June 22, 1998

Joint Statement of Commissioners Powell and Furchtgott-Roth

Re: *FCC Gen Docket No. 83-484*.

Today, by way of administrative deadlock, the Commission fails to repeal rules whose legal basis was eliminated more than a decade ago. We write separately to express our view that this inaction cannot be squared with either the record in this proceeding or, more importantly, the Commission's decision in *Syracuse Peace Council*, 2 FCC Rcd 5043 (1987), *aff'd*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). Accordingly, we are constrained by well-established principles of administrative law to conclude that this effective denial of petitioners' request for vacatur of the personal attack and political editorial rules amounts to arbitrary and capricious decisionmaking.

I.

This proceeding began on August 14, 1980, when the National Association of Broadcasters ("NAB") filed a petition seeking repeal of the personal attack and political editorial rules.[1] In response, the Commission proposed that the rules be repealed. *Repeal or Modification of the Personal Attack and Political Editorial Rules, Notice of Proposed Rulemaking*, 48 Fed. Reg. 28295 (June 21, 1983) ("1983 Notice").

Several years later, in an adjudicatory proceeding, the Commission repealed the "fairness doctrine," which required broadcasters to cover issues of public importance and also to provide "balanced" coverage of such issues. *Syracuse Peace Council*, 2 FCC Rcd 5043. This decision was based in large part on a Commission study, known as the "1985 Fairness Report," of the impact of the fairness doctrine on broadcast practices. *See* 102 FCC 2d 145 (1985).

In light of this development, NAB, the Radio-Television News Directors Association ("RTNDA"), and others, filed a Petition for Expedited Rulemaking on August 25, 1987, again seeking repeal of the rules and a conclusion to the rulemaking initiated in 1983. They filed a second Petition for Expedited Rulemaking on January 22, 1990. The Commission took no action on these petitions.

Thus, on September 16, 1996, RTNDA filed a petition for writ of mandamus in the United States Court of Appeals for the District of Columbia Circuit, requesting that the Court of

[1] 47 C.F.R. § 73.1920 ("Personal attacks"); 47 C.F.R. § 73.1930 ("Political editorials").

Appeals order the Commission to act on its requests to repeal these rules. On December 19, 1996, our Mass Media Bureau issued a public notice seeking comment to update the record.[2]

The Court of Appeals denied the mandamus petition without prejudice, giving the Commission six months to make significant progress toward possible repeal or modification of the rules. *In re Radio-Television News Directors Association*, No. 96-1338 (D.C. Cir. February 7, 1997). On August 8, 1997, however, the Commission announced its inability to resolve the issue due to a two-two split among the Commissioners.[3]

RTNDA renewed its mandamus petition. With oral argument on that petition approaching, the Commission again unsuccessfully attempted to reach consensus, as explained in a May 8, 1998 public notice.[4] The Court of Appeals ordered the Commission, by June 22, 1998, to take a formal vote on the Petition for Expedited Rulemaking and required those Commissioners who voted against repeal or modification of the rules to provide a statement of their reasons for doing so. *In re Radio-Television News Directors Association and National Association of Broadcasters*, No. 97-1528 (May 22, 1998). The vote we announce today responds to the Court's order.

II.

We start our analysis of the question of whether to repeal the personal attack and political editorial rules with the first in a long chain of administrative documents in this proceeding, the 1983 Notice. There, the Commission first concluded that these rules did not work to the good of the public, stating in no uncertain terms:

> We believe the petitioner and other commenters have presented a compelling case that the personal attack and political editorial rules do not serve the public interest. The rules impose individual rights of access contrary to a regulatory scheme that discourages such obligations. And, without apparent justification, they deprive licensees of the large measure of editorial discretion that Congress intended and which is generally favored under the fairness doctrine. Thus, the personal attack rule, rather than promoting the fair presentation of controversial issues, apparently serves largely as a means to vindicate attacks on personal reputations. The political editorial rule, contrary to Commission policy, imposes upon a licensee's own political endorsements more stringent requirements than are applied to similar broadcasts by others. Furthermore, because the rule's right of reply obligation discriminates according to the identity of the speaker, it appears contrary to First Amendment precepts. Finally, the commenters forcefully argue that the rules have an impermissible "chilling effect" on constitutionally protected speech.

---

[2] *Public Notice*, (DA 96-2159) (Released Dec. 19, 1996) ("1996 Public Notice").

[3] *Public Notice*, (Released Aug. 8, 1997).

[4] *Public Notice*, FCC 98-84 (Released May 8, 1998).

1983 Notice, 48 Fed Reg. at 28301.

The rulemaking record developed since 1983, after numerous notices seeking additional comment on the need to repeal these rules, does not undermine any of these conclusions. Quite the contrary, the present record only fortifies the Commission's initial conclusion that the personal attack and political editorial rules contravene the public interest. Several commenters submitted evidence that these specific rules impose significant costs on broadcasters and do indeed chill broadcasters' speech.[5] The record also contains evidence that, from a practical perspective, the rules do not even achieve their intended purpose of "enhancing" public debate on controversial issues and that they are unnecessary in light of the significant increase in the number of outlets for expression.[6] Moreover, as discussed more fully below, *see infra* at 8-10, the Commission's own studies, particularly the 1985 Fairness Report, support the original determination that these rules are not, from a functional point of view, in the public interest.

In bringing this proceeding to a close with a formal vote on the petitions for rulemaking, the Commission is not free blithely to ignore the record. The law requires us to "examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'" *Motor Vehicles Manufacturer's Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (quotation omitted); *see also AT&T v. FCC*, 832 F.2d 1285, 1291 (D.C. Cir. 1987) (requiring that "conclusions reached [by an agency] have a rational connection to the facts found"). In our opinion, the facts found in this record only buttress the presumption established in the 1983 Notice. We thus believe that review of the "relevant data" and "facts found" in the record before us clearly indicates that we should repeal these rules.

III.

Just as the Commission must adhere to record findings of fact, it is also constrained by its relevant administrative decisions. It is a fundamental principle of administrative law that an agency must give a reasoned explanation for departing from its prior precedents. *See, e.g., Atchison, Topeka & Santa Fe R. Co. v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973); *Motor Vehicles Manufacturer's Ass'n*, 463 U.S. at 57. For the reasons that follow, we do not think that retention of these rules can be rationally explained in light of *Syracuse Peace Council* and, therefore, it seems to us that refusal to vacate these rules is legally unsustainable.

---

[5] *See, e.g.*, Comments of NAB, filed September 6, 1983, at 14-28; Comments of CBS, Inc., filed September 6, 1983, at 34-42; and Comments of Demaree Media, Inc., filed February 10, 1997, at 5-8.

[6] *See, e.g.*, Comments of RTNDA, filed September 3, 1983, at 18-66; and Comments of Paxson Communications Corp., filed February 10, 1997, at 2-10.

In *Syracuse Peace Council*, the Commission undertook a comprehensive evaluation of the fairness doctrine, the foundation upon which both the personal attack and personal editorial rule were built. Relying largely on the extensive factual findings of the Commission's *1985 Fairness Report*, the Commission concluded that:

> (i) '"the interest of the public in viewpoint diversity is fully served by the multiplicity of voices in the marketplace today' and that the growth in both radio and television broadcasting alone provided 'a reasonable assurance that a sufficient diversity of opinion on controversial issues of public importance [would] be provided in each broadcast market'" and thus "that government regulation such as the fairness doctrine is not necessary to ensure that the public has access to the marketplace of ideas," 2 FCC Rcd at 5051 (citations omitted);
>
> (ii) "the overall net effect of the fairness doctrine is to reduce the coverage of controversial issues of importance," *id.* at 5050;
>
> (iii) the doctrine "indisputably represents an intrusion into a broadcaster's editorial discretion, both in its enforcement and in the threat of enforcement," *id.* at 5051;
>
> (iv) the doctrine "provides a dangerous vehicle -- which has been exercised in the past by unscrupulous officials -- for the intimidation of broadcasters who criticize governmental policy," *id.*; and that
>
> (v) the doctrine "imposes unnecessary costs upon on both broadcasters and the Commission." *Id.* at 5043.

On these grounds, the Commission unequivocally and unanimously held that enforcement of the fairness doctrine "is no longer in the public interest." *Id.* at 5052; *see also 1985 Fairness Report*, 102 FCC 2d at 148 ("[W]e are firmly convinced that the fairness doctrine, as a matter of policy, disserves the public interest.").[7]

In addition, the Commission called into question the constitutional validity of the fairness doctrine. Specifically, the Commission determined the rules resulted in "self-censorship" by broadcasters and provided "substantial disincentives to broadcasters to cover controversial issues of importance in their community," 2 FCC Rcd at 5050, thus reducing rather than enhancing speech. In addition, the Commission stated that "the scarcity rationale developed in the *Red Lion* decision [395 U.S. 367 (1969)] and successive cases no longer justifies a different standard of [First Amendment] review for the electronic press." *Id.* at 5053. The *1985 Fairness Report*, the

---

[7]For purposes of this statement, we take as controlling the characterization of the Commission's decision set forth in *Syracuse Peace Council v. FCC*, 867 F.2d 654, 658-59 (D.C. Cir. 1989), which held that public interest aspect of the Commission's decision was independent of its First Amendment analysis.

Commission explained, had documented "an explosive growth in both the number and types of outlets providing information to the public." *Id.; see also 1985 Fairness Report*, 2 FCC 2d at 198-221 (citing data).[8]

Syracuse Peace Council was affirmed by the U.S. Court of Appeals for the District of Columbia Circuit as a reasonable exercise of this agency's discretion to determine the public interest in broadcast regulation. *See* 867 F.2d 654. Neither the Commission nor any court has vacated or reversed *Syracuse Peace Council*. It remains the official position of this agency, therefore, that the fairness doctrine affirmatively disserves the public interest and that the factual assumptions underlying the adjudication of its constitutionality in *Red Lion* are no longer valid.

A.

There can be no dispute that the regulations at issue -- the personal attack and political editorial rules -- were expressly and solely designed to implement the fairness doctrine. In the Report and Order formally adopting the rules, the Commission stated that its purpose in establishing the rules was "to effectuate important aspects of the well-established Fairness Doctrine." 8 FCC Rcd 721, 722 (1967). The Commission further explained that personal attack rule "is simply a particular aspect of the Fairness Doctrine" and that "[t]he standard of fairness similarly dictates" establishment of the political editorial rule. *Id.* The Supreme Court has also described the personal attack and political editorial rules as "component[s]," "aspects," and specific manifestations" of the fairness doctrine. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 370, 373, 385.[9]

Specifically, the rules were intended to further the purposes of the "second prong" of the fairness doctrine, which required broadcasters, when they covered controversial issues of public importance, to provide a reasonable opportunity for the presentation of contrasting viewpoints on those issues. *See Syracuse Peace Council*, 2 FCC Rcd at 5043 n.2. Toward that end, these regulations particularize the nature and extent of broadcasters' duty to air contrary opinions when certain kinds of viewpoints -- *i.e.*, those concerning a person's character or the vote-worthiness of

---

[8]Also, in the 1983 Notice the Commission observed, in support of its proposal of repeal, that Supreme Court decisions following *Red Lion*, which emphasize the editorial rights of broadcasters, "have important implications for the rules." 48 FR 28295, 28297 (1983) (citing *CBS, Inc. v. FCC*, 453 U.S. 367 (1981); *FCC v. Midwest Video Corp*, 440 U.S. 689 (1979); and *Columbia Broadcasting System, Inc. v. DNC*, 412 U.S. 94 (1973)).

[9]The very terminology involved bears out this point: a "doctrine" is a general "principle" or precept "established through past decisions or interpretations," *see* Webster's Third New Int'l Dict. 666 (1963), whereas a "rule" is a "legal precept applied to a given set of facts," *id*. at 1986. In other words, "rules" are "as applied" versions of "doctrines," and thus by definition a subset thereof.

a political candidate -- are expressed in the course of controversial issue coverage.[10] Clearly, these rules are wholly derivative of the fairness doctrine.[11]

1.

As a general matter, if a broad doctrine that guarantees the presentation of contrary opinions chills speech and unduly intrudes upon broadcasters' editorial discretion -- as the Commission squarely held in *Syracuse Peace Council* -- then so do specific contextual applications of that very same concept. In other words, logic dictates that if the fairness doctrine itself disserves the public interest, then so must all fairness-doctrine-implementing regulations, such as the personal attack and political editorial rules. So long as the greater includes the lesser, as here, then the invalidity of the parent doctrine would seem to compel the invalidity of its subsidiary rules absent some independent basis for the rules.

In point of fact, this is the *very* reasoning that the Commission has previously relied upon in announcing the expiration of other fairness-based obligations. Specifically, *In re Complaint of the Arkansas AFL-CIO and the Committee Against Amendment 2 v. Television Station KARK-TV*, 7 FCC Rcd 541 (1992), *aff'd*, 11 F.3d 1430 (8th Cir. 1996) (en banc), held that broadcasters' duty to report "fairly" on ballot issues did *not* survive the repeal of the fairness doctrine.[12] The Commission ruled as follows:

> Any requirement that licensees provide balanced coverage of ballot issues is entirely derived from the fairness doctrine and our decision in Syracuse repealed the fairness doctrine. Syracuse thus governs the outcome of this case, and the licensee therefore had no obligation to provide any specified amount of coverage of the . . . ballot issue [in question].

---

[10]*See, e.g.*, 47 C.F.R § 73.1920 (requiring, among other things, notice of an attack to the affronted individual within one week); 47 C.F.R. § 73.1930 (requiring, among other things, notice of a political editorial to qualified opposing candidates within 24 hours).

[11]Notably, in *Syracuse Peace Council* itself, the Commission rejected the argument that the *Cullman* doctrine, another offshoot of the fairness doctrine, could be severed from its parent doctrine. *See* 2 FCC Rcd at 5047 (observing that *Cullman* doctrine, "a particular application of the fairness doctrine," "can neither be logically nor materially distinguished from the core of the fairness doctrine itself").

[12]This ruling was contrary to an earlier position taken by FCC Chairman Dennis Patrick, who suggested that the Commission's repeal of the fairness doctrine did not implicate ballot issue obligations. *See Supplemental Comments of Petitioner RTNDA* (filed October 25, 1987), at 1-2 (summarizing September 22, 1987 letter from Chairman Patrick to the Honorable John Dingell, Chairman, House Comm. on Energy and Commerce).

7 FCC Rcd at 541.

The Commission in *Arkansas AFL-CIO* further stated that "although our decision in Syracuse did not deal with ballot issues expressly, we based our conclusions on the 1985 Fairness Report. In that Report, the Commission specifically referred to evidence of how the fairness doctrine chilled broadcasters' speech with respect to ballot issues." *Id.* This apparently supplemental rationale is equally applicable here, as the *1985 Fairness Report* speaks directly to the chilling of editorials and cites a 1982 survey by the National Association of Broadcasters regarding editorializing. *See* 102 FCC 2d at 174, 186.[13]

In sum, it is not only logical to say that fairness-derived rules cannot outlive the doctrine itself, but the Commission itself has held precisely that. Assuming that one could actually explain away the force of the findings in *Syracuse Peace Council* itself, which, as shown below, is a virtually impossible task, it would also be necessary to provide a reason why the rationale of *AFL-CIO* -- that repeal of the fairness doctrine eliminated all fairness-derived regulations -- does not govern this case.

2.

We turn now from the general deductive implications of *Syracuse Peace Council* to the specific application of that case to the petition before us. A review of the findings upon which the Commission based its repeal of the fairness doctrine conclusively demonstrates that these rules should be repealed. Of the five factors relied upon by the Commission in *Syracuse Peace Council, see supra* at 4, two of them clearly mitigate more strongly in favor of regulatory repeal here, and the rest are at least equally applicable.

First, the regulations at issue in this proceeding, the personal attack and political editorial rules, are *more* invasive of broadcasters' editorial discretion than the underlying fairness doctrine. Under the fairness doctrine, broadcasters can decide what issues to cover and how to present the other side. But under "right of reply" rules, such as these, the content and speaker of the message are predetermined by the government.

As the Commission observed in the 1983 Notice proposing to repeal these rules, "[a] fundamental principle of [the fairness] doctrine is that licensees retain broad discretion to determine the manner in which opposing views are presented over their facilities" but "these particular rules stand as a unique application of the fairness doctrine: they afford a right of access for specific individuals to a broadcaster's facilities, *thereby removing from licensees almost all editorial discretion*." 48 FR 28295, 28297 (1983) (emphasis added). The Supreme Court itself

---

[13]Even if the *1985 Fairness Report* had not directly addressed editorials (which it did, as noted above), *Syracuse Peace Council* itself made particular note of the chilling of editorial speech under the fairness doctrine. *See* 2 FCC Rcd at 5050 (noting that because of the fairness doctrine "some stations refuse to present editorials").

has recognized the more intrusive nature of these rules as compared to the doctrine. *See Red Lion*, 395 U.S. at 378 ("These obligations differ from the general fairness requirement that issues be presented, and presented with coverage of competing views, in that the broadcaster does not have the option of presenting the attacked party's side himself or choosing a third party to represent that side."); *see also Syracuse Peace Council v. FCC*, 867 F.2d at 664 (describing "self-evident" chilling effects of "right-of-reply" laws).

Second, and perhaps more importantly, if communications outlets generally and broadcast stations alone were sufficiently numerous at the time of *Syracuse Peace Council* to obviate any need for the fairness doctrine, *see 1985 Fairness Report*, 2 FCC Rcd at 202-221, one can only conclude that those communications sources are *at least* sufficiently numerous now to make the personal attack and political editorial rules similarly unnecessary today. Since the time of the *Syracuse Peace Council* decision in 1987, the sheer number of television stations has increased from 1,315 to 1,574. Similarly, the number of radio stations has increased from 10,128 to 12,483 stations.[14]

In addition, the number of outlets of information from other sources (and thus also of opportunities for speech) has continued to increase over the last decade. Cable television service is available to nearly 97% of the American people and some 67% subscribe, up from 50% subscribership in 1987. Most cable systems are able to offer 36 to 60 channels of service and many offer over 100. In addition, many new and innovative modes of communication -- the Internet, direct broadcast satellite service, and digital technologies, to name just a few -- have exploded onto the scene. Direct broadcast satellite services, not even a factor in 1987, now provide multi-channel service to some 4.34 million subscribers. Internet information sources proliferate daily, with news and information sources among the most popular sites.[15]

---

[14]Indeed, in section 202 of the Telecommunications Act of 1996, Congress increased the number of radio stations that can be commonly owned and similarly increased the common ownership limitations for television stations. Contrary to evidencing a congressional concern over scarcity or under-capacity, such changes reflect congressional recognition of over-capacity, or at least a lack of concern with further concentration.

[15] For example, RelevantKnowledge, a provider of online audience demographic measurement reports, reported that the CNN Internet site drew 4.291 million individual visitors of the 57 million Internet users in the United States, age 12 and over in May 1998. Another news information source, Pathfinder, a collection of Time Warner online properties, including Time, Money and Fortune, had 4.258 million visitors. Respectively, these two Internet sites were ranked 20th and 21st of the top 25 most-trafficked Internet sites. Additionally, of the top 10 most-trafficked Internet sites -- including yahoo.com, excite.com, and msn.com -- 6 sites have a current news and events component. *See* News Release, RelevantKnowledge Announces Top Business Networks and Domains, Along with May's Top 25 Web Properties and Domains (June 9, 1998) at <http://www.relevantknowledge.com/Press/release.html>.

In short, not only are there as many outlets for expression as there were in 1987, but the passage of time and the development of technology has only dramatically *increased* the number and capacity of those outlets. The necessity of regulations intended to provide access to ideas and information can therefore only have *decreased* since 1987. Absent a decline between 1987 and the present in the number of broadcast and communications outlets, or a showing that the data set forth in the 1985 Fairness Report was somehow in error, *Syracuse Peace Council*'s finding of lack of necessity with respect to "speech promoting" regulations binds us.

Given the reality of modern technology, which marches ever forward, we simply do not think that such a showing of decreased communications outlets can reasonably be made -- especially not on the basis of this record, which contains no evidence whatsoever to support that proposition.

The remaining factors that served as the basis for the decision in *Syracuse Peace Council* are at least equally as applicable in this case. As discussed above, the Commission determined in 1985, as part of its review of the chilling effect of the larger fairness doctrine, that the personal attack and political editorial rules themselves produced a chilling effect; there is no evidence in this proceeding to rebut that determination. Moreover, the personal attack and political editorial rules are every bit as susceptible of governmental manipulation as the fairness doctrine was found to be in 1987; there are no more safeguards to prevent abuse of these rules than of the fairness doctrine. Last, there is no evidence that the costs of these rules are any less than other fairness-based rules; indeed, to the extent that they require more affirmative action than fairness obligations generally, *i.e.*, timely notification and provision of scripts, tapes, or summaries of the attack or editorial, they appear to be costlier to industry than the general rules.

For the foregoing reasons, it strikes us as irrational to conclude, against the backdrop of *Syracuse Peace Council*, that the personal attack and political editorial rules affirmatively serve the public interest. In this regard, we find it telling that it is *undisputed* by the commenters in this proceeding that retention of the personal attack and political editorial rules is *irreconcilable* with *Syracuse Peace Council*. Those who support retention of the rules have candidly conceded this point. *See* Reply Comments of United Church of Christ, Media Access Project, Center for Media Education, *et al.*, at 1 (March 12, 1997) ("The parties unanimously argue that the Commission cannot reconcile its continued enforcement of the personal attack and political editorial rules with the 1987 *Syracuse Peace Council* case.").

Some, of course, may believe that *Syracuse Peace Council* was wrongly decided. To be sure, that is a respectable personal opinion. But unless and until *Syracuse Peace Council* is formally overruled, that is all it is -- a subjective point of view. *Syracuse Peace Council*, on the other hand, is controlling administrative law, as the Commission has previously made clear. *See Arkansas AFL-CIO*, 7 FCC Rcd at 542 (applying *Syracuse* to eliminate ballot issue obligations and observing that "[w]e have been presented with no convincing basis to reverse our decision in Syracuse and decline to do so"). In an administrative system predicated on a rule of law, that decision trumps personal opinion.

B.

Apart from the pure public interest question, the constitutional issues in this proceeding loom large on the horizon. While some contend that *Red Lion* definitively establishes the current constitutionality of the personal attack and political editorial rules, we respectfully submit that recourse to *Red Lion* does not, for the reasons that follow, resolve this debate.

First, the Supreme Court's conclusion in *Red Lion* that these rules did not violate the First Amendment was specifically based on the Commission's assertion that there was no real indication, at that time, that the fairness doctrine and its derivatives adversely affected broadcast speech. The Court turned back the suggestion that the rules could force broadcasters to engage in self-censorship or to eliminate or decrease their coverage of contentious issues, but in doing so the Court framed its holding in narrow temporal and evidentiary terms:

> *At this point*, however, *as the Federal Communications Commission has indicated*, [the] possibility [that broadcasters will self-censor and their coverage will stop or decrease] is at best speculative. . . . *[I]f experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications*. The fairness doctrine in the past has had no such overall effect.

395 U.S. at 393 (emphases added).

As shown above, the Commission has now indicated just the opposite of what it said in *Red Lion*. Current Commission precedent, based on subsequent experience and careful study of an extensive record, is that "the overall net effect of the fairness doctrine is to reduce the coverage of controversial issues of importance." *Syracuse Peace Council,* 2 FCC Rcd at 5050; *cf. Red Lion*, 395 U.S. at 393. It is thus entirely possible that, if squarely presented with a case worthy of a writ of certiorari and based on current factual and legal realities, the Court might reach a different result with respect to the validity of fairness-based rules.

Second, the Supreme Court's application in *Red Lion* of a relatively lenient standard of First Amendment review to broadcast regulation was premised on the theory that broadcast spectrum is uniquely scarce. *See* 395 U.S. at 386-389; 396-401. The empirical basis of the "spectrum scarcity" theory has been roundly criticized by some of America's most distinguished jurists and commentators, even by former members of this Commission.[16] Although it is not for

---

[16]*See e.g., Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 724 n. 2 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing *en banc*) ("[P]artly the criticism of *Red Lion* rests on the growing number of broadcast channels."); *Action for Children's Television v. FCC*, 58 F.3d 654, 675 (1995) (Edwards, C.J., dissenting) (spectrum scarcity is "indefensible notion" and "[t]oday . . . the nation enjoys a proliferation of broadcast stations, and should the country

(continued...)

this agency to formulate constitutional frameworks, the factual validity of spectrum scarcity is something quite different than the constitutional jurisprudence based thereupon. The former issue is a valid one for the Commission to pass upon. *Cf. National Ass'n of Regulatory Utility Com'rs v. FCC*, 525 F.2d 630, 638 (1975) ("The [Federal Communications] Commission retains a duty of continual supervision."), *cert. denied*, 425 U.S. 992. In fact, the Supreme Court has indicated that it might revisit its constitutional jurisprudence upon the Commission's "signal . . . that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."
FCC v. League of Women Voters, 468 U.S. 364, 377 n. 11 (1984).

The long and short of it is this: as matters now stand, the Commission has unequivocally repudiated spectrum scarcity as a factual matter. *See Syracuse Peace Council*, 2 FCC Rcd at 5053-54 (summarizing factual findings of *1985 Fairness Report* on growth of broadcast and other communications outlets since 1969). Based in part on the strength of the "voluminous factual record compiled in" the *1985 Fairness Report*, 102 FCC 2d at 147, the Commission declared:

---

[16](...continued)
decide to increase the number of channels, it need only devote more resources toward the development of the electromagnetic spectrum"); *id.* at 684 (Wald, J., dissenting) ("[T]echnical assumptions about the uniqueness of broadcast . . . have changed significantly in recent years."); *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 508 n.4 (D.C.Cir. 1986) ("Broadcast frequencies are much less scarce now than when the scarcity rationale first arose in [1943]."), *cert. denied*, 482 U.S. 919 (1987); Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, Duke L. J. at 5 (forthcoming Spring 1998) ("By the 1980s . . . the emergence of a broadband media, primarily in the form of cable television, was supplanting traditional, single-channel broadcasting and with it the foundation on which the public interest obligations had been laid. If it ever made sense to predicate regulation on the use of a scarce resource, the radio spectrum, it no longer did."); Laurence H. Winer, *Public Interest Obligations and First Principles* at 5 (The Media Institute 1998) ("In a digital age offering a plethora of electronic media from broadcast to cable to satellite to microwave to the Internet, the mere mention of 'scarcity' seems oddly anachronistic."); Rodney M. Smolla, *Free Air Time For Candidates and the First Amendment* at 5 (The Media Institute 1998) ("Scarcity no longer exists. There are now many voices and they are all being heard, through broadcast stations, cable channels, satellite television, Internet resources such as the World Wide Web and e-mail, videocassette recorders, compact disks, faxes -- through a booming, buzzing electronic bazaar of wide-open and uninhibited free expression."); J. Gregory Sidak, *Foreign Investment in American Telecommunications: Free Speech* at 303-04 (AEI 1997) ("On engineering grounds, the spectrum-scarcity premise . . . is untenable."); Lillian R. BeVier, *Campaign Finance Reform Proposals: A First Amendment Analysis*, CATO Policy Analysis, No. 282 at 1, 13, 14 (September 4, 1997) ("There is no longer a factual foundation for the argument that spectrum scarcity entitles the government, in the public interest, to control the content of broadcast speech."); Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Tex. L. Rev. 207, 221-26 (1982).

> [T]he dramatic changes in the electronic media [documented in the *1985 Fairness Report*], together with the unacceptable chilling effect resulting from the implementation of such regulations as the fairness doctrine, form a compelling and convincing basis on which to reconsider First Amendment principles that were developed for another market.

2 FCC Rcd at 5054. Although the Supreme Court has not to date revisited *Red Lion* in light of these factual conclusions by the Commission with respect to spectrum scarcity, it has by no means foreclosed the possibility of such review.[17]

Relatedly, we note that, contrary to the contention of those who adhere to the concept of spectrum scarcity, the Supreme Court did *not* expressly reaffirm that rationale in either *Reno v. ACLU*, 117 S. Ct. 2329 (1997), or *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (*"Turner "I")*. In the course of deciding the proper standard of review under the First Amendment for cable regulation, the Court in *Turner I* assumed *arguendo* that the theory of spectrum scarcity justified lesser First Amendment protections for broadcasters. *See id.* at 637-638 (holding that "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, *whatever its validity in the cases elaborating it*, does not apply in the context of cable regulation" and stating that "[a]lthough courts and commentators have criticized the scarcity rationale since its inception, we have declined to question its continuing validity as support for our broadcast jurisprudence *and see no reason to do so here"* because "[t]he broadcast cases are inapposite") (emphasis added) (internal citation omitted). In *Reno*, which set the First Amendment standard for internet regulation, the Court simply described its broadcast jurisprudence and the theoretical bases thereof, concluding that those bases did not exist in the Internet context. *See* 117 S. Ct. at 2343 ("[S]ome of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers. In these cases, the Court relied on . . . the scarcity of available frequencies at [the] inception [of the broadcast medium]. . . . [That] factor[] [is] not present in cyberspace."). Thus, the *most* that one can say about these cases is that in them the Court did not overrule *Red Lion*, and that they did not do so in cases in which no party advocated such a result, that did not involve broadcast

---

[17] Some suggest that the denial of a writ of certiorari in *Syracuse Peace Council* reflects a lack of interest on the part of the Court in reviewing the merits of *Red Lion* and thus somehow an affirmance of that case. This argument is based on a fundamental misunderstanding of the certiorari process. "The denial of a writ of certiorari imports no expression upon the merits of the case, as the bar has been told many times." *Carver v. United States*, 260 U.S. 482, 490 (1923); *see also* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (7th ed. 1993), § 5.7 at 240 (explaining that "a denial is not a precedent for, or an affirmance of, any proposition of law or fact involved in the lower court decision" but is "citable only for the fact that certiorari was denied"). Moreover, the D.C. Circuit's majority opinion in *Syracuse Peace Council* was based only on the public interest and not the constitutional issues in the case, and the Supreme Court does not generally decide questions that were not ruled upon by the court below. *See id.* § 6.25 at 342-343.

regulation, and in which the continuing validity of *Red Lion* was simply not essential to the outcome.

That the Supreme Court did not overturn *Red Lion* under such circumstances is hardly a noteworthy development in the law. The Court does not lightly overrule prior precedent, much less in cases where the question is not squarely presented, briefed and argued by the parties, or otherwise necessary to the proper disposition of the case. *See generally* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (7th ed. 1993), §§ 6.25-.26; *see also* Supreme Court Rule 14.1(a) ("Only the questions set forth in the petition, or fairly included therein, will be considered by the Court.").[18]

In fact, the better characterization of these cases is not that they reaffirmed the merits of *Red Lion* but that they affirmatively declined to extend the reach of that case into other areas of communications law. In *Turner I*, the government argued for application of the *Red Lion* standard to cable laws that burden speech, a contention that the Court expressly rejected. *See* 415 U.S. at 637-40. And, in *Reno*, the Court refused to engraft the scarcity rationale onto cyberspace law. *See* 117 S. Ct. at 2343. Perhaps what is significant about these cases, then, is not that they cite *Red Lion* and allude to spectrum scarcity but that they consciously circumscribe *Red Lion*'s impact upon First Amendment jurisprudence.

Finally, and as the Commission recognized in the 1983 Notice, Supreme Court decisions following *Red Lion* have accorded increased weight to the editorial rights of broadcasters.[19] In fact, just last month, the Supreme Court reaffirmed its post-*Red Lion* caselaw regarding the editorial rights of broadcasters, writing that:

> Congress has rejected the argument that "broadcast facilities should be open on a nonselective basis to all persons wishing to talk about public issues." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 105 (1973). Instead, television broadcasters enjoy the "widest journalistic freedom" consistent with their public responsibilities. *Id*., at 110; *FCC v. League of Women Voters of Cal*., 468 U.S. 364, 378 (1984). Among the broadcaster's responsibilities is the duty to schedule programming that serves the "public interest, convenience, and necessity." 47 U.S.C. § 309(a). Public and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion *in the selection and presentation of their programming*.

Arkansas Educational Television Commission v. Forbes, 118 S. Ct. 1633, 1639 (1998) (emphasis added).

---

[18]For an example of a case in which the Court actually affirmed the validity of a prior decision, in contrast to *Reno* and *Turner*, *see IBM v. United States*, 116 S. Ct. 1793 (1996).

[19] *See supra* note 8.

The Court went on to say, with special relevance to questions like the constitutionality of the personal attack and political editorial rules, that governmental interference with choices made in the exercise of those editorial rights is disfavored under the First Amendment:

> To comply with their obligation to air programming that serves the public interest, broadcasters must often choose among speakers expressing different viewpoints. "That editors - newspaper or broadcast - can and do abuse this power is beyond doubt," *Columbia Broadcasting System, Inc*., 412 U. S. at 124; but "[c]alculated risks of abuse are taken in order to preserve higher values." *Id*. at 125. Much like a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum, a broadcaster by its nature will facilitate the expression of some viewpoints instead of others. *Were the judiciary to require, and so to define and approve, pre-established criteria for access, it would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion*.

Id. (emphasis added). Of course, unlike the fairness doctrine generally, the personal attack and political editorial rules are right-of-reply or "access" rules. It is just that kind of rule, which deprives broadcasters of the decision of who may speak and what they may say and guarantees entree to a station, that implicates the concerns expressed in *Arkansas Educational Television Association*.

In sum, much has changed in the Commission's since the Supreme Court handed down *Red Lion*. Not insignificantly, the Commission has made clear that the net effect of the fairness doctrine as well as its subsidiary rules is to dampen debate on the airwaves, thus directly implicating the Supreme Court's express reservation regarding the future validity of such regulations. In addition, the Commission, in its capacity as the relevant expert agency, has rejected spectrum scarcity as a matter of technological fact. We think this state of affairs suggests that, at the very least, we cannot in this proceeding simply assume the validity of these rules under the First Amendment. In our view, the constitutionality of these rules is not free from doubt. Our concern for avoiding, rather than creating, constitutional problems, *see, e.g., United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971), thus provides another ground for our decision to repeal them.

***

In conclusion, we do not think it possible to rationally explain, with respect to the question whether these fairness-derived rules effectuate the public interest, why a different result than that reached in *Syracuse Peace Council* and in *Arkansas AFL-CIO* should obtain today. Given the continually advancing state of communications technology and the record before us, which contains not a scintilla of evidence that communications sources have become less bountiful since *Syracuse Peace Council* was decided, it seems to us that as a matter of law and logic these ancillary rules must be adjudged to disserve the public interest. This approach also has the benefit

of avoiding what we see as potential constitutional difficulties. For these reasons, we would repeal the personal attack and the political editorial rules.