JOINT STATEMENT OF COMMISSIONER SUSAN NESS AND COMMISSIONER GLORIA TRISTANI CONCERNING THE POLITICAL EDITORIAL AND PERSONAL ATTACK RULES (GEN. DOCKET NO. 83-484)

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I. INTRODUCTION

1. In June 1983, the Commission issued a *Notice of Proposed Rule Making* that proposed to eliminate both the political editorial and personal attack rules. This rulemaking proceeding was instituted in response to a petition filed by the National Association of Broadcasters (NAB) seeking repeal of these two rules. The petition argues that the rules have failed to serve their intended purpose of enhancing diversity of expression and instead have inhibited broadcasters from effectively informing the public about controversial issues of public importance. On August 25, 1987, NAB and several other parties filed a Joint Petition for Expedited Rulemaking Action requesting that the

Commission issue a Report and Order in this proceeding "repealing the personal attack and political editorial rules and/or clarifying its [1987 decision] repealing the general fairness doctrine to state that, for the same reasons, those rules are invalid and will no longer be enforced against broadcast licensees."

2. As discussed below, we believe the political editorial and personal attack rules continue to serve the public interest by creating a right of access to the public airwaves in two particular circumstances. The Communications Act makes clear that broadcasters, as trustees of the public's airwaves, must serve the "public interest, convenience and necessity."[1] Although we are willing to modify the rules to streamline their operation, we believe that these two rules continue to serve as important components of a broadcaster's public interest obligations and complement the important objectives served by the equal opportunities requirements of Section 315(a) and the reasonable access provisions of Section 312(a)(7) of the Communications Act. In addition, these rules serve the public interest by helping to ensure that the same audience that heard the broadcast of an endorsement or personal attack be accessible to the individual concerned.

3. These two rules were challenged by RTNDA and NAB in the 1960s, and the Supreme Court rejected those challenges in *Red Lion Broadcasting Co. v. FCC*.[2] The Court held that it is not "inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public."[3] To the contrary, the Court found, these rules *advance* First Amendment goals because "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."[4]

4. RTNDA and NAB advance the same arguments that they advanced 30 years ago, and the Supreme Court's answers to those arguments are as valid now as they were then. First, the broadcasters argue that spectrum scarcity is a thing of the past, just as they did in the 1960s.[5] But broadcasting remains "a medium not open to all."[6] Over the last four years, bidders have paid billions of dollars for licenses to use the public airwaves.[7] During that time period, the government has shut

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[1] 47 U.S.C §§ 307(a), 309(k).

[2] 395 U.S. 367 (1969).

[3] *Id*. at 391.

[4] *Id*. at 390.

[5] *See Red Lion Broadcasting v. FCC*, 395 U.S. 367, 396-97 (1969).

[6] *Id*. at 392.

[7] *See, e.g., Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 975 (D.C. Cir. 1996).

down hundreds of "pirate" broadcasters, who claim that they are denied reasonable access to the airwaves.[8] The scarcity of these frequencies has been further underlined by the 1996 Act's extension of broadcast license terms to eight years and its elimination of the opportunity for competing applicants to challenge an incumbent broadcaster's license renewal.[9] Because "there are substantially more individuals who want to broadcast than there are frequencies to allocate,"[10] the dicta in a prior Commission's decision in *Syracuse Peace Council*[11] that scarcity no longer justified a relaxed standard of judicial review of broadcast regulations has been rejected by Congress (in enacting the Children's Television Act of 1990), the Commission (in implementing that Act), and the D.C. Circuit (in upholding the set-aside for non-commercial programming on direct broadcast satellite frequencies).[12] And, despite an amicus filing by the broadcasters arguing that broadcasting regulations should be subject to the same standard of review as regulation of the internet, the Supreme Court in *Reno v. ACLU*[13] relied on scarcity and other bases for not subjecting broadcast regulations to strict scrutiny. Other bases for subjecting broadcast regulations to a lower level of scrutiny include the fact that a "licensed broadcaster is 'granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations,"[14] and the fact that broadcasting has "established a uniquely pervasive presence in the lives of all Americans."[15]

5. The broadcasters nevertheless argue that the political editorial and personal attack rules should be repealed on account of their alleged chilling effect. The Supreme Court rejected that same argument on the ground that it was "at best speculative."[16] Despite our requests for better evidence to support their argument, the broadcasters have provided none.[17] To the contrary, they rely only on a biased survey, conducted 16 years ago, that in any event does not support their position.[18]

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[8] *See United States v. Dunifer*, No. C 94-03542 CW (N.D. Cal. June 16, 1998).

[9] *See* Sections 203 and 204 of Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 112-113 (1996); *Report and Order*, 12 FCC Rcd 1720 (1997) (extending broadcast license terms to eight years under the 1996 Act); *Order*, 61 Fed. Reg. 18289 (April 25, 1996) (eliminating comparative renewals pursuant to the 1996 Act) (codified at 47 U.S.C. §§ 307(c) and 309(k)(4)).

[10] *Red Lion*, 395 U.S. at 389.

[11] *Syracuse Peace Council*, 2 FCC Rcd 5043, 5054-55 (1987) *recon. denied*, 3 FCC Rcd 2035 (1988).

[12] *See* Part III E, *infra*.

[13] 117 S. Ct. 2329, 2343 (1997).

[14] *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981).

[15] *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978).

[16] *Red Lion*, 395 U.S. at 393.

[17] *See Public Notice*, DA 96-2159 (Dec. 19, 1996) (1996 Public Notice).

[18] *See* Part III B, *infra*.

6. The broadcasters also argue that our decision not to enforce the fairness doctrine necessitates repeal of the political editorial and personal attack rules. There is no merit to that claim, as evidenced most simply by the fact that the Commission that repealed the fairness doctrine kept the political editorial and personal attack rules in force. These rules, like the fairness doctrine, are ultimately grounded on the requirement that broadcasters serve the public interest.[19] In repealing the fairness doctrine, the Commission did not, of course, purport to repeal the statutory public interest obligation of broadcasters. That Commission instead believed that the increase in the number of media outlets supported the conclusion that the media marketplace should be trusted to provide adequate coverage of controversial issues of public importance. But just as the more specific political editorial and personal attack rules were needed when the fairness doctrine assured adequate coverage of controversial issues, they are still needed (perhaps more needed) when the media marketplace is relied upon for that purpose.

7. Moreover, the political editorial and personal attack rules not only further the general public interest requirement, they advance the goals of Sections 312(a)(7), which requires broadcasters to provide "reasonable access" to candidates for federal office, and 315(a), which requires broadcasters to provide "equal opportunities" to the opponents of candidates that use a broadcast facility. As the Supreme Court stated, in some respects "the personal attack and political editorial rules are indistinguishable from the equal-time provision of § 315, a specific enactment of Congress requiring stations to set aside reply time under specified circumstances."[20] The political editorial rule advances the same goals as Section 315: just as Section 315(a) requires a broadcaster to permit a candidate to advertise on its station if the candidate's opponent has advertised on that station, the political editorial rule provides a right of access to a candidate if the broadcaster has editorialized in support of the candidate's opponent. The personal attack rule also had its genesis in attacks occurring in the course of elections and plays an important role in ensuring unbiased election coverage.[21] The Supreme Court correctly described both rules as "important complements" of Section 315,[22] which remains in force.

8. In the absence of the personal attack and political editorial rules, the Supreme Court concluded in *Red Lion*, "station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed."[23] The Court upheld the political editorial and personal attack rules because "[t]here is no sanctuary in the First

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[19] *See* 47 U.S.C. §§ 307(a), 309(k)(1)(A), 315(a).

[20] *Red Lion*, 395 U.S. at 391.

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

[22] *Red Lion*, 395 U.S. at 391.

[23] *Id*. at 392.

Amendment for unlimited private censorship operating in a medium not open to all."[24] We vote to retain the rules for precisely the same reasons.[25]

II. BACKGROUND

9. The political editorial and personal attack rules were codified by the Commission in 1967.[26] The rules entitle certain candidates and parties who are personally attacked to air time to present their views. In particular, the political editorial rule requires that when a licensee endorses or opposes a political candidate, the licensee must notify opponents of the candidate endorsed (or the candidates opposed) and offer the candidates or their spokesperson an opportunity to respond. The rule provides:

> (a) Where a licensee, in an editorial, (1) Endorses or, (2) Opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to, respectively, (i) The other qualified candidate or candidates for the same office or, (ii) The candidate opposed in the editorial,
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> > (A) Notification of the date and the time of the editorial,
> > (B) A script or tape of the editorial and
> > (C) An offer of reasonable opportunity for the candidate or a spokesman of the candidate to respond over the licensee's facilities.[27]

10. Similarly, the personal attack rule provides:

> When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the persons or group attacked: (1) Notification of the date, time and identification of the broadcast; (2) A script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) An offer of a reasonable opportunity to respond over the licensee's facilities.[28]

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[24] *Id.*

[25] We have not reviewed any statements submitted to this court by Commissioners Furchtgott-Roth and/or Powell. We do not, therefore, respond to any such statements.

[26] See *Personal Attacks and Political Editorials*, 8 FCC 2d 721, 722 (1967).

[27] 47 C.F.R. §73.1930(a). The rule further states: "Where such editorials are broadcast on the day of the election or within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion." *Id*. at § 73.1930(a)(2)(C).

[28] 47 C.F.R. § 73.1920(a).

There are several exemptions to the personal attack rule's requirements.[29]

11. In a 1983 *Notice of Proposed Rule Making* (*1983 Notice*), the Commission requested comment on the proposal to eliminate both the political editorial and personal attack rules.[30] The *Notice* was issued in response to a petition for rulemaking filed by the National Association of Broadcasters.[31] Comments supporting repeal of the rules were filed for the most part by broadcasters and their representatives.[32] Comments opposing repeal were filed by various public interest groups.[33]

12. On August 25, 1987, following repeal of the fairness doctrine,[34] RTNDA, NAB, and other parties seeking repeal of the two rules filed a Joint Petition for Expedited Rulemaking Action. These same parties filed a second Petition for Expedited Rulemaking Action on January 22, 1990, again urging repeal of the rules. On September 13, 1996, RTNDA filed a petition for a writ of mandamus in the U.S. Court of Appeals for the D.C. Circuit asking the court to direct the

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[29] Specifically, the rule exempts the following from its requirements:

> (1) Personal attacks on foreign groups or foreign public figures; (2) Personal attacks occurring during uses by legally qualified candidates; (3) Personal attacks made during broadcasts not included in the preceding exemption and made by legally qualified candidates, their authorized spokesperson, or those associated with them in the campaign, on other such candidates, their authorized spokesperson or persons associated with the candidates in the campaign; and (4) Bona fide newscasts, bona fide news interviews, and on-the-spot coverage of bona fide news events, including commentary or analysis contained in the foregoing programs. *Id.* at § 73.1920(b).

[30] *Repeal or Modification of the Personal Attack and Political Editorial Rules, Notice of Proposed Rulemaking,* Gen. Docket 83-484, RM-3739, 48 Fed. Reg. 28295 (June 21, 1983) (*Notice*). We also requested comment on the possible repeal of these rules as they apply to cable systems. *Notice* at ¶ 53 n.31.

[31] Petition for Rulemaking filed by the National Association of Broadcasters on August 14, 1980.

[32] In response to the 1983 *Notice*, comments supporting repeal of the rules were filed by: Telecommunications Division of Adams-Russell Co., Inc. and Satellite Program Network, Inc.; American Broadcasting Companies, Inc. (ABC); American Legal Foundation (ALF); American Newspaper Publishers Association (ANPA); Columbia Broadcasting System, Inc. (CBS); Cosmos Broadcasting Corporation, Cox Communications, Inc., Freedom Communications Inc. and Mid-America Television Company (Joint Broadcasters); Henry Geller and Donna Lampert; McGraw-Hill Broadcasting Company, Inc.; National Association of Broadcasters (NAB); National Broadcasting Company, Inc. (NBC); National Broadcast Editorial Association (NBEA); National Radio Broadcasters Association (NRBA); Radio-Television News Directors Association (RTNDA), The Evening News Association, Gannett Co., Inc., Gaylord Broadcasting Company and Lee Enterprises, Inc. (Joint Comments of RTNDA et. al.); and Tribune Broadcasting Company. An informal comment was filed by National Conference of Editorial Writers.

[33] Comments in opposition to repeal of the rules were filed in response to the 1983 *Notice* by: Accuracy in Media (AIM); American Legal Foundation (ALF); Media Access Project (MAP) on behalf of the International Union, UAW (MAP/UAW); and Telecommunications Research and Action Center, Black Citizens for a Fair Media and Citizens Communications Center (TRAC). Informal comments were filed by Anti-Defamation League; National Education Association and the Conservative Caucus, Inc.

[34] See *infra* paragraph 53.

Commission to act on the pending petitions for repeal of the rules.

13. On December 19, 1996, the Mass Media Bureau issued a Public Notice seeking comments and replies to update the record in this proceeding.[35] Comments and replies supporting repeal of the rules were filed by RTNDA, NAB and other broadcasters.[36] Comments and replies opposing repeal of the rules were jointly filed by UCC, MAP and other public interest parties.[37] On February 7, 1997, the D.C. Circuit denied RTNDA's mandamus request "without prejudice to its renewal should the Federal Communications Commission fail to make significant progress, within the next six months, toward the possible repeal or modification of the personal attack and political editorial rules."[38]

14. On August 8, 1997, the Commission issued a Public Notice stating that "[a]fter extensive discussion and consideration of various alternatives, a majority of the Commission is unable at this time to agree upon any resolution to the issues presented in this docket."[39] Each of the four Commissioners issued separate statements regarding their respective positions.[40]

15. On August 28, 1997, RTNDA refiled its mandamus petition in the D.C. Circuit, and on December 12, 1997, the D.C. Circuit issued an Order directing the Clerk to schedule an oral argument in May 1998 on the mandamus petition.[41] Four new Commissioners subsequently joined the Commission after departure of their predecessors, and on May 8, 1998, the Commission issued a Public Notice announcing the recusal of Chairman Kennard and stating that "a majority of the participating commissioners again is unable at this time to agree upon any resolution of the issues presented in this docket."[42] Oral argument before the D.C. Circuit was heard on May 11, 1998 and on May 22, 1998, the Court issued an Order directing the Commission to "submit the final results of

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

[36] In response to the 1996 Public Notice, comments supporting repeal of the rule were filed by NAB; RTNDA; CBS, Inc.; Freedom of Expression Foundation (FEF); Demaree Media (Demaree); and Paxson Communications Corp. (Paxson). NAB and RTNDA also filed reply comments.

[37] A group of parties filed joint comments and joint reply comments opposing repeal of the rules in response to the 1996 Public Notice. Included in the filing were MAP; United Church of Christ (UCC); Center for Media Education; Washington Area Citizens Coalitions Interested in Viewers' Constitutional Rights; Peggy Charren and Henry Geller (referred to collectively as UCC/MAP).

[38] *In re: Radio Television News Directors Association*, No. 96-1338 (D.C. Cir., February 7, 1997).

[39] *Public Notice*, (released August 8, 1997).

[40] See Press Statements of Chairman Reed E. Hundt, Commissioner James Q. Quello, Commissioner Susan Ness and Commission Rochelle B. Chong (released August 11, 1997).

[41] *In re: Radio Television News Directors Association*, No. 97-1528 (D.C. Cir., December 12, 1997).

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

a formal vote on the Petition for Expedited Rulemaking" and "a statement of reasons from any Commissioner voting against repeal or modification of the Commission's rules" by June 22, 1998.[43]

[43] *In re: Radio Television News Directors Association*, No. 97-1528 (D.C. Cir., May 22, 1998).

III. DISCUSSION

A. Introduction

16. Commenters urging repeal of the personal attack and political editorial rules argue generally that, instead of encouraging robust debate on controversial public issues, the rules inhibit discussion and unreasonably burden constitutionally protected speech.[44] They argue that due to the rules' burdensome notice and mandatory access requirements, self-censorship of the airwaves is pervasive and the exercise of journalistic judgment is chilled.[45] Commenters supporting retention of the personal attack and political editorial rules describe the rules as self-enforcing mechanisms designed to foster fair and reasonably balanced programming.[46] The rules, they argue, provide a check against flagrantly abusive one-sided coverage by broadcasters and do not constitute intrusive, chilling, or unwarranted restrictions upon journalistic judgments as argued by broadcasters.[47] These parties note that any burdens imposed by the rules should be considered minimal and far outweighed by the public benefits.[48]

17. In response to the Mass Media Bureau's 1996 Public Notice seeking to update the record in this proceeding, RTNDA and NAB merely reemphasized the points made in their previous filings and provided no new anecdotal or empirical evidence.[49] They argue that the reasons set forth in their previous pleadings in this proceeding remain valid and timely, and warrant elimination of the rules. Several other commenters supporting repeal of the rules agree that the record is ripe for action by the Commission.[50] In joint comments filed in response to the 1996 Public Notice, UCC/MAP argue that opponents of the rules have not provided sufficient factual evidence to justify repeal of the rules.[51] UCC/MAP argue that the Commission cannot reasonably make the findings requested by commenters favoring repeal of the rules because of what UCC/MAP contend is an inconclusive and stale record.[52]

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[44] 1983 Joint Comments of RTNDA et. al. at 55.

[45] 1983 Comments of ALF at 8-9; 1983 Comments of TRAC at 17.

[46] 1983 Comments of TRAC at 6; 1983 Comments of ALF at 1.

[47] 1983 Comments of MAP/UAW at 2-3.

[48] 1983 Comments of ALF at 14.

[49] 1997 Comments of RTNDA at 2; 1997 Comments of NAB at 2.

[50] 1997 Comments of CBS at 3; 1997 Comments of FEF at 4; 1997 Comments of Demaree at 5; 1997 Comments of Paxson at 1-2.

[51] 1997 Reply Comments of UCC/MAP at 11.

[52] 1997 Reply Comments of UCC/MAP at 7.

18. As described below, we find that both the political editorial and personal attack rules continue to serve the public interest and should be retained. It is our view that, given the record before us and questions raised regarding the methodology used in the only study provided to demonstrate the alleged chilling effect of these rules, petitioners have failed to show that the rules unduly burden broadcasters' speech.

19. Moreover, the Supreme Court as well as the Congress continue to recognize that the scarcity of broadcast frequencies provides a rationale for imposing public interest obligations on broadcasters,[53] even after a prior Commission's decision to repeal the fairness doctrine in *Syracuse Peace Council*,[54] and we believe this rationale continues to extend to the political editorial and personal attack rules. This general obligation has been at the core of the nation's broadcasting system since its inception. It is expressly set forth in the Communications Act of 1934, and has been upheld by the Supreme Court on numerous occasions.[55] It is also the premise behind the preferential treatment broadcasters have received over the years, including the fact that all existing broadcasters have been awarded their licenses to use the airwaves without having to pay a fee, the entitlement to "must carry" rights on local cable systems enjoyed by television broadcasters,[56] and the recent set-aside, again without charge, of over 400 MHz of additional spectrum to allow each existing full service television broadcaster to convert to digital technology.[57] Given these considerations, and the record before us, we believe the political editorial and personal attack rules are justified and continue to serve the public interest.[58]

B. The Political Editorial Rule

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[53] *See Reno v. ACLU*, 117 S. Ct. 2329, 2343 (1997); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637-38 (1994); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 566-67 (1990).

[54] *Syracuse Peace Council v. FCC*, 867 F.2d 654, 656 (D.C. Cir. 1989) (summarizing FCC's reasons for eliminating doctrine), *cert. denied*, 493 U.S. 1019 (1990).

[55] *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *CBS, Inc. v. FCC*, 453 U.S. 367 (1981).

[56] *See* Section 2(a)(12) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460.

[57] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 55 (1996) (codified at 47 U.S.C. § 336); Fifth Report and Order in MM Docket No. 87-268, FCC 97-116, 12 FCC Rcd 12810 (1997) (DTV Fifth Report and Order).

[58] Given our public interest conclusion that the rules should be retained, we need not address UCC/MAP's argument that the basic obligations established by the two rules, as well as the fairness doctrine, are statutorily mandated by the Communications Act. *See* 1997 Comments of UCC/MAP at 13 (citing *Maier v. FCC*, 735 F.2d 220 (7th Cir. 1984)). *But see Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1436 (8th Cir. 1993) (en banc) (indicating that fairness doctrine is not codified in the Act); *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 517 (D.C. Cir.), pet. for *reh'g en banc denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987) (*TRAC*) (indicating that fairness doctrine is not codified in the Act); FCC Rescinds Public Notice Instructing General Counsel With Respect to Fairness Doctrine, FCC 96-211 (May 10, 1996) (noting that the fairness doctrine is not codified in the Act).

20. *Background*. The political editorial rule was adopted by the Commission in order to expose the public to various viewpoints regarding candidate elections.[59] When licensees endorse or oppose political candidates, the rule provides a contingent access requirement for the unendorsed or opposed candidates, or their spokespersons. The rule is intended to provide citizens with the information necessary to enable them to exercise their vote in a more responsible and informed manner. In such respects, we believe that this particular rule goes to the very heart of our democratic electoral process.

21. Commenters supporting retention of the rule argue that the political editorial rule is vital to protect against distortions of the political process that could occur when broadcasters endorse or oppose candidates for public office without affording response time to the affected candidates.[60] Given the importance of such concerns, these commenters contend that the corresponding burden of compliance on broadcasters is minimal.

22. Commenters advocating repeal of the political editorial rule argue that the rule's requirements are unduly burdensome. To notify each and every candidate, fringe or otherwise, and afford reply opportunities, they argue, is both time consuming and costly.[61] In multi-candidate races, where arguably the need for editorializing is the greatest, the commenters claim that the administrative burdens of the rule have inhibited broadcasters from editorializing.[62] RTNDA argues that the record illustrates the pervasiveness of "licensee self-censorship generated by the burden of having to identify, notify and provide air time to every candidate other than the one endorsed by the station."[63] CBS notes that a station that airs a political editorial is "forced to offer its air time -- to major and fringe candidates alike -- for the presentation of rebuttal statements, regardless of the opportunities it has afforded the principal contenders for the office to express their views in its overall coverage of the election."[64]

23. With respect to the political editorial rule's alleged chilling effect, the principal evidence cited by those advocating repeal is a 1982 survey conducted by RTNDA, NAB, and NBEA regarding the editorializing practices of broadcast stations in the United States and submitted as supplemental comments to the Commission's 1983 *Notice*.[65] These parties argue that this survey provides evidence that the majority of television and radio stations responding in 1982 did not endorse political

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[59] *Personal Attacks and Political Editorials*, 8 FCC 2d at 722.

[60] 1983 Comments of ALF at 8-9; 1983 Comments of TRAC at 17.

[61] 1983 Comments of NAB at 26; 1987 RTNDA Joint Petition at 8; Joint Broadcaster Comments at 11.

[62] 1983 Joint Comments of RTNDA et. al. at 55.

[63] RTNDA 1987 Joint Petition at 7-8.

[64] 1997 Comments of CBS at 8-9.

[65] 1983 Supplemental Comments of NAB, NBEA, and RTNDA at Exhibit 2.

candidates because of the political editorial rule and that many more would make such endorsements but for the rule.[66] Commenters supporting retention of the political editorial rule argue that the RTNDA survey is inadequate because it is significantly dated and used a flawed methodology.[67]

24. There are also arguments that may support modification of the rule. The Commission noted in the 1983 *Notice*, for example, that the rule imposes upon a licensee's own political endorsements more stringent requirements than are applied to endorsements by non-licensee supporters, with the latter subject to less burdensome requirements under the Commission's *Zapple* doctrine.[68] The *Notice* explained that the discriminatory application of more onerous requirements to a licensee's own political endorsements is inconsistent with the belief that licensee editorializing should be encouraged and is no more subject to abuse than other controversial issue programming.[69] The *Notice* consequently sought comment on application of the less burdensome *Zapple* doctrine to licensee candidate endorsements.[70]

25. *Discussion*. We believe that the political editorial rule continues to serve the public interest by creating a limited right of access to further the important goal of promoting the vigorous discussion of public issues. The Supreme Court made clear in *Red Lion* that, "the public interest standard in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of public concern. . . ."[71]

26. The political editorial rule also serves as an important complement to Congressional policies underlying Section 315(a) and Section 312(a)(7) of the Communications Act. Under Section 315(a), a broadcast licensee that permits a candidate to use its station must afford "equal opportunities" to the candidate's opponents.[72] The political editorial rule prevents broadcasters from

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[66] RTNDA 1987 Joint Petition at 9; 1983 Supplemental Comments of NAB, NBEA, and RTNDA at 2-3. The survey was mailed to 8,810 commercial station licensees, and 43.1 percent of the stations contacted responded. The survey indicates that while 45 percent of the stations that responded did editorialize, only 3.1 percent endorsed political candidates. It further indicates that if the political editorial rule were repealed, 35 percent of the responding stations would endorse political candidates and 7.7 percent would consider making such endorsements

[67] 1997 Reply Comments of UCC/MAP at 6.

[68] *Notice* at ¶ 52. *Nicholas Zapple*, 23 FCC 2d 707 (1970). *Zapple* was a corollary aspect of the Fairness Doctrine but is still enforced by the Commission.

[69] *Notice* at ¶ 39 citing *Report on Editorializing*, 13 FCC at 1252.

[70] *Notice* at ¶ 53 n.31.

[71] *Red Lion*, 395 U.S. at 385. *See also Time Warner Entertainment Co. v. FCC*, 93 F. 3d 957, 975-76 (D.C. Cir. 1996), *citing CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) ("preserv[ation] [of] an uninhibited marketplace of ideas" is proper consideration in imposing public interest obligations on broadcasters).

[72] Section 315(a), 47 U.S.C. §315(a), provides in pertinent part:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to

evading these equal opportunity responsibilities. In *Red Lion*, the Supreme Court expressly noted this important connection stating "[w]hen a broadcaster grants time to a political candidate, Congress itself requires that equal time be offered to his opponents. It would exceed our competence to hold that the Commission is unauthorized by the statute to employ a similar device where personal attacks or political editorials are broadcast by a radio or television station."[73] Absent the political editorial rule, a licensee could run editorials in favor of one candidate every hour of the broadcast day and never trigger the Section 315(a) equal opportunity responsibility because the candidate never made a "use" of the station.

27. Similarly, the Commission's *Zapple* doctrine is patterned on the equal opportunity requirements of Section 315(a). The *Zapple* doctrine applies when candidate supporters, but not the candidates themselves, appear on a station.[74] In such cases, the Commission requires that "quasi-equal opportunities" be made available to the supporters of a candidate if supporters of the candidate's opponents have been given or sold time by a station.

28. While the *Zapple* doctrine had its origins in the former fairness doctrine,[75] the Commission made clear in its 1972 Fairness Report that the *Zapple* doctrine "was neither traditional fairness nor traditional equal opportunities" but rather "a particularization of what the public interest calls for in certain political broadcast situations in light of the congressional policies set forth in Section 315(a)."[76] It noted that in Section 315(a), "Congress has specified that equal opportunities shall be applicable to appearances of legally qualified candidates."[77] The Commission later explained in the 1974 Fairness Report that the *Zapple* doctrine was "simply a common sense application of the statutory scheme" and "was adopted solely because it was analogous to the situation for which Congress itself had provided for 'equal opportunities.'"[78]

29. We believe the same reasoning applies to licensee endorsements and the political editorial

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> use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provision of this section. No obligation is hereby imposed under this subsection upon any licensee to allow the use of its station by any such candidate.

[73] *Red Lion,* 395 U.S. at 385.

[74] *See Nicholas Zapple*, 23 FCC 2d 707 (1970). *Zapple* also does not apply to appearances by candidates' supporters on news programs exempt from Section 315 equal opportunity requirements. *See Democratic National Committee et. al. v. CBS, Inc*., 91 FCC 2d 1170 (1982).

[75] *Zapple*, 23 FCC 2d at 707-709.

[76] *See Handling of Public Issues Under Fairness Doctrine and Public Interest Standard of the Communications Act*, 36 FCC 2d 40, 49 (1972) (1972 Fairness Report).

[77] *1972 Fairness Report*, 36 FCC 2d at 47.

[78] *Handling of Public Issues Under Fairness Doctrine and Public Interest Standard of the Communications Act*, 48 FCC 2d 1, 31 (1974) (*1974 Fairness Report*). (The 1974 *Fairness Report* appends the 1972 *Fairness Report.)*

rule. Indeed, in many ways Section 315(a), the *Zapple* doctrine, and the political editorial rule overlap in the purposes they serve and the obligations they trigger; the main difference is that the first applies to candidate appearances, the second applies to appearances by *non*-licensee candidate supporters, and the third applies to *licensee* candidate supporters. In all three cases, the station is airing appearances -- whether by a candidate, a non-licensee or licensee -- that advocate or oppose the election of a particular candidate. These appearances can have a significant impact on an election given the reach of broadcast stations and the fact that most Americans rely on television and radio to obtain news and information regarding elections.[79] In these instances, Congress has seen fit to establish equal opportunity requirements for candidate appearances to ensure diverse and robust debate on the airwaves regarding candidate elections. And the Commission, exercising its public interest authority, has established the *Zapple* doctrine and political editorial rule to serve the same purpose and prevent the objectives of Section 315 from being circumvented. As the Supreme Court recognized, "[i]n light of the fact that . . . . the analogous provisions of Section 315 are not preclusive in this area, and [Congress] knowingly preserved the FCC's complementary efforts, we think . . . . the political editorializing regulations are a legitimate exercise of Congressionally delegated authority."[80]

30. We also note that the political editorial rule is consistent with a licensee's statutory obligation under Section 312(a)(7) of the Act to provide reasonable access to political candidates. The Supreme Court has indicated that the Commission retains the ability to impose reasonable access requirements even after the adoption of Section 312(a)(7) in 1971.[81] We believe such reasonable access should include affording a candidate the opportunity to respond to a station's endorsement of his or her opponent. The political editorial rule ensures that this opportunity is provided.

31. Because of its close connection to the statutory equal opportunity requirements of Section 315(a) and the reasonable access requirements of Section 312(a)(7), the political editorial rule consequently remains critical to the public's paramount right to receive diverse and antagonistic viewpoints on issues of public concern. The rule is a vital component of broadcasters' public interest obligations and their unique position as public trustees of the nation's airwaves.

32. Broadcasters have argued that the rule has the effect of chilling station editorializing and is therefore counterproductive. These parties argue that their 1982 survey proves that many more broadcasters would editorialize but for the rule.[82]

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[79] *See, e.g.*, Roper Starch Worldwide, *America's Watching; Public Attitudes Towards Television* at 19 (reporting that 58% of Americans depend on television for news and information on political processes); *See also Arkansas Educational Television Commission v. Forbes*, ___ U.S. ___ (1998), 1998 WL 244196 at *6 (noting that a majority of the population cites television as its primary source of election information).

[80] *Red Lion*, 395 U.S. at 382-83.

[81] *CBS, Inc. v. DNC*, 412 U.S. 94, 131 (1973) ("Conceivably at some future date, Congress or the Commission -- or the broadcasters -- may devise some kind of limited right of access that is both practicable and desirable.").

[82] See 1983 Supplemental Comments of NAB, NBEA, and RTNDA at Exhibit 2.

33. Commenters supporting retention of the political editorial rule argue that the RTNDA survey is dated and used a flawed methodology.[83] These parties note that the survey is more than 15 years old and therefore the data relied on is obsolete and untrustworthy.[84] In addition, they also assert that the response rate is low and that the survey instrument does not sufficiently explore other factors, related and unrelated to the rule, that may influence a licensee's decision whether or not to editorialize.[85]

34. We share several of these commenters' concerns. The survey purports to present evidence that some stations in 1982 might have endorsed political candidates but for the political editorial rule. However, given that the survey results were obtained over 15 years ago, we find that this survey is too old to serve as conclusive evidence that the rule has a significant chilling effect on licensee editorializing today.

35. In addition, we also question whether the survey instrument and its methodology are sufficiently reliable. For example, UCC/MAP notes that the survey instrument itself manifests broadcasters' bias as to the appropriate responses by stating that "NAB is launching a major effort to measure the effect of the FCC's political editorial rule" and that "your response will play a role in the first step toward full First Amendment rights for broadcasters."[86] This casts the rule in a pejorative light and encourages a response antipathetic to the rule.[87] Moreover we find that the statistical analysis of the survey data fails to account for self-selection bias in the data. In particular, licensees who responded may have been more likely to object to the political editorializing rule than the typical licensee.

36. We agree with these commenters that the survey also failed to examine other reasons for licensees choosing not to engage in political editorializing. In particular, we note that while the survey suggests that some broadcasters would engage in political endorsements absent the rule, the survey also indicates that others endorsed candidates with the rule in place. These responses raise the unexamined question of why elimination of the rule would have been necessary for some licensees to promote editorializing when it was not the case for others. Indeed, the majority of respondents indicated that elimination of the rule would not lead them to engage in political editorializing.

37. Plainly there are other reasons, unrelated to the rule, why licensees do not endorse candidates. A recently published study noted a significant decline in the general level of television

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[83] 1997 Reply Comments of UCC/MAP at 6.

[84] 1997 Reply Comments of UCC/MAP at 6.

[85] 1997 Reply Comments of UCC/MAP at 6; 1983 Comments of MAP on behalf of International Union, UAW at 27-32.

[86] 1983 Comments of MAP on behalf of International Union, UAW at 29. *See* RTNDA 1987 Joint Petition at 9; 1983 Supplemental Comments of NAB, NBEA, and RTNDA at App. A.

[87] 1983 Comments of MAP on behalf of International Union, UAW at 29.

editorializing, not just with respect to candidate endorsements.[88] A number of factors have been attributed to this decline including broadcasters' fears of alienating viewers, station budgetary constraints and the low production quality of in-house editorials.[89] Thus the presence or absence of the rule may be less significant than other factors.

38. Although we find no persuasive evidence of a chilling effect, we are sensitive to broadcasters' concerns about the potential burdens created by the rule and particularly to the fact that the political editorial rule imposes more stringent requirements regarding licensee endorsements than the *Zapple* doctrine imposes regarding appearances by candidate supporters. Under the political editorial rule, once they have endorsed or opposed a particular candidate, broadcasters are required to seek out, notify, and provide transcripts to *all* the opponents of the candidates endorsed or those opposed, and they must also provide an opportunity to respond to *all* such candidates. By contrast, under *Zapple*, licensees are under an obligation to furnish reply time only to *major* candidates or *major* party supporters. The burden is on the candidate's supporters to request time from the station within seven days. In a footnote, we sought comment in the 1983 *Notice* on the manner in which the less rigorous requirements of the *Zapple* doctrine might be applied to licensee editorials.[90] Two commenters briefly note a preference for application of the *Zapple* doctrine. Tribune observes that "a licensee's political editorial should trigger no greater obligations or rights than are activated under the *Zapple* doctrine when a broadcast involves a candidate's supporters."[91] NBC also notes that *Zapple* is preferable to the political editorial rule.[92] This meager record should be more fully developed and brought up to date.

39. We would be willing to streamline the rule to more closely parallel *Zapple*. Under a streamlined rule, the burden would shift to the candidates to request time from the station within seven days. Licensee political editorials would only trigger an obligation to furnish time to major

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[88] *See* "*TV Editorials Merit Endangered Status*", *Electronic Media*, June 8, 1998 at 3 (a recent study indicates that while more than half of the nation's television stations were editorializing through the 1970s, today less than 10 percent of the top-50 market television affiliates do so), referencing J. Alumit, S. Carter, R. Sykes, "The Status of Broadcast Television Editorials: A Survey and Discussion," (unpublished) submitted to the Association for Education in Journalism and Mass Communications, Annual Convention, August 5-8, 1998; s*ee also* "*The vanishing TV editorial*", *Electronic Media*, June 8, 1998 at 12 ("In the last decade and a half, while broadcasters have fully reaped the advantages of a strong local voice, they have given up on providing the kind of editorial leadership that attempts to shape and challenge the communities they serve.").

[89] *Id.* Broadcast coverage of the electoral process has come under increasing criticism. *See e.g.*, "*A Call for More TV Time for Campaigns," Washington Post*, June 18, 1998, at MD1 ("Given the poor coverage California television stations gave to that state's gubernatorial primary this month, it's clear broadcasters could do much to improve."); "*'Bleeders' Sweeping Leaders Off Calif. TV", Washington Post*, May 23, 1998 at A1 ("Never before in California have politicians spent so much money on television advertising and received such little time on camera from the news departments of local stations.")

[90] *Notice* at ¶ 53 n.31. *See Nicholas Zapple*, 23 FCC 2d 707 (1970).

[91] 1983 Comments of Tribune Broadcasting Company at 13.

[92] 1983 Comments of NBC at 14.

candidates or major party supporters. We believe that this approach would reduce broadcasters' requirements under the current political editorial rule, particularly in multi-candidate races. A modification of this rule to more closely parallel *Zapple* would also reconcile the treatment of licensee endorsements with those of political broadcasts sponsored by others.

C. The Personal Attack Rule

40. *Background*. The personal attack rule creates a limited right of access to give individuals an opportunity to respond to an attack on their character during the discussion of controversial public issues.[93] In such cases, the Commission has concluded that licensees airing such attacks should be required to send the text of the attack to the party attacked and include a specific offer to use their broadcast facilities for responses.

41. Commenters supporting retention of the rule note that the rule is crucial because once an advocate's credibility is attacked, little credence will be given to his or her views on public issues. By permitting responses to such attacks, they argue, the public is better able to appraise the various positions on important public issues.[94] UCC/MAP note that no responsible broadcaster would prepare or present a documentary or editorial making a personal attack on an individual or group without seeking to obtain their views.[95] Therefore, they argue, the rule reinforces sound journalistic practice and is only needed to address the irresponsible "bad actor" who might act in blatant disregard of the public interest in the absence of any regulation.[96] ALF notes that the personal attack rule helps ensure that the broadcast media will be a marketplace of ideas rather than a forum for attacks on personal character.[97]

42. Commenters urging repeal of the rule argue that the personal attack rule has largely proved ineffective and resulted in questionable public benefits. RTNDA argues that the rule is vague in certain respects, making compliance difficult.[98] In such respects, RTNDA argues that many stations, faced with the costs of contesting an alleged violation of the rule, will "opt for timid, safe programming instead of risking the major expense and potential loss of license entailed in a personal attack complaint."[99] These commenters also suggest that, in practice, those offered reply time rarely accept. Commenters also argue that the rule is duplicative of defamation law and inconsistent with

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[93] *Personal Attacks and Political Editorials*, 8 FCC 2d at 725 (1967).

[94] 1983 Comments of TRAC at 12; 1983 Comments of MAP at 15.

[95] 1997 Comments of UCC/MAP at 16.

[96] 1997 Comments of UCC/MAP at 16.

[97] 1983 Comments of ALF at 8.

[98] RTNDA 1987 Joint Petition at 7.

[99] 1983 Joint Comments of RTNDA et. al at 48.

the constitutional standards governing defamation actions set forth by the Supreme Court in *New York Times v. Sullivan*.[100] They point out, because the rule makes no distinction between attacks on public and private figures, it goes beyond existing libel and slander laws.[101]

43. *Discussion.* Broadcast licensees have a fundamental public interest obligation to help ensure that the discussion of public affairs on the public airwaves remains a marketplace of ideas and not a platform for attacks on personal character. In upholding the personal attack rule in *Red Lion,* the Supreme Court stated that "[i]t 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, whether it is by the Government itself or a private licensee."[102] The Court went on to say that it was consistent with this First Amendment purpose for the Commission "to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues . . . . Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed."[103] Thus, the Court stated that it "cannot say that when a station publishes personal attacks or endorses political candidates, it is a misconstruction of the public interest standard to require the station to offer time for a response rather than to leave the response entirely within the control of the station which has attacked either the candidacies or the men who wish to reply in their own defense."[104]

44. The personal attack rule was based on the public interest standard and was established in a series of cases in the early 1960s involving personal attacks on candidates and elected officials.[105] The Supreme Court has stated that, "[i]n terms of constitutional principle, and as enforced sharing of a scarce resource," the personal attack and political editorial rules "are indistinguishable from the equal-time provision of § 315." The Court further characterized these two rules as "important complements" of this statutory provision.[106] In addition, Section 315(a) expressly provides that compliance with the terms of Section 315 alone does not relieve broadcasters of the "obligation imposed upon them under this Act to operate in the public interest and to afford a reasonable opportunity for the discussion of conflicting views on issues of public importance."

45. We believe that the personal attack rule strikes a reasonable balance between the editorial

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[100] See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); 1997 Comments of NAB at 3-4. 1997; Comments of CBS at 6.

[101] 1997 Comments of NAB at 3-4. 1997; Comments of CBS at 6.

[102] *Red Lion*, 395 U.S. at 390.

[103] *Id*. at 392.

[104] *Id*. at 385.

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

[106] *Red Lion*, 395 U.S. at 391.

control of licensees and the public interest obligation described above. While a licensee is granted complete discretion to broadcast any range and nature of views on issues of public importance, the rule requires that if the reputation of a person or a group is attacked during such a broadcast, the person or group attacked must be given a reasonable opportunity to respond. Like the political editorial rule, the personal attack rule has very limited application and creates a targeted and calibrated right of access. The rule comes into play only when an attack is made over a licensee's facilities during the discussion of a controversial issue of public importance. In considering whether to apply the rule, the Commission has historically left considerable discretion to the licensee to decide what issue is involved and whether the issue is controversial and of public importance.[107] The Commission intervenes only when there is evidence that the station has acted in bad faith. In addition, news programming as well as other matters are exempt under the rule.[108] This ensures that a licensee's editorial judgments regarding its news coverage are unhampered.

46. It is important, in our view, that the rule provides a targeted right of access on the station on which the attack occurred. Despite commenters' arguments that there are an increasing number of broadcast outlets in today's communications marketplace, these outlets vary greatly in terms of location, signal reach, audience share and demographics. We agree with those parties who point out that once an individual's credibility is attacked, little credence will be given to his or her views on public issues. It is therefore critical that the attacked individual be granted an opportunity to respond. This opportunity will be more effective if it takes place on the same station airing the attack. In such respects, the rule is tailored to help ensure that the same audience hearing the initial attack is likely to hear the response to that attack. For these same reasons, we also disagree with those commenters who assert that the rule does not promote the discussion of important issues, but merely serves as a means to vindicate personal reputations. An individual's personal character is inextricably linked to the credence an audience will give his or her views on public issues, and in such respects a response to a personal attack is crucial to the public's ability to reach a reasoned judgment.

47. We are also not persuaded by those commenters who argue that attacks on personal reputations can be vindicated through common law defamation actions. The Commission's personal attack rule is distinct from and serves different purposes than state defamation laws. Defamation actions are designed to remedy harms to personal reputations and can take years to resolve. In contrast, the personal attack rule is designed to expose the public to a conflicting view at the time the issue is being debated. As the commenters supporting the rule persuasively argue,[109] the rule is not intended to be a remedy for private disputes, but is aimed at permitting the public to receive a balanced, fair and more complete presentation of controversial issues of public importance. Moreover, we note that the personal attack rule applies not only to individuals but also to groups,

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[107] See *Straus Communications v. FCC*, 530 F.2d 1001, 1008 (D.C. Cir. 1976).

[108] 47 C.F.R. § 73.1920 (b). *See supra* note 28.

[109] *See* 1983 Comments of TRAC at 12; 1983 Comments of MAP at 15.

for whom a state defamation claim may not be available.[110]

48. We also find that the record contains no persuasive evidence that the precisely targeted access right embodied in the personal attack rule causes licensees to shy away from controversial issues confronting their communities or otherwise chills their speech. The rule remedies a personal attack with more speech, not censorship. As noted above, the Commission has also created significant exemptions from the requirements of the rule, including an exemption for bona fide news coverage.

49. The Supreme Court has found that the personal attack rule is not unduly vague noting, "judging the validity of the regulations on their face as they are presented here, we cannot conclude that the FCC has been left a free hand to vindicate its own idiosyncratic conception of the public interest or of the requirements of free speech."[111] We agree that the rule is sufficiently clear and promotes the prompt and inexpensive resolution of disputes between broadcasters and members of their community. As such, the rule is essentially self-enforcing and the Commission's involvement is minimal. As UCC/MAP point out, there have been very few personal attack rule cases since the RTNDA petitions were filed that have resulted in written decisions, and no adverse findings by the Commission since 1987.[112]

50. However, to address broadcasters' concerns that the rule may impose some unnecessary burdens on licensees, we would be willing to modify this rule to reflect the *Zapple* requirements. We would therefore be willing to modify the rule to eliminate the existing notification requirements and make the rule request-driven. In particular, under a modified rule, the requestor -- the individual or group subject to the personal attack -- would be required to make the request to the station for response time within a reasonable period of time or the right to reply would be surrendered. The licensee would not be required to take the affirmative step of notifying such an individual or group of the personal attack. We note, however, that we have never sought comment on such a proposal and believe it would be important to do so.

51. We therefore vote to retain the personal attack rule, but would be willing to modify the

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[110] Defamation claims arising out of defamatory statements about a group are generally only available if the statements can reasonably be construed to be "of and concerning" the individual plaintiff as a member of the group. *See, e.g.*, Restatement (Second) of Torts, § 564A (1977) ("One who publishes defamatory matter concerning a group or class of persons is subject to liability to an individual member of it if, but only if, (a) the group or class is so small that the matter can reasonably be understood to refer to the member, or (b) the circumstances of publication reasonably give rise to the conclusion that there is particular reference to that member."). In contrast, the personal attack rule explicitly applies to attacks on groups. 47 C.F.R. § 73.1920(a). This difference is consistent with the distinct purposes underlying defamation claims (remedying harm to personal reputations) and the personal attack rule (preventing the distortion of debate on important issues through attacks on groups or individuals). The validity of true "group libel" laws is open to substantial doubt. *See, e.g., Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188 (9th Cir. 1988)), *cert. denied*, 493 U.S. 812 (1989).

[111] *Red Lion*, 395 U.S. at 395-96.

[112] 1997 Reply Comments of UCC/MAP at 10-11.

rule in such a manner.

D. The Implications of the Repeal of the Fairness Doctrine

52. A number of commenters argue that a prior Commission's decision to repeal the fairness doctrine requires this Commission to repeal the political editorial and personal attack rules since these two rules have been viewed as corollaries to the fairness doctrine.[113] We disagree.

53. The fairness doctrine required broadcast licensees (1) "to provide coverage of vitally important controversial issues of interest in the community served by the licensees" and (2) "to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues."[114] In its 1987 decision in *Syracuse Peace Council*,[115] a prior Commission eliminated the fairness doctrine on the grounds that it was contrary to the public interest and First Amendment. The Commission believed that the "growth in the number of broadcast outlets reduced any need for the doctrine, that the doctrine often worked to dissuade broadcasters from presenting any treatment of controversial viewpoints, that it put the government in the doubtful position of evaluating program content, and that it created an opportunity for incumbents to abuse it for partisan purposes."[116] The U.S. Court of Appeals for the D.C. Circuit upheld this decision without reaching the constitutional issues raised by the Commission. The court instead held that the Commission had been reasonable in concluding, based on the record before it, that the fairness doctrine was contrary to the public interest.[117]

54. We do not believe that *Syracuse Peace Council* controls the Commission's resolution of this proceeding. *Syracuse Peace Council* was expressly limited to the fairness doctrine. In addition, subsequent statements and actions by Congress and the Supreme Court,[118] persuade us that broadcasters continue to play a special role in serving the public interest, including a duty to abide by the political editorial and personal attack rules. As an initial matter, we note that *Syracuse Peace Council* expressly declined to rule on a request that it also repeal the political editorial and personal attack rules, stating that "[t]hose issues are beyond the scope" of that proceeding.[119] More generally,

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[113] *See* Comments of RTNDA, NAB, Paxson, CBS, and Freedom of Expression Foundation.

[114] *See Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 FCC2d 143, 146 (1985).

[115] 2 FCC Rcd 5043 (1987), *recon. denied*, 3 FCC Rcd 2035 (1988).

[116] *Syracuse Peace Council v. FCC*, 867 F.2d 654, 656 (D.C. Cir. 1989) (summarizing FCC's reasons for eliminating doctrine), *cert. denied*, 493 U.S. 1019 (1990).

[117] *Id.*

[118] *See Reno v. ACLU*, 117 S. Ct. 2329, 2343 (1997); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637-38 (1994); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 566-67 (1990).

[119] 3 FCC Rcd at 2036.

these rules are based on the public interest standard, and are not dependent on the continued existence of the fairness doctrine. The prior Commission's decision to repeal the fairness doctrine did not diminish broadcasters' obligation to serve the public interest. To the contrary, the public interest standard continues to be embodied in the Communications Act, which requires the Commission to issue and renew a broadcaster's license only upon a finding that the station has served the public interest.[120] Moreover, Congress made clear in Section 201 of the Telecommunications Act of 1996, which required the Commission to set aside additional spectrum for existing broadcast television stations to convert to digital television, that "[n]othing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity."[121] Congress also reaffirmed the public trustee obligation in the Children's Television Act of 1990, noting "[i]t is well established that in exchange for 'the free and exclusive use of a valuable part of the public domain,' a broadcaster can be required to act as a public fiduciary, obligated to serve the needs and interests of its area."[122]

55. Broadcasters' continued role as public trustees reflects the fact that the frequencies they use remain a scarce public resource. More citizens still want to broadcast over the public airwaves that can be accommodated.[123] Indeed, the scarcity of these frequencies, and the concomitant barriers to new voices entering the broadcast industry, has been further underlined by the 1996 Act's extension of broadcast license terms to eight years and its elimination of the opportunity for competing applicants to challenge an incumbent broadcaster's license renewal.[124] Today the licensee holds a valuable right to the exclusive use of a frequency which extends significantly longer than before and which is far less vulnerable to challenge. In addition, the 1996 Act set aside virtually all remaining vacant UHF and VHF band spectrum to permit each existing full service broadcast television licensee to convert to digital television.[125] These developments have exacerbated the challenges facing those seeking to become licensees. So-called "pirate" broadcasters have recently taken to using the

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[120] 47 U.S.C. §§ 307(a), 309(k)(1)(A).

[121] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 108 (1996) (*codified at* 47 U.S.C. § 336(d)).

[122] *See* H. Rep. 385, 101st Cong., 1st Sess. *10* (1989*)(citing Red Lion; Office of Communication of United Church of Christ v. FCC*, 359 FCC 2d 997, 1003 (D.C. Cir. 1966)). *See also* Section 25(a) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (directing the FCC to impose on providers of direct broadcast satellite service, public interest requirements, including access for political candidates based on a spectrum scarcity rationale.)

[123] Originally, radio licenses were issued for 60 days (*Annual Report of the Federal Radio Commission* - 1928, at 8) and extended to one year (*Annual Report of the Federal Radio Commission* - 1929, at 2.)

[124] *See* Sections 203 and 204 of Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 112-113 (1996); *Report and Order*, 12 FCC Rcd 1720 (1997) (extending broadcast license terms to eight years under the 1996 Act); *Order*, 61 Fed. Reg. 18289 (April 25, 1996) (eliminating comparative renewals pursuant to the 1996 Act) (codified at 47 U.S.C. §§ 307(c) and 309(k)(4)).

[125] Section 201 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 107-08 (1996).

airwaves without a license in large numbers, claiming that they have no reasonable access to licenses.[126] Given this, we think it is a reasonable *quid pro quo* to expect those who have been awarded these scarce frequencies to provide access to individuals who have been personally attacked or a political candidate whose opponent has been endorsed by a station editorial. A licensee has been "'granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.'"[127]

56. Even *Syracuse Peace Council* made clear that the repeal of the fairness doctrine should not be interpreted as effectively repealing a broadcaster's obligation to cover issues that are responsive to the needs and interests of its community. As the Commission stated, "[i]ssue responsive obligations remain in full force and effect."[128] We think the same applies to the political editorial and personal attack rules. Although the *Syracuse Peace Council* Commission asserted that the growth in media outlets would generally ensure some measure of coverage of controversial issues, that does not mean that the personal attack and political editorial rules do not continue to serve important public interest purposes.[129] The personal attack rule was needed (and upheld by the Supreme Court) when the fairness doctrine ensured some balance in the discussion of controversial issues, and continues to be needed even assuming that the growth in media outlets provides that coverage. Similarly, the political editorial rule continues to be necessary even assuming that the media marketplace generally ensures some measure of coverage of controversial issues, because a particular election might be skewed if the handful of media owners in a community could choose to endorse candidates without providing the candidates' opponents a right to respond. This also explains why Section 315(a) continues to be necessary even in the wake of the Commission's *Syracuse Peace Council* decision, because without Section 315 an election might be skewed if the handful of licensees in a community could choose whose campaign advertisements to accept and reject all others. Thus, notwithstanding the Commission's belief eleven years ago that coverage of controversial issues will be forthcoming naturally, Congress has not chosen to repeal or amend Section 315(a).

57. Moreover, unlike the fairness doctrine, these rules create a specific opportunity in certain circumstances similar to the limited access created by the statutory equal opportunity requirements under Section 315(a) and the reasonable access provisions of Section 312(a)(7) of the Communications Act. These rules thus go beyond the general obligations of the fairness doctrine by providing an important complement to the requirements of Section 315(a) and Section 312(a)(7). In doing so, they directly further the robust debate on important public issues that is central to broadcasters' obligation to serve the public interest.

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[126] *See, e.g., United States v. Dunifer*, No. C 94-03542 CW (N.D. Cal. June 16, 1998).

[127] *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (citation omitted).

[128] 3 FCC Rcd at 2039.

[129] 2 FCC Rcd at 5051-52; *See* 3 FCC Rcd at 2038-39 ("Having eliminated the chilling effects most directly associated with the second prong of the doctrine, coverage of controversial issues will be forthcoming naturally, without the need for continued enforcement of the first prong.").

58. Nor do we believe the growth in the number of broadcast and other media outlets, cited by the prior Commission in eliminating the fairness doctrine, warrants repeal of the political editorial and personal attack rules. First, we do not believe the type of evidence that persuaded the Commission to find that the fairness doctrine had a chilling effect has been presented in this proceeding. The evidence submitted regarding the alleged chilling effect of the political editorial and personal attack rules has largely been anecdotal and speculative. These attacks on the rules are no more persuasive now than they were in 1969, when the Supreme Court rejected them. We also point out that the rules are tailored to avoid undue burdens and intrusions on licensees' editorial judgments, and we have expressed our willingness to modify the rules further to ensure that this is the case. Thus, for example, the personal attack rule exempts a licensee's news coverage and other matters from its requirements. The fairness doctrine contained no such exemptions or tailoring.

59. Second, while there are a greater number of outlets today, many of those outlets are irrelevant to the rules at issue. National cable networks, for instance, do not, and realistically cannot, endorse candidates for state or local office, or engage in discussion of local issues. So just as Section 315(a) has not been rendered obsolete by the increased number of outlets, neither has the political editorial rule. Third, these rules authorize a right of access in response to a specific statement that is unlikely to be provided by the general media marketplace. Consider, for example, the personal attack that was at issue in *Red Lion* -- an attack suggesting that the author of a book critical of Barry Goldwater was a communist sympathizer.[130] There is simply no reason to think that another broadcaster would happen to provide a response to the view, aired by a competing broadcaster, that a particular author was a Communist sympathizer.

60. Fourth, broadcast outlets today vary greatly in terms of location, signal reach, and audience share and demographics. Given these differences, the limited access afforded by the political editorial and personal attack rules will be most effective if it takes place on the station airing the personal attack or candidate endorsement. In this way the individual invoking the rule will be most likely to reach the same audience that heard the initial attack or endorsement. For the same reason Section 315's equal opportunity requirements are imposed on each station airing a candidate appearance and have not been rendered obsolete by the growth in the number of media outlets.

61. Fifth, the two rules do not involve the Commission in licensee programming decisions to the extent that the fairness doctrine did. The latter set forth a general obligation of balanced coverage of controversial issues that required the Commission to make judgments about whether a licensee had presented a sufficient number of "contrasting" viewpoints in the programming at issue. The political editorial and personal attack rules, however, are basically limited access requirements that are triggered by discrete, identifiable circumstances: a candidate endorsement or a personal attack during the presentation of a controversial issue of public importance. As one set of commenters indicated,[131] the rules are clear and generally self-enforcing, greatly minimizing the Commission's

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[130] *Red Lion*, 395 U.S. at 371.

[131] 1997 Reply Comments of UCC/MAP at 10-11.

involvement in licensee programming decisions..[132]

62. In the end, our task in this proceeding, just as it was in our review of the fairness doctrine, is "to make predictive and normative judgments" about the benefits and the burdens resulting from the two rules, and ultimately to determine whether the benefits outweigh the burdens.[133] In our judgment this calculus leads us to a different result than the one reached by the prior Commission with respect to the fairness doctrine given the different considerations raised by the political editorial and personal attack rules.

E. First Amendment Issues

63. A number of commenters have argued that the political editorial and personal attack rules are contrary to the First Amendment.[134] They further assert that spectrum scarcity -- the primary basis for the Supreme Court's decision upholding the rules in its 1969 *Red Lion Broadcasting Co. v. FCC*[135] decision -- is a thing of the past given new allocations of broadcast channels and the development of cable and other outlets. In this regard, they point to dicta in *Syracuse Peace Council* stating that the scarcity rationale is no longer valid and urging the Supreme Court to reconsider its holdings in *Red Lion* and *League of Women Voters*[136] that have granted the government greater leeway in regulating broadcasters under the First Amendment.[137]

64. We disagree with these arguments. In *Red Lion*, the Supreme Court upheld the very rules at issue in this proceeding against a First Amendment challenge. The Court stated that it was not "inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the

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[132] UCC/MAP, proponents of the rules, state that "since 1987 . . . there have been fewer than a dozen political editorial decisions and personal attack rule cases which actually resulted in written decisions. Of those reported, there have been about three adverse findings as to the political editorial rule, for which the sanctions were in each case mere admonitions. [UCC/MAP] were unable to locate a single instance of an adverse finding as to the personal attack rule since 1987." 1997 Reply Comments of UCC/MAP at 10-11.

[133] *Syracuse Peace Council*, 867 F.2d at 660.

[134] 1983 Joint Comments of RTNDA et. al. at 55; 1983 Comments of ALF at 8-9; 1983 Comments of TRAC at 17.

[135] *Red Lion*, 395 U.S. 367 (1969).

[136] 468 U.S. 364 (1984).

[137] *Syracuse Peace Council*, 2 FCC Rcd at 5052-57. The Commission's statements regarding the scarcity rationale were dicta in that they were not necessary to the Commission's decision that, even under the more lenient standard for reviewing broadcast programming regulation set forth in *Red Lion*, the Fairness Doctrine violated the First Amendment. In any event, on appeal, the D.C. Circuit expressly avoided any review of either the Commission's constitutional holding or its constitutional dicta and upheld the Commission's decision on the narrow ground that the Commission was reasonable in its conclusion that the fairness doctrine no longer served the public interest.

station be given a chance to communicate with the public."[138] The Court also found that "the First Amendment confers no right on licensees to prevent others from broadcasting on 'their' frequencies and no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use. In terms of constitutional principle, and as enforced sharing of a scarce resource, the personal attack and political editorial rules are indistinguishable from the equal time provision of Section 315. . . ."[139]

65. We also take this opportunity to reject the eleven-year old dicta in *Syracuse Peace Council* regarding the scarcity rationale and the appropriate First Amendment standard governing broadcasters. We believe that *Red Lion* and *League of Women Voters* remain the appropriate constitutional standard for judicial review of broadcast programming regulation under the First Amendment. In this regard, we note that three years after the Commission decision in *Syracuse Peace Council*, the Supreme Court in *Metro Broadcasting v. FCC*[140] gave no hint that it was prepared to reconsider the established standard for reviewing broadcast regulation. More recently, in *Reno v. ACLU* the Court noted the special justifications for imposing public interest requirements on broadcasting, including the history of extensive government regulation of the broadcast medium, the scarcity of available frequencies, and the "invasive nature" of broadcasting.[141] Moreover, Congress, whose decisions should be afforded "great weight" in the judicial evaluation of First Amendment claims in the broadcasting context,[142] stated in the legislative history of the Children's Television Act of 1990 its belief that broadcasters may be subject to reasonable public interest programming obligations due to the scarcity of broadcast frequencies on the traditional basis that broadcasters are public trustees of the airwaves.[143] More recently, in Section 201 of the Telecommunications Act of 1996, Congress reaffirmed this public trustee relationship and required the Commission to set aside additional spectrum for existing broadcast television stations to convert to digital television noting that "[n]othing in this section shall be construed as relieving a television

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[138] *Red Lion*, 395 U.S. at 392.

[139] *Red Lion*, 395 U.S. at 391.

[140] 497 U.S. 547, 566-67 (1990).

[141] 117 S.Ct. 2329, 2343 (1997) (*citing Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637-638 (1994) and *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115,128 (1989)).

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

[143] *See* S. Rep. No. 227, 101st Cong., 1st Sess. 10-11 (1989)(noting "[t]he Supreme court long has recognized Congress' authority generally to regulate broadcasting 'in the public interest, convenience and necessity' through the vehicle of the Communications Act of 1934 (the "Act") and FCC rules and regulations. In 1969, the Supreme court affirmed that because radio spectrum is not available to all, broadcast licensees have a duty to act as fiduciaries for the public. *Red Lion v. FCC*, 395 U.S. 367, 388-389 (1969)"); H. Rep. No. 385, 101st Cong., 1st Sess. 10 (1989) (noting "[i]t is well established that in exchange for 'the free and exclusive use of a valuable part of the public domain,' a broadcaster can be required to act as a public fiduciary, obligated to serve the needs and interests of its area." (citing *Red Lion; Office of Communication of United Church of Christ v. FCC*, 359 FCC 2d 997, 1003 (D.C. Cir. 1966)).

broadcasting station from its obligation to serve the public interest, convenience, and necessity."[144]

66. *Red Lion* is consequently still good law, and the scarcity rationale remains.[145] It is still true that "there are substantially more individuals who want to broadcast than there are frequencies to allocate."[146] Indeed, in 1996 the D.C. Circuit upheld the constitutionality of public interest requirements that have been imposed on direct broadcast satellite services ("DBS"), which similarly use scarce spectrum frequencies, on the basis of *Red Lion* and the scarcity rationale.[147] We also note that alternative rationales have been offered to support a different First Amendment standard for broadcasters by the courts[148] and in recent scholarship.[149]

67. We therefore conclude that the First Amendment standard set forth in *Red Lion* and *League of Women Voters* remains the appropriate test for assessing broadcast regulation, and that the political editorial and personal attack rules satisfy this test.

IV. CONCLUSION

68. As we find above, the political editorial and personal attack rules continue to serve the public interest. We consequently vote to retain the two rules, although, as discussed above, we

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[144] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 108 (1996) (*codified at* 47 U.S.C. § 336(d)).

[145] *See also* 1997 Comments of MAP/UCC at 9-10.

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

[147] *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 973-79 (D.C. Cir. 1996).

[148] *See FCC v. Pacifica Foundation*, 438 U.S. 726, 748-49 (1978) (upholding broadcast indecency regulation on grounds that broadcasting has "established a uniquely pervasive presence in the lives of all Americans" and "is uniquely accessible to children"); *Red Lion*, 395 U.S. at 400 ("Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government."); *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (A "licensed broadcaster is 'granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable pubic obligations.'") (citation omitted); *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 726 (D.C. Cir. 1997) (Williams, J., dissenting from denial of petition for rehearing *en banc*) (objecting to extending *Red Lion*'s scarcity rationale to justify DBS public interest requirements, but considering the possibility that "DBS regulation could be saved as a condition legitimately attached to a government grant").

[149] *See* Cass R. Sunstein, *Democracy and the Problem of Free Speech* (1993); Owen Fiss, *The Irony of Free Speech* (1996); Ronald J. Krotoszynski, Jr., *Into the Woods: Broadcasters, Bureaucrats, and Children's Television Programming*, 45 Duke L.J. 1193 (1996); Charles Logan, *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 Cal. L. Rev. 1687 (1997).

would be willing to streamline them to lessen the burdens they may impose on broadcasters.[150]

[150] As the Commission pointed out in the *Notice* and the Mass Media Bureau's 1996 Public Notice, the political editorial and personal attack rules are also applicable to cable systems when they originate programming. See 47 C.F.R. § 76.209. The focus of this proceeding has been on broadcasting, not on cable. We received no comment on these rules in the cable context. The record thus provides an insufficient basis for us to formulate a judgment on this issue.