APPENDIX

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON 25, D. C.

In the Matter of

EDITORIALIZING BY BROADCAST LICENSEES. } DOCKET NO. 8516

REPORT OF THE COMMISSION

BY THE COMMISSION (CHAIRMAN COY AND COMMISSIONER WALKER NOT PARTICIPATING; ADDITIONAL VIEWS BY COMMISSIONER WEBSTER; SEPARATE OPINION BY COMMISSIONER JONES; COMMISSIONER HENNOCK DISSENTING):

1. This report is issued by the Commission in connection with its hearings on the above entitled matter held at Washington, D. C., on March 1, 2, 3, 4, and 5, and April 19, 20, and 21, 1948. The hearing had been ordered on the Commission's own motion on September 5, 1947, because of our belief that further clarification of the Commissioner's position with respect to the obligations of broadcast licensees in the field of broadcasts of news, commentary and opinion was advisable. It was believed that in view of the apparent confusion concerning certain of the Commission's previous statements on these vital matters by broadcast licensees and members of the general public, as well as the professed disagreement on the part of some of these persons with earlier Commission pronouncements, a reexamination and restatement of its views by the Commission would be desirable. And in order to provide an opportunity to interested persons and organizations to acquaint the Commission with their views, prior to any Commission determination, as to the proper resolution of the difficult and complex problems involved in the presentation of radio news and comment in a democracy, it was designated for public hearing before the Commission *en banc* on the following issues:

1. To determine whether the expression of editorial opinions by broadcast station licensees on matters of public interest and controversy is consistent with their obligations to operate their stations in the public interest.

2. To deermine the relationship between any such editorial expression and the affirmative obligation of the licensees to insure that a fair and equal presentation of all sides of controversial issues is made over their facilities.

2. At the hearings testimony was received from some 49 witnesses representing the broadcasting industry and various interested organizations and members of the public. In addition, written statements of their position on the matter were placed into the record by 21 persons and organizations who were unable to appear and testify in person. The various witnesses and statements brought forth for the Commission's consideration, arguments on every side of both of the questions involved in the

hearing. Because of the importance of the issues considered in the hearing, and because of the possible confusion which may have existed in the past concerning the policies applicable to the matters which were the subject of the hearing, we have deemed it advisable to set forth in detail and at some length our conclusions as to the basic considerations relevant to the expression of editorial opinion by broadcast licensees and the relationship of any such expression to the general obligations of broadcast licensees with respect to the presentation of programs involving controversial issues.

3. In approaching the issues upon which this proceeding has been held, we believe that the paramount and controlling consideration is the relationship between the American system of broadcasting carried on through a large number of private licensees upon whom devolves the responsibility for the selection and presentation of program material, and the congressional mandate that this licensee responsibility is to be exercised in the interests of, and as a trustee for the public at large which retains ultimate control over the channels of radio and television communications. One important aspect of this relationship, we believe, results from the fact that the needs and interests of the general public with respect to programs devoted to new commentary and opinion can only be satisfied by making available to them for their consideration and acceptance or rejection, of varying and conflicting views held by responsible elements of the community. And it is in the light of these basic concepts that the problems of insuring fairness in the presentation of news and opinion and the place in such a picture of any expression of the views of the station licensee as such must be considered.

4. It is apparent that our system of broadcasting, under which private persons and organizations are licensed to provide broadcasting service to the various communities and regions, imposes responsibility in the selection and presentation of radio program material upon such licensees. Congress has recognized that the requests for radio time may far exceed the amount of time reasonably available for distribution by broadcasters. It provided, therefore, in Section 3 (h) of the Communications Act that a person engaged in radio broadcasting shall not be deemed a common carrier. It is the licensee, therefore, who must determine what percentage of the limited broadcast day should appropriately be devoted to news and discussion or consideration of public issues, rather than to the other legitimate services of radio broadcasting, and who must select or be responsible for the selection of the particular news items to be reported or the particular local, State, national or international issues or questions of public interest to be considered, as well as the person or persons to comment or analyze the news or to discuss or debate the issues chosen as topics for radio consideration, "The life of each community involves a multitude of interests some dominant and all pervasive such as interest in public affairs, education and similar matters and some highly specialized and limited to few. The practical day-to-day problem with which every licensee is faced is one of

striking a balance between these various interests to reflect them in a program service which is useful to the community, and which will in some way fulfill the needs and interests of the many." *Capital Broadcasting Company,* 4 Pike & Fischer, R.R. 21; *The Northern Corporation (WMEX),* 4 Pike & Fischer, R.R. 333, 338. And both the Commission and the courts have stressed that this responsibility devolves upon the individual licensees, and can neither be delegated by the licensee to any network or other person or group, or be unduly fettered by contractual arrangements restricting the licensee in his free exercise of his independent judgments. *National Broadcasting Company* v. *United States,* 319 U.S. 190 (upholding the Commission's chain broadcasting regulations, Section 3.101–3.108, 3.231–3.238, 3.631–3.638), *Churchhill Tabernacle* v. *Federal Communications Commission,* 160 F. 2d. 244 (See, rules and regulations, Sections 3.109, 3.239, 3.639); *Allen T. Simmons* v. *Federal Communications Commission,* 169 F. 2d. 670, *certiorari denied* 335 U.S. 846.

5. But the inevitability that there must be some choosing between various claimants for access to a licensee's microphone, does not mean that the licensee is free to utilize his facilities as he sees fit or in his own particular interests as contrasted with the interests of the general public. The Communications Act of 1934, as amended, makes clear that licenses are to be issued only where the public interest, convenience or necessity would be served thereby. And we think it is equally clear that one of the basic elements of any such operation is the maintenance of radio and television as a medium of freedom of speech and freedom of expression for the people of the Nation as a whole. Section 301 of the Communications Act provides that it is the purpose of the act to maintain the control of the United States over all channels of interstate and foreign commerce. Section 326 of the act provides that this control of the United States shall not result in any impairment of the right of free speech by means of such radio communications. It would be inconsistent with these express provisions of the act to assert that, while it is the purpose of the act to maintain the control of the United States over radio channels, but free from any regulation or condition which interferes with the right of free speech, nevertheless persons who are granted limited rights to be licensees of radio stations, upon a finding under Sections 307 (a) and 309 of the act that the public interest, convenience, or necessity would be served thereby, may themselves make radio unavailable as a medium of free speech. The legislative history of the Communications Act and its predecessor, the Radio Act of 1927 shows, on the contrary, that Congress intended that radio stations should not be used for the private interest, whims, or caprices of the particular persons who have been granted licenses, but in manner which will serve the community generally and the various groups which make up the community.[1] And the courts have consistently upheld Commission

[1] Thus in the Congressional debates leading to the enactment of the Radio Act of 1927 Congressman (later Senator) White stated (67 Con. Rec. 5479, March 12, 1926):

"We have reached the definite conclusion that the right of all our people to enjoy this means of communication can be preserved only by the repudiation of the idea underlying the 1912

action giving recognition to and fulfilling that intent of Congress. *KFAB Broadcasting Association* v. *Federal Radio Commission*, 47 F. 2d 670; *Trinty Methodist Church, South* v. *Federal Radio Commission*, 62 F. 2d 850, *certiorari denied*, 288 U.S. 599.

6. It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day. Basically, it is in recognition of the great contribution which radio can make in the advancement of this purpose that portions of the radio spectrum are allocated to that form of radio communications known as radiobroadcasting. Unquestionably, then, the standard of public interest, convenience and necessity as applied to radiobroadcasting must be interpreted in the light of this basic purpose. The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community.[2] It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting.

7. This affirmative responsibility on the part of broadcast licensees to provide a reasonable amount of time for the presentation over their facilities of programs devoted to the discussion and consideration of public issues has been reaffirmed by this Commission in a long series of decisions. The *United Broadcasting Co. (WHKC)* case, 10 FCC 675, emphasized that this duty includes the making of reasonable provision for the discussion of controversial issues of public importance in the community served, and to make sufficient time available for full discussion thereof. The *Scott* case, 3 Pike & Fischer, radio regulation 259, stated our conclusions that this duty extends to all subjects of substantial importance to the community coming within the scope of free

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law that anyone who will, may transmit and by the assertion in its stead of the doctrine that the right of the public to service is superior to the right of any individual to use the other * * * the recent radio conference met this issue squarely. It recognized that in the present state of scientific development there must be a limitation upon the number of broadcasting stations and it recommended that licenses should be issued only to those stations whose operation would render a benefit to the public, are necessary in the public interest or would contribute to the development of the art. This principle was approved by every witness before your committee. We have written it into the bill. *If enacted into law, the broadcasting privilege will not be a right of selfishness. It will rest upon an assurance of public interest to be served.*" (Italics added.)

And this view that the interest of the listening public rather than the private interests of particular licensees was reemphasized as recently as June 9, 1948, in a unanimous report of the Senate Committee on Interstate and Foreign Commerce on S. 1333 (80th Cong.) which would have amended the present Communications Act in certain respects. See S. Rept. No. 1567, 80th Cong. 2nd Sess., pp. 14-15.

[2] Cf., *Thornhill* v. *Alabama*, 310 U.S. 88, 95, 102; *Associated Press* v. *United States*, 326 U.S. 1, 20.

discussion under the first amendment without regard to personal views and opinions of the licensees on the matter, or any determination by the licensee as to the possible unpopularity of the views to be expressed on the subject matter to be discussed among particular elements of the station's listening audience. Cf., *National Broadcasting Company* v. *United States,* 319 U.S. 190; *Allen T. Simmons,* 3 Pike & Fischer, R.R. 1029, *affirmed; Simmons* v. *Federal Communications Commission,* 169 F. 2d 670, *certiorari denied,* 335 U.S. 846; *Bay State Beacon,* 3 Pike & Fischer, R.R. 1455, *affirmed; Bay State Beacon* v. *Federal Communications Commission,* U.S. App. D.C., decided December 20, 1948; *Petition of Sam Morris,* 3 Pike & Fischer, R.R. 154; *Thomas N. Beach,* 3 Pike & Fischer R.R. 1784. And the Commission has made clear that in such presentation of news and comment the public interest requires that the licensee must operate on a basis of overall fairness, making his facilities available for the expression of the contrasting views of all responsible elements in the community on the various issues which arise. *Mayflower Broadcasting Co.,* 8 F. C. C. 333; *United Broadcasting Co. (WHKC)* 10 F. C. C. 515; Cf. *WBNX Broadcasting Co., Inc.,* 4 Pike & Fischer, R.R. 244 (memorandum opinion). Only where the licensee's discretion in the choice of the particular programs to be broadcast over his facilities is exercised so as to afford a reasonable opportunity for the presentation of all responsible positions on matters of sufficient importance to be afforded radio time can radio be maintained as a medium of freedom of speech for the people as a whole. These concepts, of course, do restrict the licensee's freedom to utilize his station in whatever manner he chooses but they do so in order to make possible the maintenance of radio as a medium of freedom of speech for the general public.

8. It has been suggested in the course of the hearings that licensees have an affirmative obligation to insure fair presentation of all sides of any controversial issue before any time may be allocated to the discussion or consideration of the matter. On the other hand, arguments have been advanced in support of the proposition that the licensee's sole obligation to the public is to refrain from suppressing or excluding any responsible point of view from access to the radio. We are of the opinion, however, that any rigid requirement that licensees adhere to either of these extreme prescriptions for proper station programing techniques would seriously limit the ability of licensees to serve the public interest. Forums and roundtable discussions, while often excellent techniques of presenting a fair cross section of differing viewpoints on a given issue, are not the only appropriate devices for radio discussion, and in some circumstances may not be particularly appropriate or advantageous. Moreover, in many instances the primary "controversy" will be whether or not the particular problem should be discussed at all; in such circumstances, where the licensee has determined that the subject is of sufficient import to receive broadcast attention, it would obviously not be in the public interest for spokesmen for one of the opposing points of view to be able to exercise a veto power over the entire presenta-

tion by refusing to broadcast its position. Fairness in such circumstances might require no more than that the licensee make a reasonable effort to secure responsible representation of the particular position and, if it fails in this effort, to continue to make available its facilities to the spokesmen for such position in the event that, after the original programs are broadcast, they then decide to avail themselves of a right to reply to present their contrary opinion. It should be remembered, moreover, that discussion of public issues will not necessarily be confined to questions which are obviously controversial in nature, and, in many cases, programs initiated with no thought on the part of the licensee of their possibly controversial nature will subsequently arouse controversy and opposition of a substantial nature which will merit presentation of opposing views. In such cases, however, fairness can be preserved without undue difficulty since the facilities of the station can be made available to the spokesmen for the groups wishing to state views in opposition to those expressed in the original presentation when such opposition becomes manifest.

9. We do not believe, however, that the licensee's obligations to serve the public interest can be met merely through the adoption of a general policy of not refusing to broadcast opposing views where a demand is made of the station for broadcast time. If, as we believe to be the case, the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them, it is evident that broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities, over and beyond their obligation to make available on demand opportunities for the expression of opposing views. It is clear that any approximation of fairness in the presentation of any controversy will be difficulty if not impossible of achievement unless the licensee plays a conscious and positive role in bringing about balanced presentation of the opposing viewpoints.

10. It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the re-

quest. The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist. Undoubtedly, over a period of time some licensees may make honest errors of judgment. But there can be no doubt that any licensee honestly desiring to live up to its obligation to serve the public interest and making a reasonable effort to do so, will be able to achieve a fair and satisfactory resolution of these problems in the light of the specific facts.

11. It is against this background that we must approach the question of "editorialization"—the use of radio facilities by the licensees thereof for the expression of the opinions and ideas of the licensee on the various controversial and significant issues of interest to the members of the general public afforded radio (or television) service by the particular station. In considering this problem it must be kept in mind that such editorial expression may take many forms ranging from the overt statement of position by the licensee in person or by his acknowledged spokesmen to the selection and presentation of news editors and commentators sharing the licensee's general opinions or the making available of the licensee's facilities, either free of charge or for a fee to persons or organizations reflecting the licensee's viewpoint either generally or with respect to specific issues. It should also be clearly indicated that the question of the relationship of broadcast editorialization, as defined above, to operation in the public interest, is not identical with the broader problem of assuring "fairness" in the presentation of news, comment or opinion, but is rather one specific facet of this larger problem.

12. It is clear that the licensee's authority to determine the specific programs to be broadcast over his station gives him an opportunity, not available to other persons, to insure that his personal viewpoint on any particular issue is presented in his station's broadcasts, whether or not these views are expressly identified with the licensee. And, in the absence of governmental restraint, he would, if he so choose, be able to utilize his position as a broadcast licensee to weight the scales in line with his personal views, or even directly or indirectly to propagandize in behalf of his particular philosophy or views on the various public issues to the exclusion of any contrary opinions. Such action can be effective and persuasive whether or not it is accompanied by any editorialization in the narrow sense of overt statement of particular opinions and views identified as those of licensee.

13. The narrower question of whether any overt editorialization or advocacy by broadcast licensees, identified as such is consonant with the operation of their stations in the public interest, resolves itself, primarily into the issue of whether such identification of comment or opinion broadcast over a radio or television station with the licensee, as such, would inevitably or even probably result in such overemphasis on the side of any particular controversy which the licensee chooses to espouse as to make

impossible any reasonably balanced presentation of all sides of such issues or to render ineffective the available safeguards of that overall fairness which is the essential element of operation in the public interest. We do not believe that any such consequence is either inevitable or probable, and we have therefore come to the conclusion that overt licensee editorialization, within reasonable limits and subject to the general requirements of fairness detailed above, is not contrary to the public interest.

14. The Commission has given careful consideration to contentions of those witnesses at the hearing who stated their belief that any overt editorialization or advocacy by broadcast licensee is *per se* contrary to the public interest. The main arguments advanced by these witnesses were that overt editorialization by broadcast licensees would not be consistent with the attainment of balanced presentations since there was a danger that the institutional good will and the production resources at the disposal of broadcast licensees would inevitably influence public opinion in favor of the positions advocated in the name of the licensee and that, having taken an open stand on behalf of one position in a given controversy, a license is not likely to give a fair break to the opposition. We believe, however, that these fears are largely misdirected, and that they stem from a confusion of the question of overt advocacy in the name of the licensee, with the broader issue of insuring that the station's broadcasts devoted to the consideration of public issues will provide the listening public with a fair and balanced presentation of differing viewpoints on such issues, without regard to the particular views which may be held or expressed by the licensee. Considered, as we believe they must be, as just one of several types of presentation of public issues, to be afforded their appropriate and nonexclusive place in the station's total schedule of programs devoted to balanced discussion and consideration of public issues, we do not believe that programs in which the licensee's personal opinions are expressed are intrinsically more or less subject to abuse than any other program devoted to public issues. If it be true that station good will and licensee prestige, where it exists, may give added weight to opinion expressed by the licensee, it does not follow that such opinion should be excluded from the air any more than it should in the case of any individual or institution which over a period of time has built up a reservoir of good will or prestige in the community. In any competition for public acceptance of ideas, the skills and resources of the proponents, and opponents will always have some measure of effect in producing the results sought. But it would not be suggested that they should be denied expression of their opinions over the air by reason of their particular assets. What is against the public interest is for the licensee "to stack the cards" by a deliberate selection of spokesmen for opposing points of view to favor one viewpoint at the expense of the other, whether or not the views of those spokesmen are identified as the views of the licensee or of others. Assurance of fairness must in the final analysis be achieved, not by the exclusion of particular views because of the source of the views,

or the forcefulness with which the view is expressed, but by making the microphone available, for the presentation of contrary views without deliberate restrictions designed to impede equally forceful presentation.

15. Similarly, while licensees will in most instances have at their disposal production resources making possible graphic and persuasive techniques for forceful presentation of ideas, their utilization for the promulgation of the licensee's personal viewpoints will not necessarily or automatically lead to unfairness or lack of balance. While uncontrolled utilization of such resources for the partisan ends of the licensee might conceivably lead to serious abuses, such abuses could as well exist where the station's resources are used for the sole use of his personal spokesmen. The prejudicial or unfair use of broadcast production resources would, in either case, be contrary to the public interest.

16. The Commission is not persuaded that a station's willingness to stand up and be counted on these particular issues upon which the licensee has a definite position may not be actually helpful in providing and maintaining a climate of fairness and equal opportunity for the expression of contrary views. Certainly the public has less to fear from the open partisan than from the covert propagandist. On many issues, of sufficient importance to be allocated broadcast time, the station licensee may have no fixed opinion or viewpoint which he wishes to state or advocate. But where the licensee, himself, believes strongly that one side of a controversial issue is correct and should prevail, prohibition of his expression of such position will not of itself insure fair presentation of that issue over his station's facilities, nor would open advocacy necessarily prevent an overall fair presentation of the subject. It is not a sufficient answer to state that a licensee *should* occupy the position of an impartial umpire, where the licensee is *in fact* partial. In the absence of a duty to present all sides of controversial issues, overt editorialization by station licensees could conceivably result in serious abuse. But where, as we believe to be the case under the Communications Act, such a responsibility for a fair and balanced presentation of controversial public issues exists, we cannot see how the open espousal of one point of view by the licensee should necessarily prevent him from affording a fair opportunity for the presentation of contrary positions or make more difficult the enforcement of the statutory standard of fairness upon any licensee.

17. It must be recognized, however, that the licensee's opportunity to express his own views as part of a general presentation of varying opinions on particular controversial issues, does not justify or empower any licensee to exercise his authority over the selection of program material to distort or suppress the basic factual information upon which any truly fair and free discussion of public issues must necessarily depend. The basis for any fair consideration of public issues, and particularly those of a controversial nature, is the presentation of news and information concerning the basic facts of the controversy in as complete and impartial a manner as possible. A licensee would be abusing his

position as public trustee of these important means of mass communication were he to withhold from expression over his facilities relevant news or facts concerning a controversy or to slant or distort the presentation of such news. No discussion of the issues involved in any controversy can be fair or in the public interest where such discussion must take place in a climate of false or misleading information concerning the basic facts of the controversy.

18. During the course of the hearing, fears have been expressed that any effort on the part of the Commission to enforce a reasonable standard of fairness and impartiality would inevitably require the Commission to take a stand on the merits of the particular issues considered in the programs broadcast by the several licensees, as well as exposing the licensees to the risk of loss of license because of "honest mistakes" which they may make in the exercise of their judgment with respect to the broadcasts of programs of a controversial nature. We believe that these fears are wholly without justification, and are based on either an assumption of abuse of power by the Commission or a lack of proper understanding of the role of the Commission, under the Communications Act, in considering the program service of broadcast licensees in passing upon applications for renewal of license. While this Commission and its predecessor, the Federal Radio Commission, have, from the beginning of effective radio regulation in 1927, properly considered that a licensee's overall program service is one of the primary indicia of his ability to serve the public interest, actual consideration of such service has always been limited to a determination as to whether the licensee's programing, taken as a whole, demonstrates that the licensee is aware of his listening public and is willing and able to make an honest and reasonable effort to live up to such obligations. The action of the station in carrying or refusing to carry any particular program is of relevance only as the station's actions with respect to such programs fits into its overall pattern of broadcast service, and must be considered in the light of its other program activities. This does not mean, of course, that stations may, with impunity, engage in a partisan editorial campaign on a particular issue or series of issues provided only that the remainder of its program schedule conform to the statutory norm of fairness; a licensee may not utilize the portion of its broadcast service which conforms to the statutory requirements as a cover or shield for other programing which fails to meet the minimum standards of operation in the public interest. But it is clear that the standard of public interest is not so rigid that an honest mistake or error in judgment on the part of a licensee will be or should be condemned where his overall record demonstrates a reasonable effort to provide a balanced presentation of comment and opinion on such issues. The question is necessarily one of the reasonableness of the station's actions, not whether any absolute standard of fairness has been achieved. It does not require any appraisal of the merits of the particular issue to determine whether reasonable efforts have been made to present

both sides of the question. Thus, in appraising the record of a station in presenting programs concerning a controversial bill pending before the Congress of the United States, if the record disclosed that the licensee had permitted only advocates of the bill's enactment to utilize its facilities to the exclusion of its opponents, it is clear that no independent appraisal of the bill's merits by the Commission would be required to reach a determination that the licensee has misconstrued its duties and obligations as a person licensed to serve the public interest. The Commission has observed, in considering this general problem that "the duty to operate in the public interest is no esoteric mystery, but is essentially a duty to operate a radio station with good judgment and good faith guided by a reasonable regard for the interests of the community to be served." *Northern Corporation (WMEX)*, 4 Pike & Fischer, R.R. 333, 339. Of course, some cases will be clearer than others, and the Commission in the exercise of its functions may be called upon to weigh conflicting evidence to determine whether the licensee has or has not made reasonable efforts to present a fair and well-rounded presentation of particular public issues. But the standard of reasonableness and the reasonable approximation of a statutory norm is not an arbitrary standard incapable of administrative or judicial determination, but, on the contrary, one of the basic standards of conduct in numerous fields of Anglo-American law. Like all other flexible standards of conduct, it is subject to abuse and arbitrary interpretation and application by the duly authorized reviewing authorities. But the possibility that a legitimate standard of legal conduct might be abused or arbitrarily applied by capricious governmental authority is not and cannot be a reason for abandoning the standard itself. And broadcast licensees are protected against any conceivable abuse of power by the Commission in the exercising of its licensing authority by the procedural safeguards of the Communications Act and the Administrative Procedure Act, and by the right of appeal to the courts from final action claimed to be arbitrary or capricious.

19. There remains for consideration the allegation made by a few of the witnesses in the hearing that any action by the Commission in this field enforcing a basic standard of fairness upon broadcast licensees necessarily constitutes an "abridgment of the right of free speech" in violation of the first amendment of the United States Constitution. We can see no sound basis for any such conclusion. The freedom of speech protected against governmental abridgment by the first amendment does not extend any privilege to government licensees of means of public communications to exclude the expression of opinions and ideas with which they are in disagreement. We believe, on the contrary, that a requirement that broadcast licensees utilize their franchises in a manner in which the listening public may be assured of hearing varying opinions on the paramount issues facing the American people is within both the spirit and letter of the first amendment. As the Supreme Court of the United States has pointed out in the *Associated Press* monopoly case:

It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the first amendment should be read as a command that the Government was without power to protect that freedom * * * *That amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of free society. Surely a command that the Government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.* Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution but freedom to combine to keep others from publishing is not. (*Associated Press* v. *United States*, 326 U.S. 1 at p. 20.)

20. We fully recognize that freedom of the radio is included among the freedoms protected against governmental abridgment by the first amendment. *United States* v. *Paramount Pictures, Inc., et al,* 334 U.S. 131, 166. But this does not mean that the freedom of the people as a whole to enjoy the maximum possible utilization of this medium of mass communication may be subordinated to the freedom of any single person to exploit the medium for his own private interest. Indeed, it seems indisputable that full effect can only be given to the concept of freedom of speech on the radio by giving precedence to the right of the American public to be informed on all sides of public questions over any such individual exploitation for private purposes. Any regulation of radio, especially a system of limited licensees, is in a real sense an abridgment of the inherent freedom of persons to express themselves by means of radio communications. It is however, a necessary and constitutional abridgment in order to prevent chaotic interference from destroying the great potential of this medium for public enlightment and entertainment. *National Broadcasting Company* v. *United States,* 319 U. S. 190, 296; cf, *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.,* 289 U. S. 266; *Fisher's Blend Station, Inc.* v. *State Tax Commission,* 277 U. S. 650. Nothing in the Communications Act or its history supports any conclusion that the people of the Nation, acting through Congress, have intended to surrender or diminish their paramount rights in the air waves, including access to radio broadcasting facilities to a limited number of private licensees to be used as such licensees see fit, without regard to the paramount interests of the people. The most significant meaning of freedom of the radio is the right of the American people to listen to this great medium of communications free from any governmental dictation as to what they can or cannot hear and free alike from similar restraints by private licensees.

21. To recapitulate, the Commission believes that under the American system of broadcasting the individual licensees of radio stations have the responsibility for determining the specific program material to be broadcast over their stations. This choice, however, must be exercised in a manner consistent with the basic policy of the Congress that radio be maintained as a medium of free speech for the general public as a whole rather than as an outlet for the purely personal or private interests of the licensee. This requires that licensees devote a reasonable percentage of

their broadcasting time to the discussion of public issues of interest in the community served by their stations and that such programs be designed so that the public has a reasonable opportunity to hear different opposing positions on the public issues of interest and importance in the community. The particular format best suited for the presentation of such programs in a manner consistent with the public interest must be determined by the licensee in the light of the facts of each individual situation. Such presentation may include the identified expression of the licensee's personal viewpoint as part of the more general presentation of views or comments on the various issues, but the opportunity of licensees to present such views as they may have on matters of controversy may not be utilized to achieve a partisan or one-sided presentation of issues. Licensee editorialization is but one aspect of freedom of expression by means of radio. Only insofar as it is exercised in conformity with the paramount right of the public to hear a reasonably balanced presentation of all responsible viewpoints on particular issues can such editorialization be considered to be consistent with the licensee's duty to operate in the public interest. For the licensee is a trustee impressed with the duty of preserving for the public generally radio as a medium of free expression and fair presentation.

ADDITIONAL VIEWS OF COMMISSIONER E. M. WEBSTER

I adopt the majority opinion and file the following additional views. In my opinion, the report and attached separate views of Commissioner Jones still leaves a licensee in a quandary and a state of confusion in that he must follow with his own interpretation of an involved academic legal treatise to determine what he can or cannot do in his day-to-day operation. He is entitled to know from the Commission just that—"what he can or cannot do"—in as concise and unequivocal language as possible.

The issue is simply stated: "Can a licensee of a broadcasting station be an advocate over his own station?"

At the risk of oversimplification, but in the interest of the licensee, I consider the answer to this question to be as follows:

1. Freedom of speech over the radio is not at issue. The right or privilege of access to the radio microphone is an issue.

2. No individual has the right of access to a radio microphone (except for such rights as may be conferred by Section 315 of the Communications Act—"Facilities For Candidates For Public Office"). Each individual licensee has the privilege of and responsibility for determining the particular persons or groups to be granted access to the microphone, which includes denial of access, and the specific program material to be broadcast over his facilities.

3. This privilege and responsibility is not unrestricted, however, but represents a sacred trust which must be exercised in a manner consistent with the basic policy of the Communications Act that broadcasting stations be licensed to serve the interests of the public at large rather than the personal or private interests of the licensee.

4. The public interest requires that the listening public secure a reasonable opportunity to hear differing and opposing positions on the controversial public issues of interest and importance in the community. Where a licensee affords time over his facilities for the expression of any one opinion on such issues, he is under an obligation to insure that opposing points of view will also be presented or at least that a reasonable opportunity be afforded for the presentation of such views.

5. The licensee is free to exercise his privilege of selection of persons to be given access to the microphone to present his own views of controversial public issues or to select persons to broadcast over his facilities whom he knows or has reason to believe share his views. However, where the licensee grants the privilege of access to the microphone to himself or his spokesman, such broadcasts must be handled in the same manner as all other broadcasts of controversial issues and the licensee may not utilize his authority to select the persons to have access to his microphone to advance his own ideas or opinions *to the exclusion of others.*

6. The particular format or formats for the presentation of controversy must be determined by the individual licensee in the light of the particular circumstances of each case. There can be no mechanical formula or test which can be prescribed to insure the essential fairness which is the prerequisite of any successful operation in the public interest. The decision which have to be made by licensees in this field are in many cases difficult ones. But, any licensee making a sincere and reasonable effort to serve the needs of his listening audience as a whole in conformity with the precepts set out above should be able to meet his obligation as a licensee of providing service in the public interest, convenience, or necessity.

SEPARATE VIEWS OF COMMISSIONER JONES

1. I agree that radio station licensees may editorialize over their own facilities. I believe that any document establishing this policy requires a reversal of the *Mayflower Broadcasting Co.* decision, 8 FCC 333, which fully and completely suppressed and prohibited the licensee from speaking in the future over his facilities in behalf of any cause. All licensees considered this *Mayflower* decision as applicable to each of them. I believe that the Commission thus violated the first amendment and that the Commission should acknowledge the unconstitutionality of the *Mayflower* decision and rule that the licensee may speak.

2. Since the majority do not acknowledge the applicability of the first amendment in determining whether the licensee may use his own microphone to advocate causes, it is not surprising that the *Mayflower* decision is quoted with apparent approval. They seem to urge that any relaxation of complete suppression is by the sufferance or leave of the Commission. They have proscribed their permission with prospective conditions in terms of fairness, several examples of which are described *seriatim,* and then they conclude: "It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure

the fair and balanced presentation of *all public issues.*" Nor do I find any assistance to the licensee or any clarification of the constitutional questions in the separate opinion of Commissioner Webster. When the Commissioner picks legal assumptions from the ether, as "Freedom of speech over the air is not at issue. The right or privilege of access to the radio microphone is the issue," the ceiling of oversimplification is unlimited to reach most any unconstitutional conclusion.

3. The Commission connotes "editorialization" with "news" and "comment." The relationship of commentators and licensees, including network licensees, is such that under the majority view commentator editorialization cannot be ignored and fairness should attach to them if their opinion is to have any meaning of consequence to the industry.

4. In taking the position I do in this matter that licensees shall be free without previous restraint to exercise their constitutional right to editorialize, I wish to make it clearly understood that I also believe that in a revocation or renewal proceeding the Commission has the right to review the overall past performance of the licensee including now a review of one additional facet—editorialization over his own facilities by a licensee and according to my view by commentators—to determine whether a finding can be made that he will operate his radio facilities in the public interest, convenience and necessity. This power of the Commission to review the overall operations of the licensee as the steward of the public is as far as the poles from an ambiguous prospective guide the majority is adopting here to cover a specific segment of the licensee's obligations under the act.

5. Even if the Commission could attach prospective conditions upon the licensee's right to editorialize, such conditions should not be couched in ambiguous terms. Further, the Administrative Procedure Act and the rules and regulations of the administrative committee issued pursuant to the Federal Register Act (44 USC subchapter 8B) require policy statements to be published in codified form. Since I have come to these conclusions in disposing of the right of licensees to editorialize, I am constrained to state my reasons therefor as follows:

6. Neither the questions here presented nor their resolution can be adequately understood without a discussion of the case of *Mayflower Broadcasting Co.* 8 F. C. C. 333. In the *Mayflower* case, the Commission had before it a situation where a licensee had used the facilities of his station to promote ideas and political candidates of his own choosing. The Commission, in reviewing the licensee's operation, held that a licensee could not, under any circumstances, consonant with the public interest, act as an advocate. The Commission said "a truly free radio cannot be used to advocate the causes of the licensee. * * * it cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate." 8 F. C. C. at 340. While some question has been raised from time to time as to whether these broad statements constituted only dictum, examination of the Commission's disposition of the proceedings in that

case makes it clear that the broad language of the Commission prohibiting advocacy by licensees over their facilities was intended to be part of the *ratio decidendi.* Thus in concluding to grant the application for renewal of station WAAB's license, the Commission expressly relied upon the licensee's unequivocal representations that no editorials had been broadcast since September 1938, that the licensee did not intend to depart from this uninterrupted policy and that the station had no editorial policy. In view of the language of the *Mayflower* decision and the Commission's basis of disposition of the proceedings, I cannot see how the *Mayflower* decision can be read in any other way but as a square holding that a licensee cannot use his microphone for personal advocacy. The Commission, in my opinion, fully and completely suppressed and prohibited the licensee from speaking in the future over his microphone in behalf of any cause.

7. It is true that protests were heard outside of the Commission's meeting room, but for 7 years no one formally challenged the decision of the Commission,[1] and the Commission took no steps to disclaim the ban created on editorialization by licensees. It is therefore reasonable to say that at the time of the commencement of these proceedings, it was the unimpaired ruling of this Commission that editorialization over the facilities of a station by the licensee was contrary to the public interest. I would now expressly repudiate any such doctrine and explicitly make clear that to the extent that *Mayflower* created such a ban it is now overruled. The failure of the majority to discuss *Mayflower* and to repudiate the ban on editorialization created by *Mayflower* is under such circumstances extraordinary. It may not be without significance that the majority report cites the *Mayflower* decision with apparent approval. In view of the majority's decision I do not see how it can consistently appear to leave the effect of *Mayflower* unimpaired while at the same time hold that editorialization by licensees is not contrary to the public interest. The majority report in failing to discuss the effect of *Mayflower* on the main problem here presented either indicates a reluctance to admit the error of the earlier decision or a desire to perpetuate its evil effect. In either case I cannot approve.

8. In concluding that editorialization by licensees is not prohibited, the majority report does not expressly say that such conduct is permitted in the public interest. The Commission, without any reference to the effect of *Mayflower,* merely comes to the conclusion that overt licensee editorialization, within reasonable limits and subject to the general requirements of fairness, is not contrary to the public interest. This conclusion thus appears to be based solely on the requirement created by this Commission that licensees be fair and objective in the presentation of contro-

[1] This decision of the Commission has hung like Damocles' sword over every station licensee to silence the licensee as an advocate. While it is true that any licensee in defiance of the *Mayflower* decision might personally have expressed editorial opinions and thus put his station license in jeopardy, the fact remains that no one challenged the governmental authority in this instance. I realize, of course, the dangers that a licensee would have been required to face had he challenged the *Mayflower decision.* Nevertheless radio should remember the history and experience of newspapers in their fight for freedom of the press. That battle should serve as a guide to the broadcasting industry on how to combat current abuse of governmental authority.

versial issues of public importance. I believe that in resting this holding solely on that ground, the Commission overlooks the more important and determinative factor of the first amendment of the Constitution of the United States. If as the majority states "radio is included among the freedoms protected against governmental abridgment by the first amendment" and if as is made clear by the majority it must be made available to "all responsible elements in the community," then it follows that governmental prohibition of editorialization by licensees, who certainly are a responsible element of the community, constitutes an unconstitutional abridgement of free speech.[2] I, therefore, rest my decision that editorialization by licensees is in the public interest not on any policy requirement created by the Commission but upon the inviolate terms of the first amendment. For whether or not the Commission is willing to follow the rule that licensees must be fair and objective in the presentation of controversial issues of public importance, a prohibition of editorialization by licensees would, in my opinion, be contrary to the first amendment and therefore invalid as an unconstitutional abridgment of free speech.

9. It is, however, suggested that since licensees are in effect trustees of the airwaves for the public, the Commission may condition the grant of the radio station license on the duty of the licensee to refrain from editorializing. I cannot, however, subscribe to this content. In my opinion, cases such as *United Public Workers* v. *Mitchell,* 330 U.S. 75, and *McAuliffe* v. *Mitchell,* 155 Mass. 216, dealing with prohibitions on political activities by Civil Service employees are not at all applicable here. Those decisions rest solely on the peculiar nature of the relationship of the Government, as an employer, to persons in its employ. The *United Public Workers* case makes clear that the extraordinary evil of political partisanship by classified employees of Government is so substantial as to warrant an interference with the normal freedoms guaranteed by the Constitution. I do not believe that any such evil is here involved. Whatever the evil that may result from editorializing by licensees, I do not believe it is so substantial as to warrant the deprivation of the civil rights of the licensee. Accordingly, I believe that any condition imposed on a radio station licensee which prohibits editorialization by the licensee constitutes the imposition of an unreasonable and unconstitutional condition in violation of the first amendment.

10. My objection to the manner in which the majority approaches the problems presented does not constitute a mere preference as to the route by which it reaches its decision. It reflects rather what I believe to be a fundamental difference in approach to the Commission's regulatory powers with respect to the programing policies of licensees. Whatever may be the constitutional validity of the approach the Commission takes, I believe the funda-

[2] Both the Communications Act and the decisions of this Commission and the courts make it clear that radio station licensees are required to be responsible members of the community. Irresponsible licensees are, of course, not qualified to be the holders of radio station licenses and the problem of editorialization by licensees in a context of irresponsibility presents an entirely diffeernt problems from those involved in a ban on all editorialization by licensees. Cf. *Trinity Methodist Church, South,* v. *Federal Radio Commission,* 62 F. 2d 850, *cert. den.,* 288 U.S. 599.

mental policy against previous restraint of speech requires the Commission to meticulously avoid the imposition of prospective conditions upon speech of licensees that is entitled to the protection of the first amendment.

11. We should, I believe, pay particular attention to the manner in which the body of law with respect to the Commission's powers over the programing policies of licensees has arisen. Section 326 of the Communications Act expressly prohibits the Commission from exercising any powers of censorship. The Commission on the other hand has been given full power in connection with its licensing functions to determine whether an application for a station license or for renewal of such a license would serve the public interest, convenience or necessity. Moreover, application of the policy against previous restraint on speech is not at all inconsistent with this power, and the body of law with respect to the Federal Radio and Federal Communications Commission has grown upon the assumption that no previous restraint should be imposed upon radio speech but that the Commission may in connection with its regular review of each station's operation determine whether or not the operation of the station has been in the public interest. In the words of Justice Groner: "It may, therefore, bet set down as a fundamental principle that under these constitutional guarantees [of free speech] the citizen has in the first instance the right to utter or publish his sentiments although, of course, upon condition that he is responsible for any abuse of that right. *Near* v. *Minnesota Ex Rel Olson,* 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357." *Trinity Methodist Church, South,* v. *Federal Radio Commission,* 62 F. 2d 850, *cert. den.* 288 U.S. 599.[3]

12. Thus, it is clearly within the scope of the Commission's authority to refuse to grant a renewal of license to one whose operation is extensively conducted in his personal interest rather than the public interest. Cf. *KFKB Broadcasting Association* v. *Federal Radio Commission,* 47 F. 2d 670. Likewise the Commission does not deny freedom of speech by refusing to renew the license of one who in an irresponsible manner has abused the privileges conferred upon him by broadcasting defamatory and untrue matter and has obstructed the administration of justice by attempting by means of radio to impose his will upon the courts. *Trinity Methodist Church, South,* v. *Federal Radio Commission,* 62 F. 2d 850, *cert. den.* 288 U. S. 599.

13. Thus, the powers of the Commission and the responsibilities of the licensee have, without any necessity for violation of the policy against previous restraint, been defined by the courts on a case-to-case basis where the necessity for such decision has been presented. I am in complete agreement with the standards of

[3] I should, however, like to make completely clear that I believe the Government has full authority by proper measures to prohibit the use of radio in connection with activities which it may under the police powers prohibit. Cf. *Shenck* v. *United States,* 249 US 47. Hence Congress has prohibited the utterance of any obscene, indecent or profane language by means of radio communication (Sec. 1364 of the U.S. Criminal Code (18 USC 1364; 48 Stat. 1091), formerly Sec. 326 of the Communications Act) and the broadcast of lottery information (Sec. 1304 of the U.S. Criminal Code (18 USC 1304; 48 Stat. 1088), formerly Sec. 316 of the Communications Act).

licensee conduct imposed by these decisions. I would not, however, deviate from the past method of procedure in handling such problems on the basis of adjudicatory proceedings arising out of individual factual situations. I cannot subscribe to the action of the Commission in expressly imposing prospective conditions on the exercise of the licensee's right to use the facilities of a station for purposes of editorialization. I would not say to the licensee as does the Commission's decision, "You may speak but only on the prospective conditions that are laid down in our report." For my part, I would merely say to the licensee, "You may speak."

14. However, even if I were willing to adopt the approach which places express prospective conditions on the right to editorialize, I could not subscribe to a condition as vague as the concept of the duty to be fair. For where constitutionally valid conditions are imposed on speech by governmental authority, the standards by which one is required to act should be stated in such a way as to be clearly ascertainable. Cf. *Winters* v. *New York,* 333 U.S. 507. I do not believe that the conditions imposed here are made clear enough to serve as an adequate guide to the conduct licensees will be required to follow if they are to avail themselves of the right to editorialize. Insofar as the doctrine of fairness has been announced and applied in particular cases, that doctrine may well have concrete meaning. Cf. In re *United Broadcasting Company (WHKC),* 10 F. C. C. 515. But outside the context of particular circumstances, I do not believe that an *a priori* standard so broad and vague has significant meaning. We all, of course, can agree that licensees should be fair in the operation of their stations. But in the absence of past examples of the application of the standard fairness to particular situations involving editorialization by licensees, I do not see how licensees will be in a position to ascertain the meaning of the doctrine of fairness as it must be applied to the myriad of factual situations which arise in connection with the day-to-day operation of a radio station.[4] Nor do I believe that the citation of decisions involving network regulations, network programing, overcommercialism, radio advertising of liquor or broadcasts relating to atheism, furnishes any guide as to the manner in which the doctrine of fairness may apply to situations involving editorialization by licensees.

15. I believe that the problems with respect to editorialization can only and should only be determined *a posteriori* in connection with specific situations involving editorialization.[5] I would there-

[4] A few examples of questions raised:
If a licensee editorializes with respect to issue A, is he required under all circumstances to afford radio time to all responsible persons with views contrary to his with respect to issue A? Or is it enough that on most issues the licensee affords time to reply to his own editorial views? Is the licensee required to afford such persons free time or can he require payment for the time? If views contrary to his have been expressed freely on other stations in his community is he required to also afford time on his station? Can the programs of commentators either of his own choosing or of the choosing of his sponsors serve as replies by opposing views? What restrictions can he impose on the manner in which opposing views may reply? Can opposing views reply in the form of song or drama? What restrictions with respect to censorship by the licensee of the opposing script does the Commission intend to apply? These are but a few of the many practical questions faced by the licensee who wishes to editorialize but left unanswered by the Commission's decision.

[5] While it is very true the flexible standards have served very useful functions in Anglo-American law, it must be pointed out that they usually have evolved not by *a priori* announcements by courts but out of decisions arrived at on a case-to-case basis. Cf., e.g., the history the development of the legal standards in the common law of negligence. These standards

fore continue the past procedure of this Commission in handling similar problems on the basis of adjudicatory proceeding arising out of individual factual situations. In this connection the statement of the Supreme Court of the United States in *Securities and Exchange Commission* v. *Chenery Corporaion,* 332 U.S. 194, 202–203 is pertinent:

> Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.
>
> In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problems may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective.

16. But even if the Commission's approach to the problems here presented is correct, the form in which the Commission's decision is cast is entirely improper. Neither the general policy created nor the qualifications on the right to editorialize are made clear in terms free from ambiguity. Background, policy, example, qualification are all commingled. Indeed, it is, I believe, fair to state that it takes more than merely a careful reading of the report to ascertain the Commission's disposition of the issues presented. Under these circumstances I believe the Commission should speak more clearly. Sound administrative policy pursuant to the mandate of Congress requires the formulation of the standards here created in the form of clear and separately stated rules and regulations which can serve as a clear guide to licensees as to the conduct which the Commission deems it necessary for them to follow. Clearly the uncertainty with respect to the matters here presented should be removed and not augmented by a formless policy statement issued in the mold of a report.

17. Whatever may be our personal preferences with respect to the final form the Commission's decision here should take, I believe that Congress has by statute commanded, where a general policy is created independently of adjudication, that the form be

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grew out of findings by juries on a case-to-case basis that eventually were molded into general standards. See *Holmes, The Common Law,* pp. 122–129. This is especially significant where as here we are dealing with the problems of free speech.

"The subject in its more general outlook has been the source of much writing since Milton's Aeropagitica, the emancipation of the English press by the withdrawal of the licensing act in the reign of William the Third, and the Letters of Junius. It is enough now to say that the universal trend of decisions has recognized the guaranty of the amendment to prevent previous restraints upon publications, as well as immunity of censorship, leaving to correction by subsequent punishment those utterances or publications contrary to the public welfare. In this aspect it is generally regarded that freedom of speed and press cannot be infringed by legislative, executive, or judicial action, and that the constitutional guaranty should be given liberal and comprehensive construction. It may therefore be set down as a fundamental principle that under these constitutional guaranties the citizen has in the first instance the right to utter or publish his sentiments, though, of course, upon condition that he is responsible for any abuse of that right. *Near* v. *Minnesota ex rel. Olson,* 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357." *Trinity Methodist Church, South,* v. *Federal Radio Commission,* 62 F. 2d 850, *cert. den.* 288 U.S. 599.

in a separately stated and currently published codified rule. Section 3 (a) (3) of the Administrative Procedure Act expressly requires each agency to separately state and currently publish in the Federal Register "substantive rules * * * and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public." If the report of the Commission does not enact a substantive rule it at least constitutes a general statement of policy formulated and adopted for the guidance of the public. It is to avoid just the type of procedure here followed that the Administrative Procedure Act contained requirements as to the publication of policy statements in rule form.

18. Not only has Congress provided in the Administrative Procedure Act for publication in such form but the rules and regulations of the administrative committee of the Federal Register, issued pursuant to the Federal Register Act (44 U.S.C. subchapter 8B) clearly require policy statements such as that adopted here to be published in the Federal Register in codified form. See Federal Register, October 12, 1948, pp. 5929 *et. seq.* Rule 1.32 of the Federal Register regulations provides:

> Documents having general applicability and legal effect. Every document, issued under proper authority prescribing a penalty or a course of conduct, conferring a right, privilege, authority or immunity, or imposing an obligation, and relevant or applicable to the general public, the members of a class or the persons of a locality, as distinguished from named individuals or organizations, is hereby determined to have general applicability and legal effect. Such documents shall be filed in the office of the director and published in the Federal Register. (Applies sec. 5 (a), 49 Stat. 501; 44 U.S.C. 305 (a) (2)).

And Section 1.10 of the Federal Register regulations provides:

> Document subject to codification. Document subject to codification means any regulatory document which has general applicability and legal effect and which is in force and effect and relied upon by the issuing agency as authority for, or invoked or used in the discharge of, any of its functions or activities.

The style of preparation of documents subject to codification is provided for in subpart H of these rules. This style is the same as the form of the rules and regulations of the Commission.

19. Accordingly, there is no question that the policy statement here adopted in the form of a report should be separately stated and published in codified form in the Federal Register. The report in its present form may constitute a sufficient statement of the reasons or grounds for such a codified rule, but it cannot under any circumstances be said to comply with the procedural provisions relating to publication provided for in the Administrative Procedure Act and the Federal Register rules issued pursuant to the Federal Register Act. As such the failure to comply with these statutes and rules raises serious questions as to the validity of any substantive programing requirements now created by the Commission. And further, this doubt only increases the uncertainty of licensees with respect to the matters here presented. Accordingly, I believe that if the Commission is to announce prospective standards, it should proceed to issue codified rules in proper form

for the benefit and guidance not only of licensees but the public at large.

20. It seems to me that the Commission is gagging at a gnat when its opinion is confined to the licensee's personal use of his own microphone to advocate causes of the licensee. Since the adoption of the *Mayflower* decision licensees in general remained silent and supinely submitted to the Commission; however, many licensees, including network licensees who operate the most valuable radio facilities, selected commentators to do their editorializing for them. In fact, they have commercialized the commentators to positions of power and influence upon public opinion which dwarf the power and influence of any licensee or any group of licensees. In fact, this commentator commercialization has reached the point where newspaper licensee network affiliates carry regular broadcasts which they apparently reject and ridicule as proper news or comment for the newspaper columns. This is all the more significant because the majority has treated the term "editorialization" as comprehending "news" and "comment." Since the majority couch the conditions of the licensee's right to editorialize upon terms of "fairness," it is hard to understand why their opinion fails to come to grips with the licensees' standard practice of editorialization through commentators. The Commission files are literally filled with legitimate complaints of unfairness by such professionals, the alter egoes of licensees, who have become identified with them over a period of years as inextricably as the trade name of the station or network. The ambiguous doctrine of fairness has never been attached to them; the Commission has never felt it had the power to demand the kind of practice it now asserts against their principals—the licensees—in this decision. And the majority completely avoids discussing licensee-commentator fairness.

21. In view of the majority decision, the Commission should give special attention to the extent to which the selection of commentators constitutes an aspect of editorialization by licensees. Any appraisal of the realities must take into consideration the fact that licensees in effect editorialize through the mouths of commentators who by reason of their continued use of the facilities make known their views to the licensee and thus broadcast their views with the implied consent of the licensee.[6] The importance of such editorialization is made clear by the special treatment afforded commentary programs. Commentators are known to be associated with particular networks or stations for long periods of time. While the broadcast hour of other types of programs varies from time to time, networks and stations make every effort to leave the broadcast hours of commentator programs unaffected by overall changes in programing schedules. Sponsors may come and go, but the same commentators broadcast at the same hour over the same stations as they have done for years.

[6] "When a radio station hires radio commentators and pays them and puts them on, they editorialize on the news, and sometimes not only editorialize on the news, but they give out editorial opinions about every conceivable subject, many of which they don't know anything about." Comment of Chairman Wheeler in Senate Hearing on S. 814 (78 Cong. 1st Session) p. 1413.