hold a contrary view could mitigate against editorials. The rule, while unconstitutionally dampening incentives to editorialize, might operate in conjunction with such other entirely legitimate factors. Given this fact, any causal link between the suspension of the rules and the amount of editorial speech that occurs during that time will be virtually impossible to establish. Accordingly, I do not see that any useful inferences can be drawn from evidence showing more, less, or the same amount of political editorials during the 60-day suspension period than at other times.

Moreover, if one is serious about studying broadcasters' behavior in the absence of the rule, sixty days from the adoption of this Order is not a sufficient period of time in which to do so. Broadcasters schedule and plan their programming well in advance of its airing, and it may be too late for them to upend those plans now. Significant amounts of coverage of current campaigns have already occurred, as we are now only one month away from the elections, but this Order comes too late to cover that period. The proximity in time between the adoption of this Order and the election also means that, out of the 60-day period, only the next 30 or so days are pertinent to the study; the election will be over after that. In addition, it will take time for the Order to be published and for its contents to filter down to broadcasters nationwide. Then, after learning of their new duty to editorialize in order to sustain any hope of ultimate regulatory relief, broadcasters will have to organize political editorial responsibilities and assignments within their stations. Finding out about the new reporting duty and gearing up to engage in political editorials could take broadcasters longer than the approximately 30 days that now precede the election. For these reasons, the period of time in question does not give broadcasters sufficient notice to meaningfully respond to the Commission's request for proof of increased political editorializing during an election cycle.

On top of creating the constitutional and empirical problems discussed above, the Commission has the temerity to shift the burdens of proof and persuasion in this matter back to the broadcasters. *See, e.g.*, Order at para. 8 ("If the Broadcasters intend to continue to challenge the rules, we would request that they present evidence 60 days after the suspension ends reporting on their actions while the rules were suspended, addressing how that evidence supports their contention."). This action flouts the Court of Appeals' express holding that, under the circumstances of this case, it is the Commission that bears an affirmative burden of explaining how the rules promote the public interest. *See RTNDA*, 184 F.3d at 875 (defending the rules "by negative implication, rejecting attacks on the rules while assuming their underlying validity" might be adequate as a general matter "but not where the NPRM and subsequent FCC precedent frame the proceeding to require a persuasive rationale for rules that seem unnecessary"); *id*. at 881 ("[W]e reject the FCC's contention that petitioners bear the burden of explaining why the rules are not in the public interest. The FCC's attempt to minimize its burden might be appropriate" in other circumstances "[b]ut having initiated a rulemaking premised on the conclusion that the rules may not be in the public interest and then rejected a proposal to abrogate the rules, the FCC bears a burden of explanation.").

Finally, we likely will soon hear from the Commission in this litigation that the broadcasters'

case is moot or they lack standing to sue because the rules have been suspended. The suspension of the rules here is only temporary, however, and the Order makes plain that the rules will spring back into being at the close of the 60-day period, even before the further rulemaking is completed. *See supra* at para. 28. The rules thus will remain firmly in place while this matter is pending before the Commission; as noted above, given the absence in today's Order of any termination date for the proceeding, that could be quite a while. Surely this controversy over the validity of the rules is capable of repetition and of evading review as well. Indeed, I respectfully submit that ultimately renewing the rules while avoiding review for the time being is the very end of this temporary suspension, not the considered study of broadcasters' behavior during that period. RTNDA and NAB's litigation papers will only have to be refiled when the rules come back into effect – that is, if the Commission has not worn them down in the attrition mill of its processes by then.

* * *

To my mind, the cat-and-mouse game that this agency has played – and continues to play in this Order -- with these rules, the parties, and even the Court of Appeals, is unconscionable. By now, the Commission should and could have explained how it continues to find the rules to serve the public interest in light of relevant precedent. If that task has proven too difficult to carry out, then an honest reevaluation of the merit of the rules ought to have followed. Conversely, if the Commission truly believes in the merit of the rules, it should have stepped up and forthrightly made its best effort to demonstrate the reasons for that belief. But the Commission cannot go on shirking its duty to justify the rules when called upon to do so by aggrieved parties and the courts, while at the same time retaining them by persistent refusal to take final action in this proceeding.

Separate Statement of Commissioner Michael K. Powell, Dissenting

I cannot support this *Order and Request to Update Record* ("*Order*") for it is a day late, and a dollar short. I dissent for four reasons. First, the Commission, once again, has kicked the can down the road rather than substantively addressing the concerns pointedly raised by the rulemaking proceeding initiated in 1983. Second, despite the fact that over a year has passed since the D.C. Circuit Court of Appeals instructed the Commission to justify affirmatively and "expeditiously" the public interest benefits of the political editorial and personal attack rules, the Commission has still failed to do so. Third, the *Order* is inappropriately coercive, and will not significantly aid in addressing the court's concerns. And, fourth, I vigorously reject the Majority's unnecessary "clarification" of the Commission's First Amendment analysis in *Syracuse Peace Council*.[1] It is not relevant to the task at hand and it sweeps much more broadly than brushing aside dicta as it purports. For these reasons, on which I expand below, I must respectfully dissent.

A Day Late

As the *RTNDA* court recognized, this case has been marked by the FCC's "vacillation, delay and deadlock." *Radio-Television News Directors Ass'n v. FCC*, 184 F.3d 872, 886 (D.C. Cir. 1999) ("*RTNDA*"). I will not recount in detail the long and painful journey this proceeding has taken, but offer only this brief outline. The present rulemaking proceeding (MM Docket No. 83-484) was initiated 17 years ago. There have been two "petitions for expedited rulemakings" (one in 1987 and another in 1990), after which no Commission action was taken.[2] In September 1996, RTNDA was compelled to file an extraordinary petition for a *writ of mandamus* in the D.C. Circuit to force the Commission's hand. In response, the Mass Media Bureau (on delegated authority) requested parties to file "updated comments" in December 1996.[3] The court dismissed the *mandamus* petition "without prejudice. . . *should the [FCC] fail to make significant progress, within the next six months.*" *Radio-Television News Directors Ass'n*, No. 96-1338, 1997 WL 150084 (D.C. Cir. 1997) (emphasis added). That was three years ago. The four-member Commission deadlocked in 1997.[4]

In 1998, a second *mandamus* petition was filed, and the present Commission deadlocked as

[1] In re Complaint of Syracuse Peace Council Against Television Station WTVH, Syracuse, New York, FCC 87-266, *Memorandum Opinion & Order*, 2 FCC Rcd 5043 (1987), *aff'd*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

[2] The *Order* (¶ 2) incorrectly faults the Radio-Television News Directors Association ("RTNDA") and the National Association of Broadcasters ("NAB") for "not vigorously press[ing] their attack on the political editorial and personal attack rules" for "nearly a decade after the repeal of the fairness doctrine." While I fail to see the point of this statement, it is just plainly untrue, ignoring the 1987 and 1990 petitions.

[3] *Public Notice*, Updated Comments Invited Regarding the Personal Attack and Political Editorial Rules and Related Pleadings, DA 96-2159, 12 FCC Rcd 4688 (Dec. 19, 1996).

[4] *Public Notice*, 12 FCC Rcd 11956 (Aug. 8, 1997).

well.[5] The court chose to treat the effect of retaining the rules as final agency action, and directed Commissioners Ness and Tristani, who would retain the rules, to offer an explanatory statement upon which review could be had.[6] The court found their Joint Statement inadequate for meaningful review and remanded for more specific and comprehensive justification of the rules. The court warned "[g]iven its prior delay in this proceeding, the FCC need act expeditiously." *RTNDA*, 184 F.3d at 889 (citation omitted). It did not. Instead, after a year of non-action, RTNDA and NAB again had to go to court, this time filing, on July 5, 2000, a Motion to Recall the Mandate or for an Order or a *Writ of Mandamus* to Compel Agency Action. The court held the motion in abeyance through September 29, 2000, inviting the parties to supplement their requests and seek whatever action they deem appropriate from the court if the Commission did not act.[7] The result is this *Order* temporarily suspending the rules and seeking to refresh the record, promulgated over a year after the court's remand.

I am disturbed that given the backdrop of this case, and its public policy and constitutional import, the Commission has only now elected to proceed, and then only to refresh the record. The Majority's claim that it has been "struggling" to implement the court's decision, but believed it could not proceed because of the deadlock, is mystifying. For one, the court seemed to expect the Commission to provide a better explanation for maintaining the rules, irrespective of the split vote. It chose to treat the Joint Statement of Commissioners Ness and Tristani as final agency action. *Id.* at 880. It reviewed the decision with the deference normally afforded agency decisions, despite the petitioner's argument that the split decision was not entitled to such deference, and used "FCC" and "Joint Statement" interchangeably throughout its opinion. *See, e.g., id.* at 881. Furthermore, the court ordered the Commission to respond to its remand and averred that the Commission might reopen the record or begin a new proceeding, without any reason to assume the Commission would not remain divided or that the Chairman would participate. *Id.* at 888-89.[8] To suggest now that the Commission could not procedurally act disregards the court's findings and expectations.

Additionally, there was no reason to have assumed that the Commission would deadlock on a decision to refresh the record or initiate a new proceeding. While the Commission was split on the merits, given the record three years ago, it was by no means given that it would in fact have split over additional inquiry. Indeed, in 1996, when the Commission was also composed of only four members, it

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[5] *Public Notice*, 13 FCC Rcd 11809 (May 8, 1998). Though the Commission had five members at this point (four of whom were new), the Chairman had voluntarily recused himself, having personally worked on the matter as an attorney for the National Association of Broadcasters.

[6] *Radio-Television News Directors Ass'n*, No. 97-1528, 1998 WL 388796 (D.C. Cir. May 22, 1998) (unpublished opinion).

[7] *Radio-Television News Directors Ass'n & Nat'l Ass'n of Broadcasters v. FCC*, No. 98-1305 (D.C. Cir. July 24, 2000).

[8] Specifically, the court stated:

> The FCC retains discretion to commence a new rulemaking, or to reopen the record, to ensure that it fully accounts for relevant factual and legal developments since 1983, but is not compelled to do so. *In any event*, the FCC on remand *must* address *at least* the concerns it raised in its NPRM, the Fairness Report, and the Syracuse order, and *must* supplement its analysis with record evidence showing a fit between its policy preferences and the actual communications market in which the rules operate.

Id. (emphasis added, citation and footnote omitted).

was able to refresh the record (via a Bureau Public Notice), even though it too split over the merits of the case. In the year since the court's opinion, neither the Mass Media Bureau nor my colleagues proposed a new proceeding to me. I might have considered refreshing the record at a point in time and in a manner that afforded a real opportunity to address expeditiously the specifics of the court's remand. But, at the twilight of our generous grace period and based on this incomplete and hurried *Order*, I cannot now support today's "action."

Last, the Chairman could have rejoined the case a year ago, if his participation genuinely was necessary to move forward. The Chairman's stated reason for un-recusing himself, ten days before the court intended to proceed with RTNDA and NAB's motion, was that his participation was required to break the deadlock and allow the Commission to initiate this proceeding to refresh the record.[9] Assuming one accepts this premise given the court's treatment of the split Commission, it is still unfortunate that it took this long for him to rejoin the matter. In sum, given the importance of this case, the disturbingly long delay in reaching the merits, and the court's comprehensive decision a year ago, there is no excuse for not acting on these disputed rules by now.

This *Order* is a Dollar Short

It is obvious that today's action does not itself respond to the court's charge to affirmatively show why these rules are in the public interest. It is useful, however, to review the Commission's charge and take note of the stark contrast with today's modest step forward. In remanding the matter back for further explanation, the court made clear that the Commission bore the heavy burden of explanation, in sustaining these rules. *See RTNDA*, 184 F.3d at 881 ("having initiated a rulemaking premised on the conclusion that the rules may not be in the public interest and then rejected its own proposal to abrogate the rules, the FCC bears a burden of explanation") (citation omitted); *id.* at 885 ("the FCC's explanation for retention of the rules is inconsistent with prior FCC actions that set a very high standard for the deliberations").

To satisfy its burden, if it wished to retain the rules, the court insisted that the Commission explain "why the public would benefit from rules that raise . . . policy and constitutional doubts." *Id.* at 882. The policy doubts rightly stem from (1) the *Fairness Report*'s comprehensive evaluation of changes in the market that have produced substantial growth in the number of media outlets, *i.e.*, the number of voices in the marketplace of ideas; (2) the counterproductive chilling effect of the rules that actually quell the coverage of controversial subjects; and, (3) the degree of interference in the editorial judgments of broadcasters. *See Fairness Report*, 102 FCC 2d 142, 246 (1985). Based on its findings in that report, the Commission ultimately found the fairness doctrine was not in the public interest. *See Syracuse Peace Council*, 2 FCC Rcd 5043 (1987).

While the court held that the elimination of the fairness doctrine did not automatically invalidate the separately promulgated political editorial and personal attack rules, *RTNDA*, 184 F.3d at 879, it did make clear that the Commission is bound by the precedent "for declining to use the FCC's power to redress a market failure in provision of balanced coverage of important issues." *Id.* at 886. The court's

[9] I cast no aspersions on the merits of the Chairman's ethics decisions. The recusal decision is his alone to make. *See* Statement of William E. Kennard, Chairman, Federal Communications Commission, Concerning His Participation in the Personal Attack and Political Editorial Rule Proceeding (Sept. 18, 2000) [available at http://www.fcc.gov/speeches/kennard/statements/2000/stwek075.html].

opinion continually emphasized that the Commission must square its decision to retain these rules with the (1) *Fairness Report*, (2) the decision in *Syracuse Peace Council*, and (3) the concerns raised in the 1983 NPRM that nothing inherent in the nature of an editorial necessitates countervailing speech to ensure balanced debate, and that the rules' utility is questionable. S*ee id.* at 884, 886 ("[T]he agency must offer clear, cogent explanations for treating the two cases differently. It is not enough to note that one case is narrower than the other; there must be a reason why the more focused nature of the present rules shields them from the myriad defects that the FCC recognized in Syracuse.") (citation omitted). The court noted further that "the NPRM frames the rulemaking proceeding, such that failure to consider the concerns that animated the rulemaking casts doubt on the reasonableness of the agency's decisionmaking process." *Id.* at 884 n.16 (citation omitted). *See also id.* at 884 ("Most troubling is the fact that the Joint Statement ignores the concerns that the FCC raised in the NPRM about the rule's utility."). Additionally, the defense of the public interest benefits must be specific and demonstrable and not housed in the typical hortatory language that accompanies these rules:

> Wooden application of principles underlying rhetoric about the FCC's vast power, its broad discretion, and the importance of vibrant debate in democracy to a specific set of rules would force the court to adopt an impressionistic approach that would disserve the parties and muddle the First Amendment analysis. The FCC must therefore explain its rationale for these rules in more detail, thereby permitting the court to test that rationale against petitioners' factual assertions and, if necessary, the demands of the First Amendment.

Id. at 887.

The court also made it abundantly clear that the Commission must be cognizant of the serious constitutional concerns that are raised by these rules. It specifically noted that the rules "*by their nature* interfere with at least some journalistic judgment, chill at least some speech, and impose at least some burdens on activities at the heart of the First Amendment," *id.* (emphasis added), and that those effects are cause for concern. *See id.* at 881 ("the rules to some degree interfere with the editorial judgment of professional journalists and entangle the government in day-to-day operations of the media. The Supreme Court and the FCC have noted that both effects are cause for concern. . .") (citations omitted).

The court further clarified that the Supreme Court's conclusion in *Red Lion Broad. Co. v. FCC*[10] that the rules were constitutional does not necessarily insulate them from constitutional infirmity *as applied* in the contemporary context. *See RTNDA*, 184 F.3d at 887 n.19 (noting that the Supreme Court, since *Red Lion* has indicated "that while the Red Lion framework may still be good law, its application to the instant rules may require updating,") (*citing Arkansas Educ. Television Comm'n*, 118 S. Ct. 1633, 1639)); s*ee also id.* ("Although Red Lion affirmed the rules challenged here, the Court recognized that changed circumstances might be salient in future cases.") (c*iting Red Lion*, 395 U.S. at 393 and *FCC v. League of Women Voters*, 468 U.S. 364, 381 ("The First Amendment requires a critical examination of the interests of the public and broadcasters in light of the particular circumstances of each case.'")). For these reasons, the present rules must also be examined with a concern for their constitutional validity.

The preceding discussion is a review of what this agency was tasked to do on remand by the *RTNDA* court. It has been over a year since it was ordered to do so—expeditiously. Yet, the action today by the Majority does not offer a "well-reasoned, carefully documented order affirming the

[10] 395 U.S. 367 (1969).

challenged rules," *RTNDA*, 184 F.3d at 886. Instead, it refreshes the record. Again. I recognize that the court suggested the Commission might do so, or that it might initiate an entirely new proceeding. But, that was over a year ago in a proceeding that has dragged on for over 17 years.

I am of the view that the Commission has continually evaded justifying these rules because it knows all too well that it cannot, to the degree the public interest, the Constitution, and the courts require. We should not, however, be permitted to preserve them through inaction and delay, when their benefits are so questionable and their dangers of constitutional proportions. At some point, as the court noted "delay and deadlock in this case may militate in favor of final resolution now. . ." *Id.* at 888 (*citing Checkosky v. SEC*, 139 F.3d 221, 226 (D.C. Cir. 1998)).[11]

This *Order* Hangs Over Broadcasters Like the Sword of Damocles

Looking at the specifics of the *Order*, I cannot accept that it merely represents a brief delay period, during which the parties will face no harm while the rules are stayed. The Majority's scheme of suspending the rules for sixty days, during a presidential election, is reminiscent of the proverbial "Sword of Damocles." In sixty short days, the parties will again be subject to the rules and susceptible to sanctions for non-compliance. Indeed, the response to the *Order*'s request for information is not due until early February 2001, sixty days after the rules come back into effect. Only then, when the record is assembled, will the Commission proceed to consider the merits of the rules, which might easily take an additional year under our processes. I also note that the Commission is likely to change significantly in membership over the next year, increasing the probability that the Commission will make little progress on these highly controversial rules.

More troubling, however, is that the Majority's conception will impermissibly coerce a government-favored form of speech by broadcasters. The Majority seems to believe that an ideal time to experiment with broadcast editorial judgment is in midst of a presidential election. They suggest that if broadcasters are actually dissuaded from editorializing because of the rules, then one should see them significantly increase their political editorializing while the rules are suspended. This theory is flawed in two respects. First, knowing that the political editorial rules will be restored at the end of the experimental period, and taking the hint that any hope of the rules being eliminated rests on demonstrating increased political speech, a broadcaster likely will feel he has no choice but to broadcast political editorial content. I believe this clever device presents the danger of government coercing political speech in the final innings of a major national election. I also am at a loss to see what value this period offers for testing the merits of the personal attack rules, which apply year-round, every year.

Second, the Majority's suggested inference is unsound. The suggestion is that if broadcasters do not editorialize during the suspension, then somehow their claims of a chilling effect from the rules has been undermined. As just described, however, the chilling breath from the rules (which have been a

[11] The Administrative Procedure Act ("APA") "directs agencies to conclude matters presented to them 'within a reasonable time' . . . and stipulates that the "reviewing court shall ... compel agency action unlawfully withheld or unreasonably delayed ...." *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984) (*quoting* 5 U.S.C. §§ 555(b) & 706(1)). "[S]ection 706(1) coupled with section 555(b) [of the APA] does indicate a congressional view that agencies should act within reasonable time frames and that courts designated by statute to review agency actions may play an important role in compelling agency action that has been improperly withheld or unreasonably delayed." *Id.* (*citing Public Citizen Research Group v. Commissioner, Food & Drug Admin.*, 740 F.2d 21, 32 (D.C. Cir. 1984)).

mainstay of the broadcasters' regulatory regime for more than three decades) may not be blowing for a mere sixty days, but rather than feeling the warmth of government non-intervention, broadcasters may only sense the government inhaling deeply before exhaling a second cold blast. Worse, rather than feeling chilled, they may in fact feel prodded by a hot iron to produce government-favored content. Finally, if the broadcasters do not produce political programming, then the Commission cannot properly assume that the rules remain valid because they have no significant chilling effect. Broadcasters may not want in fact to generally editorialize. If they do not, it raises serious questions about what the problem is that the rules promulgated many years ago are targeted to address. If there is no problem, there need be no rules.[12] Given the nature of the rules, moreover, the FCC cannot maintain them on the claim that they do little harm. As the court noted:

> In theory, balancing could be avoided if the rules so obviously entailed no ill effects that they would survive even if only marginally useful. That, however, is not the case, as illustrated in the NPRM and the Fairness Report. Even were the court to assume that some of petitioners' arguments are overstated, the challenged rules by their nature interfere with at least some journalistic judgment, chill at least some speech, and impose at least some burdens on activities at the heart of the First Amendment.

RTNDA, 184 F.3d at 887 (footnote omitted). With the dark shadow from the *Fairness Report*, the NPRM and the First Amendment hanging over these rules they cannot be sustained on such an airy basis. Moreover, as I look at the *Order* I doubt seriously it will produce a record that will enable the Commission to address the specific concerns of the court. It places nearly complete responsibility on broadcasters to review and answer the court's concerns, and I doubt seriously that they will offer anything meaningful, given it is not they who wish to retain the rules.

Red Lion **is a Red Herring**

Tacked onto this *Order* is the Majority's unnecessary attempt to brush aside the First Amendment analysis offered by this Commission in *Syracuse Peace Council*. It does so on the mistaken supposition that the Commission in *Syracuse Peace Council* based its decision "largely on the view that the standard of *Red Lion Broadcasting Co. v. FCC*, should be abandoned." *Order* at ¶ 18. Unquestionably, the *Syracuse Peace Council* decision is sprinkled with that Commission's view that the First Amendment standard should be the same as that applied to other media (a view I share). This surely is dicta, given the obvious fact that a regulatory agency cannot overturn a Supreme Court case. But the Majority wrongly attempts to paint much more broadly in its "clarification" by suggesting that the *Syracuse Peace Council* Commission erred in considering the number of media outlets in its First Amendment analysis.[13]

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[12] According to the Mass Media Bureau records, over the last decade, the Commission has found absolutely no violations of the personal attack rule and only three of the political editorial rule.

[13] I note that the Commission found the fairness doctrine was not in the public interest and unconstitutional under the *Red Lion* standard. The reviewing court affirmed only on the public interest basis, choosing to follow the time-honored cannon of avoiding a constitutional question if possible. Thus, it did not affirm but also did not reject the Commission's constitutional analysis. Indeed, Judge Starr, concurring, believed the court should have examined the constitutional question and approved of the Commission's analysis. *See generally Syracuse Peace Council v. FCC*, 867 F.2d 654, 682-84 (D.C. Cir. 1989) (Starr, J., concurring). I believe the Commission's precedent for how (continued….)

Before turning to the specifics of the Majority's contentions, I must first highlight that *Red Lion* is a "red herring" (or maybe a "paper tiger"). What is too often lost, is that absolutely nothing in that case absolves the Commission from its responsibility to affirmatively explain why its rules are in the public interest, even if they are constitutional. As the *RTNDA* court observed, "[t]he mere fact that the FCC has the power to regulate broadcasters more intensely than other media does not also mean that it may impose any obligation it sees fit. Each regulation must be in the 'public interest.'" *RTNDA*, 184 F.3d at 883. More importantly, the *Red Lion* incantation does not open a magic box of content regulation unimpeded by the First Amendment. The Commission still must assure itself that under that framework a content regulation is constitutional. I turn now to that framework and explain why I feel that it is the Majority that is confused.

While there is dicta in *Syracuse Peace Council* that *Red Lion* should not be the standard of review, it should be emphasized that the Commission found the fairness doctrine unconstitutional, *faithfully applying the standard*, not abandoning it as suggested by the Majority. *See Syracuse Peace Council*, 867 F.2d at 682 n.10 (Starr, J., concurring) ("Although the FCC sets forth the view (in other portions of the *Order*) that *Red Lion* itself may no longer be viable, the Commission expressly stated that reconsideration of *Red Lion* lies solely within the province of the Supreme Court. . .and that the Order is thus based on a *Red Lion* analysis.").

Additionally, I reject the Majority's assertion that the Commission fundamentally erred by considering the absolute number of outlets in its determination. The *Syracuse Peace Council* Commission rightly focused on numerical scarcity. It recognized that the Court was focused on ensuring a robust marketplace of ideas in order to ensure "suitable access to social, political, esthetic, moral, and other ideas and experiences . . ." *Red Lion*, 395 U.S. at 390. Moreover, the Court believed that the First Amendment did not sanction monopolizing the market by a handful of licensees: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than countenance monopolization of that market." *Id.*

The Commission reasonably saw that access to ideas was not limited to broadcast and that a wide array of communications services offered diverse viewpoints to the public. A speaker excluded from a broadcast license may be able to find a voice on cable television, direct broadcast satellite ("DBS"), or the Internet. Similarly, an excluded would-be licensee is not captive to the messages spewed by those fortunate enough to obtain a broadcast license if he can access other ideas from other media outlet.

The Majority seems to prefer the view that content regulation is permissible so long as the demand for broadcast spectrum exceeds supply (*i.e.*, allocational scarcity). Of course, because all economic resources are scarce by definition, because demand will always exceed supply where a resource is offered for free, and because the Commission controls the supply, this view assures, for time immemorial, that the government will be able to tread more deeply on broadcast speech.[14] I believe this

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to apply *Red Lion*, thus, is binding on this Commission and cannot be swept away as dicta in an order to refresh the record.

[14] *Cf. Telecommunications Research & Action Ctr. v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986), *petition for reh'g en banc denied*, 806 F.2d 111, *cert. denied*, 482 U.S. 919 (1987); *see also Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (*en banc*) (Edwards, C.J., dissenting) (noting "[i]t is no longer responsible for courts to apply a reduced level of First Amendment protection for regulations imposed on broadcast based on an indefensible notion of spectrum scarcity.") *See also* Thomas G. Krattenmaker & Lucas A. Powe, Jr., *Regulating Broadcast Programming* 204-219 (The MIT Press 1994).

approach is not only intellectually flawed but dangerous, for having the government empowered forever to direct the content of broadcast messages, regardless of the plethora of other messages available to the public, is itself constitutionally disturbing.

In a nutshell, the dispute is over how to define the market for the marketplace of ideas. The current Majority and others would like to always define the market as strictly limited to broadcasting. Apparently, under this view, there are no substitutes for broadcast-delivered ideas. Similar or even identical ideas viewed over cable television are inferior, I suppose. The *Syracuse Peace Council* Commission's view was that the marketplace of ideas is much larger (even if one excludes print media as qualitatively different). Indeed, the Court in *Red Lion* punctuated that "it is the right of viewers and listeners and not that of broadcasters, which is paramount." *Red Lion*, 395 U.S. at 390. That being so, how can we ignore the wide range, and large number of outlets that viewers and listeners now have available to them in the communications market? How can we ignore cable television with 67 percent of the viewing public?[15] How can we ignore DBS with 12.5 percent of the viewing public?[16] How can we ignore the Internet: 52 percent of home computers in the U.S. are connected, 28 percent of home users access it every day[17] and, on average, more than 18 minutes per day are spent accessing news, information and entertainment.[18] Responsibly, we cannot and neither could the Commission in *Syracuse Peace Council*.

What I find amazing is that this Commission does not ignore these other outlets in any other context. For example, our broadcast cross-ownership rules prohibit common ownership of a television station and a newspaper or a cable system and a broadcast station in the same market, and restrict the number of radio and television stations one may own in a market, in order to preserve the diversity of voices.[19] Why, if they are not all voices in the marketplace of ideas? It seems we recognize other media outlets as "voices" when it enhances our regulatory power, but discount them when it restrains it.

The value of other media for distributing ideas is also revealed by the fact that broadcasters today use them increasingly to convey their messages. Disney owns ABC on which it offers Monday Night Football, while it runs other football games on its ESPN cable channel. It runs kids programs on the cable Disney Channel, but also communicates at its websites Disney.com and Go.com. The same can be said of NBC's properties: NBC (broadcast), MSNBC and CNBC (cable), MSNBC.com and NBCi.com (Internet). Or, CBS/Viacom which owns a television network, movie properties, and a substantial number of radio stations. Similarly, local radio stations now regularly stream audio content over the internet, as do others that do not even hold a broadcast license. A license is not required to broadcast

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[15] Data is as of June 1999. *See* Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 99-230, Sixth Annual Report, 15 FCC Rcd 978, 989, ¶ 20 (2000).

[16] *Id.* at 984, ¶ 15.

[17] *See The Role of the PC, Communications and Leisure*, CyberAtlas (citing report from PC Data) [available at http://cyberatlas.internet.com/big_picture/hardware/article/0,1323,5921_447001,00.html (last visited Sept. 29, 2000)].

[18] *See Metrix Central*, Media Metrix [available at http://www.mediametrix.com/usa/data/metrixcentral.jsp (last visited Sept. 29, 2000)].

[19] *See* 47 C.F.R. §§ 73.3555, 76.501(a).

over the Internet, which is cheaper to do than building and operating a radio station.[20] This is the reality of the modern communications marketplace of ideas, no matter what the theoretical problem was in 1969, when *Red Lion* issued and when broadcasting dominated the electronic media.

There are two critical points that must be recognized. First, the marketplace of ideas has to be defined in a broad manner that respects the choices available to viewers and listeners and does not unduly tread on the First Amendment rights of only one medium that competes in the market. Scarcity may be a valid concern, but the question is scarcity of what. I firmly believe that the only meaningful answer under the First Amendment is a scarcity of viewpoints (not spectrum) and that must be measured broadly across the plethora of available media outlets.

Second, accepting *Red Lion*'s legal framework and its interpretation of the Constitution, we must acknowledge that it rests on economic, technical, and other factual predicates, as well as predictive judgments about the effects of government intervention that can and have changed over time. *See Syracuse Peace Council*, 867 F.2d at 681 (Starr, J., concurring) ("the constitutionality of the fairness doctrine is linked in part to the technological developments (and behavior) in the communications marketplace. Those developments obviously continue to unfold.") (*citing Columbia Broad. Sys., Inc. v. DNC*, 412 U.S. at 102 ("the broadcast industry is dynamic in terms of technological change; [solutions] acceptable today may well be outmoded 10 years hence.")).

These factual and analytic questions fall squarely within the unique expertise of the Commission, not the courts, and we have a duty to evaluate them in light of changing circumstances. These judgments may effect the underpinnings of *Red Lion*,[21] but that should not be our concern. We must make them soundly based on the facts and circumstances of the time. It is up to the judiciary to decide if our evaluation of current circumstances dislodges the foundations of the *Red* (perhaps graying) *Lion*. I cannot accept, however, the Commission's persistent pattern of evading any judgment—no matter how compelling—because its actions might undermine the venerable old cat. The Commission's reasons are transparent—to preserve its authority to regulate broadcast speech content with less worry about First Amendment constraint. That alone should disturb anyone that takes comfort in the Constitution's guarantee that the government "shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I.

It is for these, and all the foregoing reasons, that I respectfully dissent from the Commission's decision to prolong this proceeding further rather than squarely justifying, as the court directed us to do, rules that unquestionably impinge on editorial judgment and chill rather than promote speech.

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[20] *See* Thomas E. Weber, *Online: Web Radio: No Antenna Required*, Wall St.J., July 28, 1999, at B1.

[21] S*ee League of Women Voters*, 468 U.S. at 377 n.11 ("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.")