

TV - Regulation FCC

PROGRAMING

# Fairness court test opens in Chicago

## Briefs argue that First Amendment guarantees broadcasters freedom of press and speech

Broadcasters opposing the FCC's fairness regulations have taken an all-or-nothing stance on the First Amendment in briefs filed in federal court last week. On the outcome of the litigation, no doubt due to be carried to the U. S. Supreme Court before it's over, may well turn the future of electronic journalism—free and unfettered or circumscribed by government-imposed limits.

This was the thrust of the briefs filed by the three major petitioners and by one friend of the court in the federal appeals court in Chicago.

Filing were the Radio Television News Directors Association, eight licensees, CBS and NBC. The amicus brief was submitted by King Broadcasting Corp. (KING-AM-FM-TV Seattle).

Under attack is the FCC's July order establishing as regulation the decades-old fairness policy as it applies to personal attack and editorializing. In August the commission amended the rules to exempt bona fide newscasts and on-the-spot coverage of news events.

**Unanimity** ■ All the briefs attacked the FCC's action as a violation of freedom of the press and of speech. All also contended that even if this argument does not prevail, the commission has no power under the Communications Act to impose its determination of fairness on licensees.

RTNDA, which was the first to appeal the commission's order (the CBS and NBC appeals were originally filed in the second circuit in New York but subsequently consolidated with the Chicago appeal) put it bluntly: The First Amendment precludes the commission from restricting the freedom of broadcasters to express controversial opinions on public issues.

Questioning the means the commission has selected to accomplish the goal of an informed electorate, RTNDA maintained that the First Amendment calls for public debate that should be "wide open and uninhibited" and should include biased and partisan speech.

"The commission cannot," RTNDA said, "substitute a different and con-

sulting standard in place of that selected by the First Amendment, even though it believes its own standard to be better."

**Constraint** ■ The FCC's fairness rules and doctrine in practice, RTNDA said, reduce the "vigor and scope" of public discussion on controversial issues by forcing broadcasters to be self censors and by imposing economic, administrative and other burdens on broadcasters.

Also, RTNDA contended, the rules permit the commission to enter day-to-day determination of individual fairness questions, leading to the scrutiny of particular programs.

In a sense, the rules tax the broad-

caster, RTNDA said, by forcing broadcasters to give away free time for replies. It is, the news directors commented "in effect a tax on controversial speech—the more controversial the broadcaster is, the higher his 'tax.'"

Since most so-called personal attacks are made on public officials or public figures, the commission's requirement that reply time must be proffered conflicts with the Supreme Court's own rulings in the *New York Times* and *Curtis Publishing* cases, RTNDA stated. Both cases held that public officials or figures could be attacked and even libeled, and that the publications could not be held for damages, unless maliciousness was proven.

Anticipating the commission's arguments, the RTNDA brief maintained:

■ Broadcasters may not be denied protection of the First Amendment on the alleged physical limitations on the number of stations that may operate in the spectrum. This cannot, the association added, "justify a constitutional distinction between broadcasting and print media." In fact, it went on, newspapers are "far more scarce" than broadcast stations.

■ Broadcasters may not be denied their rights under the First Amendment

WUSN-TV  
 Ch. 2, the ABC  
 station in  
 Charleston, covering  
 the eastern half  
 of South Carolina  
 is represented  
 by Edward  
 Petry & Co

regulation of broadcasting on the theory of a scarcity of facilities and public ownership of the airwaves does not withstand analysis, NBC pointed out. The number of broadcast stations, it related, has increased from 30 in 1922 to 5,681 in 1965; in the same period, the number of daily newspapers has decreased from 2,033 to 1,751.

The commission's rules, therefore, are "constitutionally impermissible," NBC stated. They discourage broadcasters from taking stands on public issues, require them to censor programs, muffle criticism of, or editorializing against, public figures, and "it places in the hands of the commission the power, by its day-to-day interpretations of a vaguely worded rule, to affect in more subtle ways the content of what is broadcast—to promote expression which it favors, and discourage expression of which it disapproves." NBC's brief was filed by the New York law firm of Cahill, Gordon, Sonnett, Reindel & Ohl.

The King Broadcasting amicus brief called the rules "unlawfully vague . . . incapable of being administered properly."

The rules, King said, will discourage use of the media to inform the public of broadcaster's views on political elections.

**Withheld Rights** ■ Because broadcasters are "clients" of the government, in that they require a license to operate, King said, they are at the mercy of the FCC in editorial decisions and thus are restrained in exercising their First Amendment rights.

King recounted its experiences in the recent Seattle city-council election, where it took an editorial position endorsing five of the nine candidates and offering the other four 20-second announcements to be broadcast six times over two days. One unendorsed candidate complained to the FCC, resulting in an FCC order to King to provide more exposure to that candidate. Failing to win a stay in the District of Columbia circuit court, King negotiated and gave the candidate one additional 20-second announcement (BROADCASTING, Nov. 20, 13). King also said that a similar situation occurred during the primary campaign for city council last September. In this case, an unendorsed candidate complained to the FCC that King's offer of one one-minute response to be run twice was too little. The commission agreed, and because the primary election was only a day away, King agreed to give the complaining candidate six 20-second announcements. In both cases, King's editorial endorsements ran several times daily over a period of a week.

The King brief was submitted by the Washington law firm of Haley, Bader & Potts.

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