

83-484

August 11, 1997

**FCC COMMISSIONERS ISSUE STATEMENTS  
ON PERSONAL ATTACK AND POLITICAL EDITORIAL RULE PROCEEDING**

Attached are the individual statements of the FCC Commissioners regarding the pending rulemaking proceeding regarding the possible repeal of modification of the personal attack and political editorial rules.

The Public Notice released on Friday, August 8, 1997, stating that the Commission "is unable at this time to agree upon any resolution to the issues presented in this docket" is also attached, for your information.

August 11, 1997

**STATEMENT OF CHAIRMAN REED E. HUNDT**

**Re: In the Matter of the Repeal or Modification of the Personal Attack and Political Editorial Rules**

The Commission has before it a proceeding to determine whether the personal attack and political editorial rules should continue. Changes in technology, the political process, and the needs of the public make it appropriate for the Commission to review the purposes and effects of these rules. I believe that these changes are insufficiently understood with respect to the two rules, and that therefore we should seek prompt but ample further comment.

In general, I think a Commission inquiry into the use of the public's airwaves to further the process of full and fair political debate is long overdue. President Clinton called just last week for the Commission to commence an inquiry into the possibilities of using the public's airwaves for free and reduced rate access for political candidates. I think the same inquiry rationally should examine the political editorial rule and the personal attack rule.

It certainly is difficult to conceive of a more important purpose for free, local, universal television than its role in promoting democracy. It is also plain to even the most casual observers of politics and even the most occasional watchers of television that the ways candidates and issues appear on television, and the effects of television on the political process, have changed substantially, for better and for worse, since these rules were drafted. Even more obvious is the way that paid access to television has become one of the most troublesome necessities of American politics. It is virtually impossible to run for election by a large constituency without devoting an inordinate amount of time to the task of raising increasingly impossible sums of money to buy television time. Meanwhile, the nature of political discussion, debate, and comment on radio and television outside of paid time has changed radically.

All these changes amount to a metamorphosis in the relationship between the uses of the public's airwaves and politics since the long-ago days when the country first realized that television had swayed voters to Jack Kennedy, radio to Richard Nixon, and newspapers to both. Because Kennedy won, television was deemed the triumphant medium, for the first time in politics. Our ruminations about the significance of this well-documented event are now relegated to the ancient history of both politics and television. Yet the Commission has not in recent times looked comprehensively at the implications of the transformations in the subtle, critical, and often justly criticized triangular relationship among television, money, and politics.

An inquiry of an appropriately neutral, fair, open, nonpartisan, and broad dimension is in order. Indeed the current Commission unanimously voted for an inquiry on the full extent of the public interest duties of broadcasters in the digital age when it granted the multibillion dollar gift of digital TV spectrum to current analog broadcasters. That inquiry was intended specifically and clearly to include the political debate issues that are implicated in today's

decision. It should be launched.

Another aspect of that Public Interest Notice of Inquiry should be a reexamination of the Commission's 1987 decision in *Syracuse Peace Council*. In that decision, the Commission gratuitously took up the issue of what standard of review should apply to the broadcast medium under the First Amendment. Upon review, the Court of Appeals for the D.C. Circuit declined to reach that conclusion by the Commission -- a conclusion that is inconsistent with repeated statements by the Supreme Court.

Since 1987, the Commission itself has clearly retreated from the position taken in *Syracuse Peace Council*. For example, the rules recently written to implement the Children's Television Act plainly and properly follow the standard of review for broadcasters that has been set by the Supreme Court, rather than that articulated in the *Syracuse Peace Council* dicta. The Supreme Court, of course, has repeatedly pointed out that the nature of broadcasting warrants a special standard of review for the broadcast medium, as recently as this last term's decision in *Reno v. ACLU*. Our overdue Public Interest Notice of Inquiry should address the implication of recent decisions on that aspect of *Syracuse Peace Council*.

In our Public Interest Notice of Inquiry, we should also take account of the current nature of the video marketplace. Many more people continue to seek to acquire broadcast licenses, and the right to broadcast, than do obtain them. That is a scarcity issue. Moreover the digital TV proceeding limited, as opposed to expanded, the number of analog TV licenses that physically can be granted. By dint of Congressional decision, the digital television spectrum grant therefore did nothing to increase the number of voices in the marketplace and nothing to reduce spectrum scarcity for free, broadcast television. This is another aspect of the inquiry that the Commission should undertake.

Furthermore, the Commission should take this inquiry beyond an examination of the issue of spectrum scarcity. Scarcity is not the only justification on which we can appropriately base minimal, nonburdensome requirements for broadcast licensees to serve the public interest, such as the requirements imposed by Congress on cable (*e.g.*, must-carry and "PEG" obligations) or on direct-to-home satellites. See *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C.Cir. 1996).

There is a line of cases under Supreme Court's public forum doctrine that permits government regulation of speech activity on certain types of public property. The appropriateness of their application to broadcasting should be considered. It is also worth considering whether a quid-pro-quo approach or conditional license approach is a sound legal principle for guiding future Congressional and Commission treatment of broadcast licensees.

Yet another line of discussion lies in the notion that the First Amendment directs the government to promote robust public debate on public issues. The marketplace alone will not ensure that every kind of valuable speech is provided. Many, such as Professor Cass Sunstein, argue that the values embodied in the First Amendment should be furthered through content-specific, though viewpoint-neutral, rules. A similar argument underlies, for example,

the Commission's unanimously voted children's educational and informational television rule of 1996. Does the theory of that vote, in which all members of today's Commission concurred, suggest that when market forces do not promote appropriate and necessary opportunities for fair political discourse on television, some minimal, nonintrusive, and viewpoint-neutral rules to correct for such market failure are constitutional and indeed desirable?

The inquiry that I, this Commission, many Members of Congress, and most important in my view, the President, have demanded must be seen in the context of the broadcast industry's aggressive, persistent, and successful promotion of its own commitment to use the public's airwaves to serve the public interest. Because of advocacy by not only the United States government, but also by the broadcast industry, the courts repeatedly declare the broadcast medium as specially deserving of commercial benefits granted by law and regulation, and deserving of special legal treatment as the carrier of special public interest duties. The Supreme Court's recent *Turner II* decision upholding broadcasters' must-carry rights is just one example. What are the implications of the broadcasters' arguments on the definition of their duties to promote, protect and further democracy in America?

These issues are important to our democracy, and from a constitutional perspective they are non-trivial. They should not be addressed by glib, nonfactual, unsupported statements that scarcity does or does not exist; that the First Amendment says one thing or the other; that there is or is not adequate diversity of viewpoint in television; that there is or is not sufficient access to free television for candidates or issues. The Commission cannot with any level of intellectual honesty report to Congress or the country on the facts and the law relating to these crucial issues without voting for a respectable, even-handed, all-questions-asked inquiry. The Public Interest Notice of Inquiry should articulate with academic rigor all relevant issues and invite a full exploration by academics, public interest citizens' groups, affected industries, all political parties, and indeed all citizens. Using everything from the Internet to personal visits, all should comment, and a responsible, honest report should be written about how the public's airwaves are used and ought to be used to make our glorious and on-going experiment in democracy work better and better.

I believe that the personal attack and political editorial rules should be considered comprehensively in that context. It might well be that after appropriate consideration, including but not limited to consideration of the impact of digitization of television, the Commission would include that the existing and arguably antedated formulation of the personal attack rule or political editorial rule does not further the goals it was intended to promote. Perhaps the Commission would then change or repeal the rules. However, further inquiry is appropriate, has already been promised by this Commission, and should be made.

**Press Statement of  
Commissioner James H. Quello**

**August 11, 1997**

**Re: Repeal of Modification of the Personal Attack  
and Political Editorial Rules**

On August 8, 1997, the Commission released a Public Notice stating that it was unable to reach final resolution as to the fate of the personal attack and political editorial rules. I am extremely disappointed that after extensive deliberation regarding the continued enforcement of these rules that this Commission was not able to establish a majority for final resolution of the issues. Although the Commissioners and the Chairman held lengthy discussions in a good faith attempt to resolve our differing positions, it appears that the result is a 2-2 tie.

I am heartened, however, that there will be three new Commissioners and a new Chairman at the Commission soon. As a result, the new Commission will be able to take up consideration of the continued application of these rules.

August 11, 1997

STATEMENT OF  
COMMISSIONER SUSAN NESS  
REGARDING  
RTNDA PETITION

Unfortunately, despite considerable efforts, the Commission has not yet been able to forge agreement on any course of action affecting the personal attack and political editorial rules.

With an unprecedented 80% turnover in Commission membership expected this Fall, one of our first major responsibilities will be to review the public interest responsibilities of broadcasters in the digital world. In that context, or separately and simultaneously, our review of the personal attack and political editorial rules should be completed. I hope that the Court of Appeals will give the Commission the latitude to proceed in this fashion.

In my judgment, the record at this time does not support repeal of the personal attack and political editorial rules or provide sufficient information upon which to make final judgments about ways in which they might be modified. Indeed, the record before us does not reflect developments such as two major Supreme Court cases casting light on the relationship of broadcasting to the First Amendment, the issuance of three Commission orders enabling television broadcasting to be transformed by the use of digital transmission technologies, and the President's creation of a blue-ribbon committee to evaluate the public interest responsibilities of broadcasters in a digital environment.

The increasing ownership concentration of the broadcast marketplace and the rapidly changing technological and competitive conditions make it timely to reexamine the personal attack and political editorial rules within the context of the overall public interest requirements of broadcasters. In our Digital Television proceeding, we committed to conducting an examination of the public interest of broadcasters in a digital environment. Together with the work of the President's advisory committee and any related hearings that may be conducted by the Congress, there will ample opportunity for a robust public debate on these fundamental issues.

In light of these developments, I would have preferred that we seek additional public comment on both the personal attack and political editorial rules. I believe we should have sought specific comment on the extent to which the purposes of each of these rules remain valid and whether the specific requirements that are part of these rules might be simplified or eliminated. But this proposal, like others that were considered, did not secure support from a majority of the Commissioners.

Ever since the Radio Act of 1927, the Congress has required broadcast licensees to serve the public interest. This trusteeship is critical to the vitality of our democracy because all Americans, not just those who choose to subscribe, are able to receive free, over-the-air radio and television broadcasts. Contrary to some suggestions and to our ill-founded dictum regarding

spectrum scarcity in Syracuse Peace Council (1987), broadcasting has not lost its special character -- with unique privileges and powers and unique responsibilities as well. This is apparent from the Supreme Court decisions this very term on must-carry (Turner, 1997) and the Internet (ACLU v. Reno, 1997). Moreover, Congress recently and specifically determined that public interest responsibilities shall continue as television broadcasters transition to a digital environment. 47 U.S.C. Sec. 336(d) ("Nothing in this section shall be construed as relieving a television broadcasting station from its obligation to serve the public interest, convenience, and necessity").

Regrettably, debates concerning the public interest obligations of broadcasters have too often been cast in extreme terms. On the one hand, the First Amendment can be invoked as an excuse to keep the public interest responsibilities of broadcasters as vague, unenforceable, and unaccountable as possible. On the other, concern for the public interest can be invoked to justify an activist government role that seems insensitive to the First Amendment protections that are the birthright of all American citizens, including broadcasters. But, when the debate is carried on in this manner, real progress on concrete issues is hindered. At the end of the day, our decisions must serve First Amendment values and the public interest responsibilities that are inherent in broadcasting.

I hope that our future consideration of these issues demonstrates that polar characterizations of both the First Amendment and the public interest present a false choice. The First Amendment is in the public interest. And the public interest can be well-served, and advanced, without impinging upon the values served by the First Amendment.

I look forward to working with my new colleagues on the Commission to resolve these issues.

August 11, 1997

**PRESS STATEMENT OF  
COMMISSIONER RACHELLE B. CHONG**

*Re: Repeal or Modification of the FCC's Personal Attack and Political Editorial Rules, 47 C.F.R. §§ 73.1920, 73.1930, 76.209(b), (c), (d).*

In June 1983, the FCC issued a Notice of Proposed Rulemaking that proposed to eliminate our "personal attack" and "political editorial" rules. Fourteen years later, this proceeding remains unresolved and, unfortunately, will remain so into the indefinite future despite our efforts. At this time, my colleagues and I are unable to find a majority vote to take further action on this NPRM.

For the record, I would have voted to repeal both the personal attack and political editorial rules and terminate this proceeding. It is not an acceptable answer for me to continue studying these rules *ad nauseam*. I do not believe that is what the D.C. Circuit Court of Appeals had in mind last February when it rebuffed the Radio-Television News Directors Association's (RTNDA) effort to force us to resolve this rulemaking. Rather, the Court invited RTNDA to renew its request "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." The Court was clearly prompting the Commission to resolve this 14-year-old proceeding within six months, and it was clear to me that the Court's preferred answer was to either repeal or modify these rules. I regret that we have disappointed them.

In my view, the record before us adequately demonstrates that these rules do not serve their intended purpose. They do not further discussion of important public issues -- in fact, they inhibit it. The personal attack rule, for example, has been invoked largely as a substitute for defamation suits and serves primarily to escalate personal quarrels than illuminate public debate. It is not only ineffective, but it is inconsistent with the constitutional standards that govern defamation actions as set forth by the Supreme Court in *New York Times v. Sullivan*. This rule needlessly limits the constitutional protection available to broadcasters. For this reason, I would have repealed it.

I would also have repealed the political editorial rule for much the same reason. The record shows that the political editorial rule has a chilling effect on broadcasters who wish to express their views. The rule places burdens on broadcasters that are beyond what Congress contemplated when it enacted Section 315 of the Communications Act. I see no public interest reason to treat broadcasters as second class citizens in this regard, subject to different rules than other media and other political advocates. For this reason, I would end this disparate treatment and also repeal this rule.

In the spirit of compromise, I would have agreed to repeal the personal attack rule but put the political editorial rule out for further notice, but it is disappointing that we could not find a majority to support even this reasonable compromise.

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# PUBLIC NOTICE

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**Released:** August 8, 1997

## COMMISSION PROCEEDING REGARDING THE PERSONAL ATTACK AND POLITICAL EDITORIAL RULES

The Commission has before it a pending rulemaking proceeding regarding the possible repeal or modification of the personal attack and political editorial rules, 47 C.F.R. §§ 73.1920, 73.1930, 76.209(b), (c), (d). See Notice of Proposed Rulemaking, Gen. Docket 83-484, RM-3739, 48 Fed. Reg. 28295 (June 21, 1983). On December 19, 1996, the Commission issued a Public Notice, DA 96-2159, seeking updated comment on the issues raised in this proceeding.

After 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. The Commissioners expect to issue statements setting forth their respective views on this matter.

By the Commission