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memorandum

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Federal Communications Commission
Office of Secretary

DATE: August 24, 1999

TO: Magalie Roman Salas, Secretary

FROM: Daniel M. Armstrong, Associate General Counsel

SUBJECT: *Ex Parte* Filing, Gen. Dkt. No. 83-484

On August 19, 1999 I spoke with Henry Geller about matters at issue in the referenced proceeding. A summary of that discussion is attached.

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August 20, 1999

Mr. Daniel Armstrong
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Federal Communications Commission
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Dear Mr. Armstrong:

This follows up my telephone conversation with you yesterday concerning the appropriate course of Commission action in light of the remand in RTNDA v. FCC, Case No. 98-1305, D.C. Cir., issued August 3, 1999.

While it was not the main purpose of my call, I noted that there appeared to be some confusion about the public interest/public trustee obligation that the Commission might want to clarify at the outset. The 1987 Syracuse had followed more of a print model (Tornillo) and the Court had affirmed on the ground that in light of the FCC's discretion, it was free to follow that model in the fairness area. There have been developments since that decision – the 1990 Children's Act clearly is not the print model but rather imposes a public trustee obligation. The 1996 Telecom Act again stressed the applicability of the public interest standard to digital broadcasting. I also pointed out that the rationale of the 1987 FCC opinion – that there was so much coverage of controversial issues because of the explosive growth of the electronic media, there was now no need to interfere with licensee editorial judgment – undermines the entire renewal process because that rationale would apply even more strongly to community-issue oriented programming (really all non-entertainment programming), so what's left of renewal?

The main purpose of my call was to point out that the case could be resolved on narrow grounds, even assuming the continuing validity of the 1987 rationale. The Court in the August 3rd opinion asked the Commission to explain why the above 1987 rationale does not apply to these two rules. I raised what I believe was an important distinction that the Commission should explore. The Commission adopts general rules or policies that apply generally even though in some instances the rules don't fit. In the fairness area, the 1987 FCC believed that generally there is so much information now before the public on controversial issues that there is no need for government intervention (although obviously there will be some cases where this might not be so). This general approach can be the case in local controversies. Take the famous or infamous WLBT case involving the charge of fairness violations in the area of racial integration. While I don't believe that a licensee can be a public trustee if it acts in a flagrantly racist fashion, the

FCC could point out today that as to the issue of racial discrimination, there are many sources of information, national and also local, flooding the public.

That's not true generally in the case of the personal attack or the political editorial. Most of these are local in nature, so there is no national programming that can be said to give the other side of the personal attack or the political attack or endorsement, and there may well be no other local coverage. That would be true of the leading case, Red Lion, where the program was discussing the controversial issue of communism/left wing damage to the nation, and cited Fred J. Cook as an example; unless Cook is given an opportunity to respond, the public would receive no information on the contrasting viewpoint on this facet of the issue. It would be true in the famous print case, Tornillo, where he was attacked as unfit to hold office in an editorial; no national coverage and probably no local coverage would give the other side.

What I therefore suggested was that the Commission research either all its rulings in these two areas or some large chunk like the last decade or so, and see if the above position is generally sound – that the situations generally involve local attacks so national coverage is not relevant and are of such a nature that it's unlikely to be covered by any significant number of local sources. I don't expect there to be absolute proof or no exceptions – only that it is reasonable to proceed on this general position. If the research did give substantial support to the position, it should be all set out in an appendix to a NPRM, so as to give RTNDA, the NAB, and others a chance to comment. Further, this should be done expeditiously in light of the long delays in this area, as the Court noted.

I also addressed very briefly the second ground of the 1987 opinion – that the implementation of the rules chill debate. I pointed out that the reviewing court in 1987 did not affirm this holding, asserting that it's just anecdotal on both sides of that issue. In any event, there may well be a distinction again here as to the situations involving the rules. The Commission noted in 1987 (I believe it was on reconsideration) that responsible journalism means getting the other side. That is particularly applicable to the attack or political editorial situation. Would any responsible broadcast journalism department engage in such attacks without trying to get the person attacked an opportunity to respond? The FCC ought to raise this issue in its NPRM to give RTNDA an opportunity to comment. Again, I used the Tornillo case as an example. The paper refused to allow Tornillo to respond in its pages because he stated that under the Florida statute, he had a right, and it was this right and statute that the paper successfully challenged. I had heard the paper's counsel say that if Tornillo had only requested the opportunity to respond, they would have acceded as responsible journalists. If this is a journalistic norm, where is the chilling effect? Of course, any governmental intervention in the journalistic process has some effect, but that goes with the public trustee obligation and in these particular areas, the effect may be of a smaller adverse nature.

I believe that this is a full resume of my phone conversation. I request that it be placed in the public record in this proceeding. Thank you for your courtesy.

Sincerely yours,

A handwritten signature in cursive script that reads "Henry Bellar". The signature is written in dark ink and is positioned below the typed name "Henry Bellar".