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PROGRAMING

FCC ducks fairness showdown

Facing constitutional challenge it so often claimed to be inviting, it decides at final hour it would rather switch its rules than fight

The FCC has decided to retreat and attempt to regroup in its critical court fight over the legality of its fairness-doctrine rules. It will ask the U. S. Seventh Circuit Court of Appeals in Chicago, where the fight was to be waged, to hold the case in abeyance so that the most controversial of those rules may be rewritten.

The surprise decision, which reflects doubt over the commission's ability to withstand the challenge of the Radio Television News Directors Association, CBS, NBC and other groups, was made at a commission meeting last Thursday.

And it came on a suggestion from Donald F. Turner, assistant attorney general in charge of the Justice Department's antitrust division. (The antitrust chief represents the Justice Department in suits brought against administrative agencies in which the attorney general has charge of litigation.) The commission planned to announce its decision to request a delay on Friday (March 1).

At issue in the case are the rules in which the commission, in an order adopted last July (BROADCASTING, July 10, 1967), codified aspects of its fairness doctrine dealing with personal attacks.

Procedures Spelled Out ▪ The rules require stations airing a personal attack to send the person or group attacked a tape, script or accurate summary of the broadcast, a notification of the time of attack and an offer of an opportunity to respond. Similar procedures were adopted in connection with the broadcast of political editorials, but these are not to be revised. Mr. Turner was not concerned about them.

The broadcast industry groups, in seeking judicial review of an order they said sharply circumscribes the freedom of broadcast journalism, attacked the rules as a violation of the constitutional guarantees of freedom of speech and press—or at the least as exceeding the commission's statutory power.

Mr. Turner, who had been conferring with commission attorneys on the case, indicated in a letter to the agency Thursday his belief that the commission has the constitutional and statutory authority to promulgate the fairness doctrine. He also said that a special rule would be valid.

"But," he added, "we have some concern that the rule, as written, poses possible problems that might be minimized by appropriate revisions" without materially affecting the "public interest objectives that the rule is intended to serve."

Suggests Rewrite ▪ Accordingly, he said that the commission "might wish to weigh the possibility of considering revision of the rule before proceeding further with the cases" now pending in the appeals court in Chicago. He said he had discussed possible revisions with commission attorneys.

The commission's decision to seek a delay in the case means a lengthy postponement—perhaps one of a year—in the broadcasters' fight to overturn the rules. Commission officials said rulemaking proceeding would be necessary, in which a new version of the rules would be drafted and submitted for comment by the industry.

In the meantime, the challenged rules will remain on the commission books. But it was not clear last week whether and to what degree the commission would attempt to enforce them.

For some commission officials, at least, the action Thursday came as a bitter pill, and it was adopted only after some two hours of soul searching and argument. The commission on several occasions has invited broadcasters who have complained about the fairness doctrine to test it in court. Members have said they would "welcome" a resolution of the controversial issue.

Second Case Affected ▪ The seventh

(Continued on page 4)

Churchmen back FCC on fairness

A group of religious organizations rallied to the side of the FCC last week on the commission's fairness rules in what may be an academic exercise.

In a brief filed in the U. S. Court of Appeals for the Seventh Circuit, seven national religious bodies contended that the FCC's fairness rules are proper and legal.

The friend-of-the-court brief was filed last Wednesday (Feb. 28) by the Office of Communications of the United Church of Christ, United Church Board for Homeland Ministries, Board of National Missions of the United Presbyterian Church in the USA, National Division of the Methodist Board of Missions, the General Board of the Christian Social Concerns of the Methodist Church, the American Jewish Committee and the National Catholic Conference for Interracial Justice. The Church of Christ was the principal protestant against the program policies of WLBT(TV) Jackson, Miss., regarding racial matters. A hearing examiner last October recommended that the station's license be renewed for a full three years.

The attack on the FCC's fairness rules was made by the Radio-Television News Directors Association, CBS and NBC. Petitioners filed their briefs last year (BROADCASTING, Nov. 27, 1967). The FCC was to file its response to petitioners this week, but it has decided to seek remand of the case in order to revise the fairness rule (see above).

See As Beginning ▪ Calling the FCC's fairness rules a "modest first step" toward balanced programing on controversial issues, the religious groups maintained that the First Amendment requires the commission to assure fairness, and that the public interest requires "a direct and summary procedure" to correct inequities in programing.

License-renewal proceedings taking into account charges of unfairness, the group said, have not proved effective, are too great a financial burden on individuals or groups, and their resolution "long after an attack" is not an effective remedy.

And the brief said, alleged difficulties for networks in complying with the fairness rules are not relevant to the problem.

FCC Wants to Revise Rule on Broadcasting Of Personal Attacks; Delay of Suit Sought

By WAYNE E. GREEN
Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON—The Federal Communications Commission has changed its mind on rules regulating radio and television stations that broadcast personal attacks on people.

Now the question is, should it be allowed to change the rules?

A Federal appeals court in Chicago will begin to wrestle with that dilemma this week. The FCC asked the court Friday to delay action on a case in which the agency's current personal-attack rules are being challenged as a violation of free speech by Columbia Broadcasting System Inc., the National Broadcasting Co. unit of Radio Corp. of America and the Radio and Television News Directors Association.

The commission said it wanted the delay so it could "set aside" the controversial personal-attack provisions and "conduct an expeditious rule-making proceeding looking toward their revision." Its action was taken after "further consideration (of rules) and consultation with the Department of Justice," the agency said.

The commission's move came as a surprise. Its rules had been under fire from the broadcasting industry since they were adopted last July, but the FCC has staunchly defended them. Its latest action brought a mixture of feeling about why the agency made the request for delay of the court case and whether the networks and the association will oppose the delay.

Disputed Rules Outlined

The rules require broadcasters, when they air an attack on the "character, honesty, integrity or like quality" of persons or organizations, to furnish a tape or script to those attacked and offer them air time for reply.

The FCC said it adopted the rules to clarify broadcasters' obligations under the agency's Fairness Doctrine, a statement of general policy in effect for several years. Basically, that policy—also under attack in the Chicago court—says that if a broadcaster airs "controversial issues of public importance" he must make "reasonable" efforts to present conflicting viewpoints.

While the FCC didn't spell them out, several factors apparently affected its decision to try to modify the rules. One was the Supreme Court's decision in January to delay ruling on the Constitutionality of the Fairness Doctrine in a case filed by Red Lion Broadcasting Co. The High Court said it would wait until the Chicago case was decided and appealed to the Supreme Court.

Most legal experts saw this as a setback for the FCC and the Justice Department, which had urged the Supreme Court to go ahead and decide the Red Lion case. These experts felt the FCC had a better chance of winning the Red Lion case, which challenged only the broad fairness policy and not the rules. A victory there, they argued, would have given the FCC something of a favorable precedent to rely on when the Chicago case was appealed.

Networks' Attack

Another factor was the vigorous Constitutional attack the networks and the association made in the Chicago case. They not only challenged the rules, but also raised questions about the agency's power to regulate this type of conduct, asserting that it was a violation of free speech. CBS hit particularly hard at the inhibiting effect it said the rules would have on news commentators like Eric Sevareid.

But the deciding factor probably was the attitude of the FCC's chief ally in the case, the Justice Department. In a letter to FCC Chairman Rosel H. Hyde on Feb. 29, Assistant Attorney General Donald F. Turner said he thought some form of personal-attack rule would be valid, but the current rules "raise possible problems that might be minimized by appropriate revisions." He suggested that the FCC "weigh the possibility" of revisions before proceeding in the Chicago case.

There's some disagreement over what the FCC's motive is in making the request. In dissenting from the agency's decision, Commissioner Lee Loevinger charged the majority with deliberately delaying a court test of its power to "supervise and regulate speech" in broadcasting. The request is "obviously merely a cosmetic effort to present a better face in court," he said.

The delay could have two effects, some legal experts say. It would allow the FCC to revise its rules to make them more defensible against a charge they violate free speech. It also might cause the Supreme Court to go ahead and decide the Red Lion case. "If Mr. Loevinger is right," the FCC action "is a tactical retreat rather than a retreat based on principle," says a Washington lawyer familiar with the issues.

Majority's Position

Commissioner Kenneth A. Cox vehemently denied this in a separate statement concurring with the majority. He conceded there might be a delay, but he argued that the Supreme Court still is free to defer the Red Lion case until the rules are revised. But even if it went ahead and decided Red Lion in the FCC's favor, "that wouldn't in any way commit it" to later upholding the revised rules, Mr. Cox said.

Mr. Cox also denied that the FCC request is merely a legal ploy to avoid a court defeat. He said the FCC is legitimately striving for a "better" rule to regulate broadcasts of personal attacks—a rule that will promote the public interest without impairing "the interests of the parties (to the Chicago case) and the public in free broadcast journalism."

It's unclear how the networks and the association will respond. Some legal experts feel they might try to force the FCC's hand by arguing that the issues have dragged on long enough and should be decided now. If that argument were upheld, the commission might have to defend rules it apparently has reservations about in a case which may call into question its authority to regulate this aspect of broadcasting.

Another possibility is that they will agree to the request if the FCC will also set aside its editorial rules. These rules, also being challenged in the case, require stations, when they endorse a political candidate, to offer rebuttal time to opposing candidates. They were adopted at the same time as the personal-attack rules, but the FCC didn't mention them in its request.

Finally, the networks and the association may just accede to the request, then argue their position when the rule-making proceeding opens. It's uncertain how long such a proceeding would take, but most estimates have ranged from three to six months. Replies to the FCC request probably will be filed within the next three weeks.

Photographed from The Wall Street Journal of March 4, 1968

backing away from, and will now modify or change. Here is your United Presbyterian Church, your Methodist Church, your United Church of Christ. And then the United Church Board of Homeland Ministries which is well known to many of us because their Secretary on Evangelism, Willis E. Elliot, was the spokesman on evangelism for the National Council of Churches at their Miami meeting in 1966, and he is the one who, on the Barry Farber show in New York (and we have the tape), questioned even whether man has a soul or not. Thus, your religious liberals, who have been doing so much to help the Communists, are joined with the forces that have Government power to restrict speech.

Our liberty has been denied. Our religious freedom, our freedom of speech, have been restricted and nobody knows it better than I do. The strain of broadcasting every morning, to stay within the restrictions so that you don't get over the barriers and cause all these troubles and the expense of fines to all our radio stations has been an ordeal! God has given us grace and strength to do it, and we will continue to fight every day on this radio. I want you, my friend, to come to our help, as never before.

First, join us in our daily prayers, Our first weapon is prayer