The FCC Assumes a New Role as Regulator of Broadcast Advertising and Candidates' Access

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THE FCC ASSUMES A NEW ROLE AS REGULATOR OF BROADCAST ADVERTISING AND CANDIDATES' ACCESS

JAMES A. ALBERT*

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I. INTRODUCTION

WKKQ is a relatively small country music station, on the air only during the daylight hours each day, serving the small town population of 16,000 people in Hibbing, Minnesota, and surrounding areas. United States Senator Wendell Anderson, a candidate

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I wish to dedicate this article to Dean John J. Broderick, a 1936 graduate of St. John's University School of Law. Dean Broderick, Professor of Law at Notre Dame for 30 years, inspired me as a law student and will always be my guiding light. He is a jetstream of encouragement. He stands for all as a symbol of competence, generosity, and compassion.
for election to the Senate in the November 1978 general election, sought to purchase twenty-four 5-minute blocks of advertising time on WKKQ immediately prior to the election. The station refused the request, explaining that it did not sell 5-minute blocks of advertising time to anyone, including its commercial, business sponsors. WKKQ noted it was a music and news station whose fast-paced programming format necessitated a policy of refusing to sell any advertising time beyond the length of a 1-minute spot announcement.

Emphasizing that it was not attempting to deny Senator Anderson or any other political candidate access to the air, but was merely protecting its format from disruption by treating Senator Anderson exactly the same as it treated all other business and political advertisers, WKKQ sold the Anderson campaign seventy-five spot announcements to be run during the final 8 days before the election.

Unsatisfied, the Anderson campaign threatened the radio station that the Federal Communications Commission (FCC or Commission) would be contacted to force the station to sell the 5-minute segments. To the possibility that it might be compelled to

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1 Senator Wendell Anderson, 69 F.C.C.2d 1265 (1978). In broadcasting, advertisements of 1-minute in length are known as “spots” and those of 5-minutes or longer are referred to as “program length” ads.

Ads are also classified on the basis of placement. Run-of-schedule ads can be aired whenever the station chooses, can be moved for fixed position ads, and are sold at relatively low rates. Fixed-position ads are sold for airing at a specific time or during a specific program and are more expensive. See Holden E. Sanders, 52 F.C.C.2d 592, 592-93 (1975).

Primetime is that period of the broadcasting day characterized by peak audience potential. For a radio station such as WKKQ, prime time includes those morning and afternoon hours that maximum numbers listen to the radio on the way to or from work — commonly known as “drive time.” Prime time for a television station, on the other hand, is during the evening hours when most people are at home.

2 69 F.C.C.2d at 1266. But see id. at 1267 n.3. Although WKKQ has an established policy of refusing to sell time segments longer than spot announcements to anyone for the purpose of advertising, it does present program length material in its typical broadcast day. WKKQ features one half-hour of news and two 4-minute religious programs a day, as well as a half-hour religious program once a week. Id.

3 Id. at 1266.


5 69 F.C.C.2d at 1266.

6 Id. The FCC is a regulatory agency created by the Communications Act of 1934 (the Act), ch. 6592, 48 Stat. 1064 (1934)(codified at 47 U.S.C. §§ 151-609 (1976)). The Act was
offer 5-minute commercials, WKKQ responded by setting a chargeable rate of eighty dollars for any commercial of such length.\textsuperscript{7}

On October 26, 12 days before the election, a representative of Senator Anderson filed a formal complaint with the FCC. The complaint charged that WKKQ's refusal to sell 5-minute blocks of time was unlawful, violating the Communications Act of 1934 (the Act),\textsuperscript{8} as amended by the Federal Election Campaign Act of 1971 (FECA).\textsuperscript{9} Further, the complaint contended that the $80 rate had been intentionally set outrageously high by the station to discourage Senator Anderson from purchase, a practice which was also improper on the station's part.\textsuperscript{10}
On October 31, by a 4-2 vote the Commission adopted a decision in response to the Anderson complaint. The decision ordered WKKQ to sell Senator Anderson 5-minute blocks of advertising time. Moreover, the Commission found the $80 rate to be unreasonable on the record before it, and ordered the station to either justify the amount or reduce it.


Few problems have arisen regarding the meaning of “lowest unit charge.” This may be due to the clear Congressional intent to “place the candidate on par with a broadcaster's most favored commercial advertiser” during the crucial period immediately prior to an election or primary. S. Rep. No. 96, 92d Cong., 1st Sess. 27 (1971), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 1773, 1780. Regularly, under § 315(b)(2), candidates will be charged rates “comparable” to those charged other users. They need not be afforded the same special rate or deal given a purchaser of a large amount of advertising time. When the time period described in § 315(b)(1) is in effect, however, a broadcaster is obligated, under this “lowest unit charge” provision, to give the candidate the same rate given to a bulk purchaser, even if the candidate does not purchase that quantity of time. See A. Shapiro, Media Access 97-99 (1976). In other words, the candidate is entitled to pay no more than the best rate the licensee charges a commercial advertiser for the type and length of ad bought. For a discussion of the meaning of “type” and “length” under § 315(b)(1), see Holden E. Sanders, 52 F.C.C.2d 592, 593-94 (1975).

Senator Wendell Anderson, 69 F.C.C.2d 1265 (1978). Voting in the majority were Chairman Ferris and Commissioners Quello, Fogarty, and Brown; Commissioners Lee and White dissented.

Id. at 1267. The Commission reasoned that given the purposes of the Federal Election Campaign Act of 1971, an affirmative obligation is imposed upon the licensee to afford certain time lengths to political candidates for federal office regardless of their policy towards commercial advertisers. In other words, it is not enough for the station to assert that it does not permit anyone to purchase 5-minute segments of time. Id. at 1266. The Commission relied on its Report and Order on Commission Policy in Enforcing Section 312(a)(7), 43 Fed. Reg. 36,342 (1978) [hereinafter cited as 1978 Report & Order], wherein the FCC stated “a station may not refuse all requests for time simply because they do not fit into the station's particular format. . . . A station that normally broadcasts only music and spot announcements will not be meeting its obligation if it refuses to accept or schedule any political discussion running longer than one minute.” Id. at 36, 382-83.

Although Commissioners Fogarty and Quello agreed that the Commission's Rules required the station to accept 5-minute political ads, each was disturbed by the result reached in this case. Commissioner Quello indicated the rule should be modified, and Commissioner Fogarty questioned the rule's purpose. See FCC forces station to take five-minute political spot, Broadcasting, Nov. 6, 1978, at 52.

69 F.C.C.2d at 1268. The FCC found the quoted rate to be violative of the lowest unit charge provision of the Federal Election Campaign Act of 1971. Id. at 1267; see note 9 supra. The majority went on to explain that it was not fixing the rates licensees must charge, but that the licensee must justify its rates by showing a reasonable relation between the amount charged for program time and spot announcements. Id. The licensee in this case ordinarily charged $6.48 for a prime-time, 60-second spot and $21.60 for a single prime-time spot. 69
In a blistering dissent, Commissioner Margita White characterized the majority’s reasoning as “pious nonsense,” and “beyond any reasonable construction of its alleged statutory authority,” and the decision as an “impermissible and unparalleled intrusion,” and an effort “to expand the Commission’s regulatory reach.” As Commissioner White saw it, “[t]he majority here has ignored fifty years of legislative and regulatory wisdom.” What makes her jarring attack even more pronounced is the amiable and urbane comradery typical of the Commission, and the conspicuous reluctance on the part of individual Commissioners to indignantly denounce, even in dissenting opinions, any colleagues over policy differences.

The purpose of this Article is to analyze the WKKQ decision in terms of the relevant statutes, and Commission and judicial precedents in an effort to determine whether the decision was beyond the authority of the Commission and susceptible to reversal.

F.C.C.2d at 1266 n.2. Therefore, the Commission held that the licensee’s rate for a 5-minute political program, being nearly thirteen times the rate for a spot announcement, bore no reasonable relation to the lowest unit charge. Id. at 1268. The FCC required the station to rebut the presumption of unreasonableness by showing that the charge actually does bear a reasonable relation to the lowest unit charge or to show why the lowest unit charge cannot be used. Id.

14 69 F.C.C.2d at 1270-72. (White, Comm’r, dissenting); see notes 74-79 and accompanying text infra.
15 16 Id. at 1271 (White, Comm’r, dissenting).
16 Id. at 1272 (White, Comm’r, dissenting).
17 Id. (White, Comm’r, dissenting).
18 Id. (White, Comm’r, dissenting). Commissioner White pointed out that Section 3(h) of the Communications Act of 1934, 47 U.S.C. § 153(h) (1976), specifically states that a broadcaster is not a common carrier. Therefore, regulation of its specific rates is unjustified. 69 F.C.C.2d at 1271 (White, Comm’r, dissenting). She also noted that Congress, when enacting § 315, made it clear that “rates would not be regulated [although] discrimination in charges to candidates were prohibited.” Id. (White, Comm’r, dissenting); see notes 234-235 and accompanying text infra.
19 See notes 24-36 and accompanying text infra.
20 See notes 87-161 and accompanying text infra.
21 See notes 175-246 and accompanying text infra.
22 The FCC derives its authority from Congress, which has delegated to it the responsibility of regulating the airwaves. See note 6 supra. The scope of authority the FCC has received by way of the Communications Act of 1934 is expansive. See National Broadcasting Co. v. United States, 319 U.S. 190 (1943). In National Broadcasting the Court rejected the contention that the FCC was restricted to resolving technological problems or objections to the granting of a license, such as determining whether there are too many stations in that area already, and if another station would interfere with the existing broadcast frequencies. Id. at 215-18. The Supreme Court stated that Congress did not “frustrate the purpose for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency.” Id. at 219. See generally D. Pember, Mass Media Law
on reconsideration by the FCC or on appeal to the courts.\textsuperscript{23}

\section*{II. The Applicable Law}

By enacting the landmark Communications Act of 1934,\textsuperscript{24} Congress created the Federal Communications Commission as an expert, independent regulatory agency. Among its other responsibilities, the Commission is empowered by the terms of the Act to extensively regulate radio broadcasting throughout the nation.\textsuperscript{25} The cutting edge of the FCC's broadcasting jurisdiction is its licensing power;\textsuperscript{26} no radio station can broadcast without an FCC li-

\textsuperscript{23} Appeals from all orders of the Commission, except those granting or refusing an application for a construction permit, a station license or its renewal or modification, or suspending an operator's license, can be sought through application to the United States Court of Appeals. 28 U.S.C. § 2342 (1976). In all other cases, an appeal may be taken to the United States Court of Appeals for the District of Columbia, by an unsuccessful applicant, a suspended operator, or "any other person who is aggrieved or whose interests are adversely affected by" the Commission's order. 47 U.S.C. § 402(b)(1976). Also, any decision by the court of appeals is subject to review by the Supreme Court of the United States. 47 U.S.C. § 402(j)(1976); see note 83 infra.

WKKQ and the national broadcast industry have petitioned the FCC to reconsider this decision. See note 83 infra.

\textsuperscript{24} Ch. 6652, 48 Stat. 1064 (1934) (codified at 47 U.S.C. §§ 151-609 (1976)).


Procedurally, the FCC usually receives a complaint about a broadcaster from the candidate or his representative. The complaint must establish a prima facie case of a violation or no further action will be taken. American Security Council Educ. Foundation v. FCC, 607 F.2d 438, 452 (D.C. Cir. 1979); Melbourne Noel, Jr., 66 F.C.C.2d 1063, 1064 (1976). Next, the FCC investigates the complaint by mail or phone, depending on the circumstances. Should this investigation show the licensee to have acted unreasonably, the station must rebut the evidence or be charged with the violation. Few complaints reach the stage where the broadcaster needs to reply. American Security Council Educ. Foundation v. FCC, 607 F.2d 438, 447 (D.C. Cir. 1979) In 1973, of 2400 complaints, 94 required licensee responses. Id. See generally W. FRANcois, MASS MEDIA LAW AND REGULATION 434-35 (2d ed. 1978).

The licensing powers of the Commission are enumerated in 47 U.S.C. §§ 301, 303, 307-312 (1976), and 47 C.F.R. §§ 1.511, .533, .538-.539, .540, .541, .591-.592, .593, .597, .601, .605 (1978). The FCC receives complaints covering a wide variety of subjects, see, e.g., FCC Forty-Second Annual Report 226-27 (1976), and FCC response may take a variety of forms. B. COLE & M. OHRINGER, RELUCTANT REGULATORS 190-202 (1978). Revocation of a broadcaster's license, pursuant to 47 U.S.C. § 312(a) (1976), is the most serious response. For this reason and also because a timely response is essential in order to remedy a licensee's violation, the Commission generally handles complaints when they arrive. See National Broadcasting Co. v. FCC, 516 F.2d 1101, 1115 (D.C. Cir. 1974), cert. denied, 424 U.S. 910 (1975). After the immediate dispute is resolved, however, the FCC may reconsider the violation when the broadcaster's license is renewed. See, e.g., Pacifica Foundation Station WBAI (FM), 56 F.C.C.2d 94, 99 (1975), rev'd, 556 F.2d 9 (D.C. Cir. 1977), rev'd, 438 U.S. 726 (1978).
Upon application to the Commission, a station can be initially granted and subsequently awarded renewal of a 3-year, limited right, expiring license to broadcast if its operation inures to the benefit of the public.\textsuperscript{27}

Such a federal license comes to the local broadcaster with strings of responsibilities attached. With an FCC license to broadcast, certain obligations are imposed on the station. Literally scores of such obligations and conditions have been congressionally mandated and thus appear as substantive provisions of the Communications Act of 1934, as amended. Two such obligations stand as the touchstones of the \textit{WKKQ} case:

Section 312:
(a) The Commission may revoke any station license or construction permit —

\begin{itemize}
  \item[(7)] for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.\textsuperscript{28}
\end{itemize}

Section 315(b):

The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office . . . shall not exceed—

(1) . . . during the sixty days preceding the date of the general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time

\textsuperscript{27} 47 U.S.C. § 301 (1976).
\textsuperscript{28} Id. at §§ 303, 307(a), 307(d), 309(a). The FCC may only grant a license for the operation of broadcasting station for a 3-year period. At the end of the period the license may be renewed if the Commission “finds that public interest, convenience, and necessity would be served thereby.” Id. § 307(d).

There is no specific definition of “public interest, convenience or necessity.” The FCC has articulated the belief that a licensee must, in order to meet its obligation to serve the public, make a “diligent, positive and continuing effort to discover and fulfill the tastes, needs and desires of its community.” National Broadcasting Co., 47 F.C.C.2d 803, 810 (1974). The Commission has also developed extensive rules and policies which provide some idea of what the FCC deems to be acting in the public interest. In Commission’s En Banc Programming Inquiry, 44 F.C.C.2d 2303 (1960), for example, the FCC sets forth elements it has found necessary for a station to provide in order to meet their public interest obligation. Among the elements listed are public affairs programs, political broadcasts, and opportunity for local self-expression. Id. at 2314.

\textsuperscript{27} 47 U.S.C. § 312(a)(7) (1976); see notes 87-171 and accompanying text infra.
It is the delegated responsibility of the Commission to enforce and interpret all provisions of the Act. In discharging these duties with respect to sections 312 and 315, the FCC has been prolific in issuing policy statements, public notices, rules, primers for candidates and broadcasters, and decisions resolving specific cases and issues.

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50 47 U.S.C. § 315(b)(1976). This provision has generally been interpreted as requiring the licensee to place the candidate at least on a par with their commercial advertisers. See, e.g., Anthony Martin-Trigona, 64 F.C.C.2d 1087, 1090 (1977). Therefore, if a station charges ten dollars for one spot announcement and $7.50 per spot if ten are brought at one time, for the 60 days preceding a general election, the station must charge a political candidate $7.50 for one spot announcement. The Law of Political Broadcasting and Cablecasting, 43 Fed. Reg. 36,342, 36,348 (1978). Section 315(b)(1) has also been interpreted to mean that if spot time segments are made available to commercial advertisers they must be made available to candidates. See Campaign '76 Media Communications, Inc., 58 F.C.C.2d 1142, 1144 (1976).

51 47 U.S.C. § 303 (1976); see notes 6 and 22 supra.

52 A policy statement is an exposition of the FCC's interpretation of a particular phase of its duties to regulate the airwaves, and how it could be expected to react to certain licensee practices. See, e.g., Political Spot Announcements on Radio, 59 F.C.C.2d 103 (1976), modified on other grounds, 72 F.C.C.2d 255 (1979); Commission's En Banc Programming Inquiry, 44 F.C.C. 303 (1960).

53 A public notice issued by the Commission will focus on a particular issue which the FCC views as needing clarification and so it will set guidelines for broadcasters to follow. See, e.g., The Federal Election Campaign Act Amendments of 1974, 55 F.C.C.2d 279 (1975); Use of Broadcast Facilities by Candidates for Public Office, 24 F.C.C.2d 832 (1970).

54 Rulemaking proceedings consider whether a change in the Commission's stance on a topic should be made. Such change may be premised on new factual situations or novel arguments. See John Cervase, 44 F.C.C.2d 744, 746-47 (1974). The FCC is empowered by Congress with broad discretion to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter." 47 U.S.C. § 303(r) (1976). Such rule-making documents, in addition to opinions and orders, final decisions and documents contained in FCC Reports, and formal policy statements and interpretations, have precedential value if published in the Federal Register.

If the [rule-making documents] . . . are published in the Federal Register [or the F.C.C. Reports, . . . they may be relied upon, used or cited as precedent by the Commission or private parties in any matter. If they are not so published, they may not be relied upon, used or cited as precedent, except against persons who have actual notice of the document in question or by such persons against the Commission.

47 C.F.R. § 0.445(e) (1978). But see Senator Wendell Anderson, 69 F.C.C.2d 1265, 1270 n.2 (1978) (White, Comm'r, dissenting)(political primer no more than "reference tool and has no force and effect of law").

55 A primer recapitulates and expands prior statements and decisions by the Commission in a given area. See, e.g., The Law of Political Broadcasting and Cablecasting, 43 Fed. Reg. 36, 342 (1978) [hereinafter cited as 1978 Political Primer].

56 See notes 120-171 infra.
III. The Issues

The issues in the WKKQ case were well-defined. The complaint argued that the refusal of the station to sell the requested 5-minute ad violated the reasonable access obligations imposed on the station by section 312(a)(7). Secondly, the complaint characterized the $80 rate set by the broadcaster as "artificially high... to discourage the candidate from exercising" his reasonable access rights. It was contended that such attempted discouragement in itself violated section 312(a)(7) by contravening the spirit of the provision and circumventing the access rights of the candidate.

The station’s response was simply that it had an established policy of selling absolutely no 5-minute advertising time to any prospective buyer—commercial or political. It was explained that such a deliberate policy was justified by its concern to keep intact its news, music, and spot announcement format. The broadcaster insisted that such a business judgment was fully within its own discretion and that section 312(a)(7) did not require a disruption of this type of format.

With respect to the rate issue, WKKQ protested that it was axiomatic that the FCC had no authority to regulate advertising rates charged by broadcast stations. The station’s position was...
that the law and the intent of Congress\textsuperscript{42} were unequivocal that the FCC could not regulate advertising rates\textsuperscript{43} and that this was reflected by the Commission’s action in the past.\textsuperscript{44}

IV. THE DECISION OF THE COMMISSION

With the issues clearly framed, the Commission ordered WKKQ to sell the 5-minute segments and to either justify or reduce the $80 rate.\textsuperscript{45} The decision addressed the station’s argument that it sold no 5-minute blocks to even its business advertisers, flatly ruling that “[r]easonable access imposes an affirmative obligation on licensees, standing independently of their commercial practices.”\textsuperscript{46} The opinion offered a precedential litany for this proposition. First, a public notice issued in 1968 (1968 Public Notice)\textsuperscript{47} alerted broadcasters that programming format modifications might be necessary to meet political broadcast obligations.\textsuperscript{48} Additionally, a public notice issued in 1974 (1974 Public Notice)\textsuperscript{49} declared that the purpose of the FECA amendments was to allow federal candidates to explain exhaustively their positions for the benefit of a fully informed electorate.\textsuperscript{50} Further, the Commission

\begin{itemize}
  \item See S. Rep. No. 781, 73d Cong., 2d Sess. (1934); notes 43, 234, 235 infra.
  \item As Commissioner White pointed out in her dissent, 67 F.C.C.2d at 1271 (White, Comm’r, dissenting), during the drafting of the Radio Act of 1927, Congress rejected classifying broadcasters as common carriers, see notes 79 & 129 and accompanying text infra. It thus appears that if the legislature had intended broadcasters to be subject to rate regulation by a government agency they would have provided for such by including broadcasters within the term common carrier. See 69 F.C.C.2d at 1271 (White, Comm’r, dissenting); S. Rep. No. 781, 73d Cong., 2d Sess. (1934).
  \item 69 F.C.C.2d at 1268.
  \item Id. at 1266.
  \item Public Notice — Licensee Responsibility as to Political Broadcasts, 15 F.C.C.2d 94 (1968) [hereinafter cited as 1968 Public Notice].
  \item Id. The FCC wished to call to the attention of the licensees that it was desired that licensees make “their facilities effectively available to candidates for political office even though this may require modification of normal station format.” Id. The Commission recognized the importance of political broadcasts and encouraged the licensee to take steps in assuring that this aspect of the public need would be met. Id.
  \item 47 F.C.C.2d at 517. The Commission reminded licensees that Congress intended in passing the FECA “to ensure candidates for Federal elective office adequate opportunity to present and discuss their candidacies and hence provide the voters with information necessary for the responsible exercise of their franchise.” Id. at 517; see note 39 supra.
\end{itemize}
observed, a 1978 public notice (1978 Political Primer)\(^1\) stated that music, news, and spot announcement stations would not be in compliance with section 312(a)(7) if they refused to sell 5-minute program-length segments.\(^2\) Finally, a 1978 enforcement order (1978 Report and Order)\(^3\) explained that reasonable access meant nothing less than making 5-minute segments available to candidates during prime time.\(^4\) The decision acknowledged that the 1974 Public Notice and the 1978 Political Primer had held out to broadcasters that noncompliance with the enumerated responsibilities was possibly acceptable under certain extenuating circumstances.\(^5\) The FCC noted, however, that WKKQ had made no such showing in this case.\(^6\)

Turning to the eighty-dollar rate issue, the majority concluded that the station's rate was "unreasonable in light of the history and purpose of the FECA."\(^7\) The decision identified as one purpose the reduction of candidates' campaign expenses by inaugurating the lowest unit charge rule.\(^8\) In those instances in which a station in fact had no established rate, as here, one must be set, and the decision stated it must also be a lowest unit charge.\(^9\)

There were two separate standards to which the station was held on the rate issue by the majority. The first was that WKKQ must be reasonable in setting its rates.\(^10\) In deciding that the rate was unreasonable, the Commission found it significant that the 5-

\(^1\) 1978 Political Primer, supra note 35.

\(^2\) See id. at 36, 382-83. In the Political Primer, the FCC explained that "a station that normally broadcasts only music and spot announcements will not be meeting its obligation if it refuses to accept or schedule any political discussion running longer than one minute." Id. (citing the 1968 Public Notice, supra note 47).

\(^3\) 1978 Report and Order, supra note 12).

\(^4\) Id. at 33,770. The majority stated: "absent certain unusual circumstances . . . "reasonable access" requires that a legally qualified candidate be afforded program time in prime time.' This statement does not contain any qualification that this requirement applies only if the licensee sells program time to commercial advertisers." 67 F.C.C.2d at 1267 (quoting 1978 Report and order, supra note 12).

\(^5\) 69 F.C.C.2d at 1267. The countervailing circumstances referred to by the majority have usually been inferred to mean a multiplicity of candidates or a donation of free time by the station. See Summa Corp., 43 F.C.C.2d 602, 605 (1973).

\(^6\) 69 F.C.C.2d at 1267.

\(^7\) Id.; see note 9 supra.

\(^8\) 69 F.C.C.2d at 1267-68.

\(^9\) Id. at 1267.

\(^10\) Id. The Commission does not usually attempt a determination of the reasonableness of rates charged by broadcasters. It confines itself to a ruling on whether the lowest unit charge has been afforded a political candidate, and whether a station has been discriminatory in the rates charged different candidates. See notes 186-189 infra.
minute rate was fully thirteen times the lowest unit rate charged by WKKQ for a 1-minute spot. To the Commissioners, the 5-minute rate thus bore "no reasonable relation to the lowest unit charge that is applicable to spot announcements." As the decision ex-tolled, unreasonableness in the setting of rates would thwart the purposes of sections 312 and 315, discourage candidates from abundantly communicating their views to the electorate, and raise serious questions about the true motivation of the broadcaster in establishing such rates.

The second standard used by the Commission was the general public interest standard which all broadcast licensees must meet. FCC broadcast licenses are conditioned on the licensee operating in the public interest, as defined by the FCC. The concern of the majority was that high political advertising rates could deter, limit, or silence political broadcasts, which are a part of the overall programming obligations of licensees. If political broadcasts were thus deterred, there would be a question whether the licensee was meeting all its programming obligations, and thus serving the public interest.

The majority concluded that WKKQ had met neither rate standard and therefore had acted unreasonably, in violation of sections 312 and 315. The station was offered the option of justifying its rate by the Commission's standards, which would involve persuading the Commissioners that an extenuating circumstance prevented the use of the lowest unit charge or that the eighty dollar rate was reasonably related to the lowest unit charge. Whether such option was illusory, given that the majority had already concluded there was no reasonable relationship between WKKQ's rate and the lowest unit charge, was a determination for the station to make. The holding of the case appears to be that absent such justification, the rate must be revised. The Commission did not, however, indicate with exactness what the new rate should be. Explaining that it was not infringing on WKKQ's discretion to set its

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61 69 F.C.C.2d at 1267.
62 Id. at 1268.
63 Id. at 1267-68.
64 See note 28 supra.
65 See id.
66 Id.
67 Id.
68 Id.
V. DISSenting Statements

In separate statements, two commissioners dissented to the majority’s decision. Commissioner Robert E. Lee disagreed with the majority’s perception that Commission precedent mandated the result. To the contrary, he argued, the 1974 Public Notice upon which the majority essentially based its conclusion had been overruled by the Commission in its 1977 Martin-Trigona decision. He explained that the 1977 opinion held the reasonable access provisions did not “mandate access to any particular length or class of time.” Further, Commissioner Lee noted Martin-Trigona stood for the proposition that licensees have the discretion to decide how their facilities will be used to afford political access, subject only to a narrow FCC review for reasonableness. Under the Martin-Trigona standard, Commissioner Lee contended that WKKQ’s refusal to sell 5-minute segments was reasonable, which was demonstrated by the station’s showing that its policy of banning program-length ads was uniformly applied to commercial and political advertisers, that its format would be otherwise disrupted, and that it had agreed to afford Senator Anderson extensive access by selling him dozens of 1-minute spots.

The second dissenter, Commissioner Margita E. White, was severely critical of the decision. With respect to ordering WKKQ to sell the ads, Commissioner White challenged the majority that Commission precedent should have forced the opposite result. She referred to the language in the 1978 Report and Order that licensees could “follow usual commercial practices” in meeting their po-

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63 Id. at 1267. The station was ordered to advise the Commission by 4:00 p.m. the next day exactly how it planned to meet its reasonable access obligation to Senator Anderson, as interpreted and defined in the decision. Id.
64 69 F.C.C.2d at 1268-69 (Lee, Comm’r, dissenting).
65 Anthony Martin-Trigona, 64 F.C.C.2d 1087 (1977); see notes 134-142 and accompanying text infra. In Martin-Trigona, the Commission specifically overruled Campaign ’76 Media Comm’n, Inc., 58 F.C.C.2d 1142 (1976), and the 1974 Public Notice to the extent that they “granted access to particular units of time based on section 315(b).” 64 F.C.C.2d at 1091.
66 69 F.C.C.2d at 1269 (Lee, Comm’r, dissenting); see Anthony Martin-Trigona, 64 F.C.C.2d at 1090-91; note 70 supra.
67 69 F.C.C.2d at 1269 (Lee, Comm’r, dissenting).
68 Id.
69 Id. at 1270-72 (White, Comm’r, dissenting).
She noted that WKKQ's usual commercial practice was to sell no 5-minute ad time to any potential advertiser. The station, declared Commissioner White, should thus be allowed to continue its usual 5-minute ad policy without Commission disturbance.

Alternatively, the White dissent insisted that the station's access policy was reasonable and should therefore be affirmed. She contended that reasonableness was shown when WKKQ met Senator Anderson's political communications needs by selling him seventy-five 1-minute spots for the last 8 days of the election campaign.

Addressing the eighty dollar rate issue, Commissioner White's dissent complained that the Commission's decision "went beyond any reasonable construction of its alleged statutory authority." She explained that the section 315(b) lowest-unit-charge requirement was inapplicable and could not serve as a basis for the WKKQ order since it merely placed a candidate on a lowest rate par with the station's most favored commercial advertiser. She argued that because WKKQ did not sell 5-minute time to business advertisers, it had no 5-minute lowest rate for commercial, business advertisers, and, therefore, section 315(b) plainly did not apply. The dissent further maintained section 312(a)(7) did not confer rate authority either, as it dealt only with insuring candidates' access.

The dissent denounced the decision as exceeding the Commission's authority, as found in sections 312 and 315 and disparaged the majority for going beyond the intent of Congress as it had been clearly identified in legislative histories dating to 1927.

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76 Id. at 1270 (White, Comm'r, dissenting)(quoting 1978 Report and Order, supra note 12, at 33,770). In the Report and Order quoted by Commissioner White, the Commission assured licensees that compliance with political access requirements would not necessitate a disruption of their broadcast schedule; they need only allow that time which they afford commercial advertisers to be available for political candidates. 1978 Report and Order, supra note 12, at 33,770.
77 Id. at 1270-71 (White, Comm'r, dissenting).
78 Id. at 1271 (White, Comm'r, dissenting); see note 6 supra.
79 Id. at 1271-72 (White, Comm'r, dissenting).
80 Id. at 1272 (White, Comm'r, dissenting); see notes 31-32 supra. There is scant legislative history focusing on section 312(a)(7). See Reasonable Access, supra note 4, at 1292-93.

Commissioner White vigorously argued that the FCC by law could regulate only rates charged by communications common carriers (telephone, telegraph, and satellite communications), see notes 234-35 and accompanying text infra, and that Congress had never equivocated in its determination that broadcasters are not common carriers and thus not subject to rate regulation. See note 18 supra. She protested that in drafting, debating, and enacting
VI. REACTION TO THE DECISION

Not unpredictably, WKKQ responded to the Commission’s decision by telegraphing Senator Anderson its willingness to sell him one 5-minute ad on each of the 5 days prior to the election. Further, the Senator was quoted a revised rate of either thirty-one dollars for prime time or twenty-six dollars for run-of-schedule. Each 5-minute rate was proportional to the 1-minute rate charged by the station. A copy of the telegram was immediately forwarded to the FCC.

Quickly recognizing the landmark status of the FCC’s ruling, the news media accorded it extensive coverage. Legal reaction followed shortly thereafter. The FCC and Senator Anderson had won the skirmish with the small Minnesota radio station, but the national broadcasting industry, acknowledging the precedential nature of the decision and its potentially far-reaching adverse consequences to all broadcasters, allied itself with WKKQ and swiftly reacted by mounting an all-out attack on the Commission’s decision. Shortly after the release of the decision, the National Association of Broadcasters (NAB), the well-known trade association representing more than 5,000 radio and television stations across the

the statutes that created the Federal Radio Commission in 1927 and its successor, the Federal Communications Commission in 1934, Congress deliberately and meticulously avoided conferring any jurisdiction on either agency to regulate the advertising rates charged by broadcasters. 69 F.C.C.2d at 1271 (White, Comm’r, dissenting); see 79 Cong. Rec. 11240 (1934); note 8 supra.

81 Western Union Mailgram from Jerry J. Collins, President, WKKQ, Inc. to D.J. Leary, Campaign Media Consultants, Minneapolis, Minnesota, October 31, 1978.

82 The Associated Press wire reported the decision and noted: “[t]he precedent-setting ruling broadens previous FCC rules on accepting political ads, and is expected to anger many broadcasters.” Political Time, Associated Press wire story, Item No. B-145 (Nov. 2, 1978). As the AP explained the significance of the case to its members and in turn to their many readers and listeners: “Up until Tuesday [when the decision was adopted] the FCC only required stations to accept [political] ads equal in length to what they had sold to regular advertisers.” Id. Broadcasting magazine, a preeminent national trade journal of the broadcast industry, heralded the news under a headline reading: “FCC forces station to take five-minute political spot.” FCC forces station to take five-minute political spot, Broadcasting, Nov. 6, 1978, at 52, col. 3.

The local and regional newspapers in northern Minnesota rapidly announced the decision to their readers. The Hibbing Daily Tribune, under a headline reading “Station ordered to accept ad,” Station Ordered to Accept Ad, Hibbing Daily Tribune, Nov. 3, 1978, at 1, col. 1, reported the news. The Mesabi Daily News headline read “WKKQ ordered to accept ad from senator.” WKKQ Ordered to Accept Ad from Senator, Mesabi Daily News, Nov. 3, 1978, at 16, col. 1. Its story included the angry reaction to the decision from the station’s president, Jerry J. Collins, who said: “This is an entirely new invasion into small business and takes away licensee discretion on programming.” Id.
country, sought to overturn it by jointly filing with WKKQ, in the form of a legal brief, a "Petition for Reconsideration." On the access issue, it was argued that WKKQ was reasonable in refusing to air the 5-minute ads because: 1) the 1978 Report and Order, relied on by the majority, simply did not stand as authority for disrupting a station's format or uprooting its usual commercial practices; 2) Senator Anderson was not being denied reasonable access to the station as it had sold him ninety-six 1-minute spots during the 4 weeks before the election; 3) the interruption of the tight music and news format with political ads, including those from several other candidates, was so severe that by November 6 the station was airing 8 or 9 minutes of them an hour; and 4) considering that the FCC required this small daytime station to leave the air by 4:30 p.m. daily, WKKQ's format was being clearly disturbed and too frequently interrupted. The petition insisted it was reasonable for such a broadcaster to attempt to save its audience from negatively reacting to the listening format interruptions by refusing to sell more political ad clutter.

With respect to the eighty dollar rate question, the petition excoriated the Commission for extending itself into broadcast rate regulation. The petition declared that unquestionably and despite its own protests to the contrary, the FCC majority had in fact set the WKKQ 5-minute rate as one to be directly proportional to its 1-minute rate. The broadcasters protested that any rate fixing was plainly beyond the Commission's statutory authority.

The petition expressed incredulity that the majority had re-

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83 Petition for Reconsideration filed by WKKQ, Inc. and Nat'l Ass'n of Broadcasters, Sen. Wendell Anderson (filed Dec. 4, 1978) [hereinafter cited as Petition for Reconsideration]. A petition for reconsideration, authorized by the Commission's rules, accords aggrieved parties an opportunity to urge the Commission to reconsider the case and reverse the result. 47 C.F.R. §§ 1.106, .429(a) (1977). A party seeking reversal of an FCC decision must first exhaust this Commission-level administrative appeals process before petitioning for judicial invalidation of the order in the United States Court of Appeals. The petition must cite findings of fact and conclusions of law which the petitioner deems erroneous, state the form of relief sought, and be filed within 30 days from the date of the release of the decision or public notice announcing the action in question. Id. §§ 1.106(d)(1), (f), .429(c), (d); see note 23 supra.

84 Petition for Reconsideration, supra note 83. Senator Anderson originally requested 24 5-minute ads over an 8 day period. Had those been sold, his opponent could have demanded 24 similar 5-minute ads under the FCC's equal opportunities/equal time rule. See 47 U.S.C. § 315(a) (1976). The petition submitted that airing 24 or 48 5-minute ads over 8 days would have grossly disrupted the station's regular programming. Petition for Reconsideration, supra note 83 at 13.

85 Petition for Reconsideration, supra note 83.
fused to recognize the factors submitted by WKKQ as justification for its rate. It was noted that the station justified a charge thirteen times the 1-minute rate, explaining its audience loss due to format disruption and the alienation of business sponsors who would not be able to purchase similar 5-minute ads. By comparing the relatively inobtrusive 1-minute spot to the disruptive potential of a 5-minute ad for rate purposes, contended the petition "[t]he Commission compared apples with oranges—and came away with prunes." 85

VII. DISCUSSION

A. The Access Issue—Ordering the Sale of the 5-Minute Ads

1. Analysis of Policy Precedent

In first focusing on the access decision ordering the station to sell the 5-minute ads, an analysis of the Commission’s policy statements specifically listed and relied upon by the majority reveals the true character and reliability of this precedent.

The majority regarded the result reached as fully consistent with and required by past Commission policy statements interpreting sections 312 and 315. The best that can be said of Commission policy precedent in this area, however, is that it is inconsistent. The worst to be said is that the Commission has vascillated, changed directions, reversed itself often, blown hot and cold, and bent like a frail reed subject to only the changing winds that each successive, changeable majority of the Commissioners brings to the decisionmaking. It is also impossible for this decision to be man-

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84 Id. The National Radio Broadcasters Association (NRBA), representing 1,200 radio stations in the country, also filed a Petition for Reconsideration in this case. Petition for Reconsideration filed by the National Radio Broadcasters Association, Sen. Wendell Anderson (filed Dec. 4, 1978).

Mr. D. J. Leary, Senator Anderson’s campaign media consultant who originally filed the WKKQ complaint with the FCC, filed an opposition to the broadcasters’ petitions for reconsideration. Opposition To Petition For Reconsideration, Sen. Wendell Anderson (filed Jan. 16, 1979). The Leary petition maintained the essence of the case was that past Commission policy statements had imposed a reasonable access obligation on broadcasters to accept 5-minute political ads, that WKKQ had wrongly refused to do so, and had ipso facto properly been ordered to comply by the majority’s decision.

Mr. Leary submitted that the ultimate test for reconsideration should be the question whether WKKQ in reality suffered the negative consequences it predicted would befall it if the FCC ordered the 5-minute ads. Those included audience dissatisfaction with the interruptions and alienation of its regular business sponsors. The Leary Petition argued that WKKQ had not submitted “one scintilla of evidence” that it suffered those consequences, id. at 5, and that it apparently therefore did not suffer adverse consequences.
dated by precedent when that precedent has stood for so many different, mutually exclusive propositions over the years, although, unquestionably, FCC policy precedent could have been used as authority for any result the majority chose—whether that be ordering the sale of the 5-minute ads or not ordering such sale.

a. The 1978 Report and Order

The 1978 Report and Order, as referenced by the majority, states that reasonable access requires program-length ads during prime-time hours and that a candidate's media decisions should be honored. These provisions do stand as authority for the majority's conclusion. Yet, there are provisions in the Report and Order that stand as precedent for a decision affirming the station's refusal to sell the 5-minute ads. Or, at the very least, these conflicting provisions serve to dilute the provisions relied upon by the majority and thereby confuse and mislead a typical licensee as to which of its practices meet the obligations of sections 312 and 315 and which do not.

The Report and Order declares that commercial licensees are not required to "disrupt their programming schedules by offering candidates lengths of program time which are not a normal component of their broadcast day." Read by a station which offers no program-length ads to business advertisers, the language arguably gives full assurance that the station will not be required to carve out 5-minute political ads if 5-minute ad blocks are not normally a component of its broadcast day.

This policy report also explains that licensees cannot ban access to lengths they sell to commercial advertisers. WKKQ could have legitimately relied on this provision and concluded that it would not be violating section 312 by refusing Senator Anderson's request, because such refusal would not constitute banning access to a political candidate a length of ad time sold to commercial ad-

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87 1978 Report and Order, supra note 12.
88 Id. at 33,770. The Commission states that "[e]xcept for prime time, this does not necessarily mean that a licensee must always allow a candidate access to every class and length of time." Id.
89 Id.
90 Id. at 33,771. This provision was intended to place candidates in a position equal to commercial advertisers. That is, if certain lengths of time are not offered to anyone, there is no discrimination against a candidate and in favor of a commercial advertiser.
91 Id. at 33,770, 33,772. If certain time segments and viewing or listening hours are available to commercial advertisers, they also must be available to political candidates. See Summa Corp., 43 F.C.C.2d 602 (1973).
vertisers, as no 5-minute ads were sold to commercial advertisers.

The Report and Order does not entitle a candidate to particular placement of his or her ads: "[A] licensee might reasonably refuse broadcast time to political candidates during certain parts of the broadcast day. It is best left to the discretion of the licensee when and on what date a candidate's spot announcement or program should be aired." Arguably, if a licensee has the discretion to protect its format by deciding when a political ad can run, there is a corollary power to protect its format by deciding not to air a series of lengthy political ads.

The report also declares that the section 312 right of access is not absolute, that political broadcasts may not monopolize the airwaves, that other programs should be aired to satisfy the needs and interests of the listening audience, and that the best way to accommodate both is to rely on the reasonable, good faith discretion of the licensee to program its own broadcast day. This part of the report indicates a station need not succumb to excessive demands for political ad time, which WKKQ deemed twenty-four or forty-eight 5-minute ads during an 8-day period on its short daylight-only operating day. WKKQ's accommodation of Senator Anderson's demand by providing ninety-six 1-minute spots and refusing any longer ads to protect its listening format seems the type of fair balancing decision this Report and Order leaves to the station.

The report even limits its application by explaining that it does not stand as authority for disrupting a station's format: "We do not believe that this policy will in any way disrupt a station's broadcast schedule. It only requires that a licensee follow its usual commercial practices." This assurance, it could be argued, squarely places the Commission's imprimatur on WKKQ's refusal to deviate from its usual commercial practice and disrupt its schedule by selling the 5-minute ads to Senator Anderson.

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92 1978 Report and Order, supra note 12, at 33,771 (footnotes omitted). This is part of the policy which leaves to the broadcaster's discretion such items as programming and scheduling.
94 Id. at 33,770.
95 The Commission usually leaves to the licensee the balancing of interests which compete for air time. See National Broadcasting Co., 47 F.C.C.2d 803, 811 (1974); Reasonable Access, supra note 4.
96 1978 Report and Order, supra note 12, at 33,770.
b. 1974 Public Notice

The 1974 Public Notice, relied upon by the majority, states it would be unreasonable for stations to refuse to sell program-length time to candidates during prime time because that would deny them access to the greatest audiences. Further, it explains that the purpose of FECA amendments was to allow federal candidates maximum opportunity to explain their political positions and thereby fully inform the voters. Like the Report and Order, however, there are provisions in the 1974 Public Notice that would confuse and mislead a typical licensee because they support the station’s denial of access or dilute provisions relied on by the majority. Specifically, the notice states that licensees cannot deny candidates ads of the lengths available to commercial business advertisers. Arguably, then, if no 5-minute ads were available to commercial business advertisers, none need be offered to candidates.

The 1974 Public Notice also emphasizes that under certain circumstances a station need not comply with the general requirement of selling program-length ads to political candidates. Circumstances noted include coverage of the campaign on newscasts, the sale of spot announcements to the candidate, and the possibility of several candidates running and demanding so much time that the station could properly refuse some of the demands. Similar countervailing circumstances were extant at the time WKKQ refused to sell the 5-minute ads. The station had agreed to sell Senator Anderson an extensive number of spot announcements. There was also concern that his twenty-four 5-minute ads and a demand for twenty-four more lengthy ads from his opponent would inundate the few hours a day the station was on the air. Logically enough, WKKQ saw itself well within this exception to the general rule and therefore thought it was justifiable to have regarded this provision as an affirmation of its 5-minute political ad ban and not as a requirement for it to sell the ads.

This advisory explains that the access obligations imposed on

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68 1974 Public Notice, supra note 49.
67 Id. at 517.
68 Id.; see note 10 supra.
100 Id. at 517. The Commission has expressed concern over a possible inundation of the airwaves with political campaign messages in the days immediately prior to the election. Furthermore, a multiplicity of candidates has repeatedly been viewed by the Commission as a countervailing circumstance which mitigates the right of candidates of access to the air. See, e.g., Honorable Pete Flaherty, 48 F.C.C.2d 838, 848 (1974); note 127 infra.
stations include the opportunity for candidates to purchase reasonable amounts of time and that the test for determining whether these obligations are met is one of reasonableness; a station acts reasonably when it expands the exposure of a candidate and accords him access via its airwaves to the voters. Underlining these duties was the expressed assurance that each licensee was entitled to exercise some discretion in meeting its access obligations. It was arguably rational for WKKQ to have concluded that it abundantly afforded Senator Anderson access to the voters by selling him ninety-six spot ads and was within its discretion to decide how its facilities would be used for such access purposes.

c. 1978 Political Primer

The 1978 Political Primer, relied upon by the majority, states that "it is no excuse to claim that a station's program format prevents it from carrying anything longer than spot announcements by candidates." Further, it sets forth the proposition that "a station that normally broadcasts only music and spot announcements will not be meeting its obligations if it refuses to accept or schedule any political discussion running longer than one minute." While these provisions stand as authority for the majority's decision, once again, there are provisions in this primer that stand as precedent for a decision affirming the station's refusal to sell the 5-minute ads. For instance, the primer emphasizes: "Commercial stations must always make prime-time spot announcements available." The inescapable corollary remains that stations must not always make prime-time program-length announcements available.

Like the Report and Order and 1974 Public Notice, this advisory to candidates and broadcasters notes that "[s]tations may not adopt a policy of rejecting requests of Federal candidates of types, lengths and classes of time that they normally sell to commercial advertisers." Implicit in the language of this provision is the idea that a station may adopt a 5-minute political ad ban policy if it did not
normally sell 5-minute ads to commercial advertisers.

The primer declares that the definition of reasonable access “will depend on the circumstances of each case.” It is admitted that reasonable access for station A “cannot be defined exactly, however, because what is reasonable for station A may not be reasonable for station B.” It could be argued that this language negates any universal application of general reasonable access provisions, including the one that stations cannot use their formats as reasons for refusing to air 5-minute political ads.

The primer also restates:

Important as an informed electorate is to our society, there are other elements in the public interest standard, and the public is entitled to other kinds of programming than political . . . . The Commission will not substitute its judgment for that of the licensee, but, rather, it will determine in any case that may arise whether the licensee can be said to have acted reasonably and in good faith in fulfilling its obligations under this section.

This language affirms the rule that it is within a station’s own judgment as to how it will continue to provide the listening public with the regular programming format it desires and respond to a candidate’s request for political ad time. The unmistakable concomitant of this is that the FCC will defer to the station’s judgment if reasonable and made in good faith. WKKQ was well within precedential bounds to assume its reasonableness and good faith would be shown by allowing Senator Anderson extensive access in selling him nearly 100 spot announcements, not treating him differently than any other candidate or any other business sponsor, and assessing its local audience and commercial advertisers and concluding the 5-minute ad would indeed have negative consequences. Once it went through such a good faith effort, WKKQ arguably could have assumed that the Commission would have deferred to its response to the Anderson request, rather than the Commission substituting its own judgment.

d. 1968 Public Notice

The brief 1968 Public Notice, referenced by the majority,
alerts licensees “to the desirability of making their facilities effectively available to candidates for political office even though this may require modification of normal station format.” The one-page notice, though, issued late in the 1968 campaign, was prompted by the Commission’s receipt of “information indicating that some licensees have policies proscribing or severely limiting political broadcasts over their facilities.” The notice concluded that “the presentation of political broadcasts, while only one of many elements of service to the public . . . is an important facet, deserving the licensee’s closest attention.”

The Public Notice, however, is not authority for the WKKQ decision. First, this weakly-worded notice does not even require licensees to sell any ad time to candidates. Second, the notice only expresses disapproval of stations’ policies that either prohibit political broadcasts or severely limit them. WKKQ’s policy did neither. It allowed political broadcasts, and no one could sensibly argue that selling ninety-six spots to one candidate alone was limiting the broadcast of political messages or discussion. Third, the repeated thrust of the notice is that political broadcasts should be considered and aired as a part of the public-interest programming licensees are expected to air. The notice does not go beyond that statement. WKKQ’s political broadcast policy clearly met and exceeded that expectation.

2. Analysis of Case Precedent

It is readily apparent that precedent could have been gleaned from the Commission’s four major political broadcasting policy statements for any result the majority chose in this case. It is equally clear that past Commission case decisions, in which the FCC has adjudicated political broadcasting issues as they have appeared in actual, specific contexts, constitute precedent for only one conclusion: given the facts of this case, WKKQ should not have been forced to sell a 5-minute ad to Senator Anderson. In three important cases since 1972, the FCC has ruled that a sta-

\[\footnotesize{\textsuperscript{112}}\textit{Id.}\]
\[\footnotesize{\textsuperscript{113}}\textit{Id.}\]
\[\footnotesize{\textsuperscript{114}}\textit{Id.}\]
\[\footnotesize{\textsuperscript{115}}\text{There is not one word in the notice requiring or even encouraging the sale of specific lengths of ads to candidates — neither 1-minute spots nor 5-minute segments.}\]
\[\footnotesize{\textsuperscript{116}}\textit{Id.}\]
\[\footnotesize{\textsuperscript{117}}\textit{Id.}\]
tion's denial of political ad time violated either section 312 or 315.118 Each is distinguishable from WKKQ in that the three stations treated political advertisers differently than commercial advertisers. Of greater importance are six other cases in which the Commission ruled that stations' policies preventing candidates from purchasing specific blocks of time violated neither the reasonable access nor lowest unit cost provisions.119

In Campaign '76 Media Communications, Inc.,120 then-President Ford sought to buy 1-minute spot ads on WGN-TV and WGN Radio in Chicago in 1976. The stations refused, citing their policy of not selling political ads less than 5 minutes in length. Appealing to the FCC, the candidate argued that his political access rights had been violated. The Commission ordered the stations to sell the 1-minute ads, basing its decision on two violations of the Communications Act.121 It was felt that the station policy denied President Ford reasonable access as mandated by section 312 because it forced him to buy the more expensive 5-minute ads in order to reach the electorate. The order also concluded that the policy violated the lowest unit charge provision of section 315(b) because, by allowing commercial advertisers 1-minute spots, candidates were not placed on a par with the business sponsors.122

118 See notes 120-132 and accompanying text infra.
119 See notes 134-189 and accompanying text infra.
120 58 F.C.C.2d 1142 (1976).
121 Id. at 1144-45. In the plurality ruling, Commissioners Wiley and Robinson dissented and Commissioners Reid and Washburn concurred solely on § 315(b)(1) grounds. Therefore, the ruling cannot be read to find that the ban on spot ads was a denial of reasonable access pursuant to § 312(a)(7). On the contrary, a majority of the Commission believed that the ban violated the "parity" rule of § 315(b).
122 Campaign '76 and WGN-TV disagreed about the relative costs of 5-minute ads versus spot ads. Id. at 1144. Without addressing this issue in its rationale, the FCC stated that the refusal to allow spots ads curtails the campaign so drastically that the purposes of § 312(a)(7) would be defeated by such a practice. Id.
123 Id. at 1144-45. Commissioners Lee, Hooks and Quello found that the refusal to afford political advertisers the same opportunities to purchase spots that were afforded regularly to other advertisers was contrary to Congress' intent in enacting the "reasonable access" provision. Id. In his dissent, however, Commissioner Robinson disagreed bluntly: "Nothing in the plain meaning of this provision's language, and nothing in its legislative history, compels the conclusion that a distinction between commercial and political advertisers for purposes of selling time is beyond the reasonable discretion of a broadcast licensee." Id. at 1145 (Robinson, Comm'r, dissenting). The Campaign '76 ruling has been limited by the FCC in Anthony Martin-Trigona, 64 F.C.C.2d 1087, 1091 (1977), where the Commission declared in a plurality opinion that no right of access to particular units of time arises from the "lowest unit charge" provision of § 315(b). Id.; see note 134 infra. Previously, the FCC had foreclosed the possibility of there being a right of access to particular units of time based on § 312(a)(7). See, e.g., Honorable Donald W. Riegle, 59 F.C.C.2d 1314, 1315 (1976). Consequently, while a
The FCC also found a violation of the FECA in *Summa Corp.* In *Summa Corp.*, a candidate running in the 1972 Nevada congressional primary election was denied his request to purchase 5-minute political ads by a Las Vegas television station. The station had adopted a policy of selling no political ad time during the day in excess of 1-minute spots. The Commission ruled that such a refusal violated section 312(a)(7) and that the station could not, absent certain circumstances, restrict candidates to 1-minute spots. At two separate points in the decision, the Commission emphasized that one of the countervailing circumstances that would justify such a 5-minute ad ban was the existence of several candidates for office.

A most significant aspect of the decision in this case, as stressed in subsequent decisions, was the Commission's refusal to "establish [some] precise or definite standard of licensee compliance with the requirements of Section 132(a)(7)." Instead, if the licensee's charge to its best commercial customers provides the FCC and the parties with an accurate yardstick for measuring compliance with the rate provision of § 315(b)(1), that yardstick is unworkable for measuring the reasonableness of a licensee's conduct in granting federal candidates access to airtime under § 312(a)(7). But see Anthony Martin-Trigona, 64 F.C.C.2d 1087, 1092 (1977) (Hooks, Comm'r, dissenting). It appears that the Commission, or at least part of it, has changed its mind about a § 312(a)(7) basis for requiring particular length ads. See Senator Wendell Anderson, 69 F.C.C.2d 1270 (1978).


Id. at 602. In *Summa*, one of eight Congressional candidates filed a complaint against a television station based on the station's policy of banning all political ads in excess of 60 seconds between 6 a.m. and 1:30 a.m. Id.

Id. at 605. Based on its interpretation of Congress' intent in enacting § 312(a)(7), the FCC stated that a complete ban on program-length ads is unreasonable in the absence of countervailing circumstances. Id.; see 1974 Public Notice, supra note 49.

Id. at 605 & n.1. Two such countervailing circumstances justifying a ban on program-length ads were enumerated by the Commission: a multiplicity of candidates and a licensee's providing free advertising time to candidates. In this case, the FCC did not consider eight candidates to be a "multiplicity" so as to justify the ban.

In a unique situation brought on by the election of Senator Walter Mondale to the Vice-Presidency and the death of Senator Hubert Humphrey, Minnesotans in 1978 were electing two United States Senators. There were four men running for two Senate seats in the general election and several more in the primaries. Together with the large number of local, county, and state candidates running in the multi-county service area of WKKQ, there unquestionably existed a unique multiplicity of candidates in Minnesota in 1978, precisely fitting the exception established in *Summa*. See Carter-Mondale Presidential Committee, No. 79-773 (F.C.C. Nov. 25, 1979), aff'd on reconsideration and petition for stay denied, No. 79-775 (F.C.C. Nov. 28, 1979), discussed in note 132 infra.

The *WKKQ* ruling is also distinguishable from *Summa* on another point, since the television station in *Summa* allowed commercial advertisers to purchase day-time 5-minute ads and was thus treating political candidates differently than its business sponsors. See note 123 supra.

34 F.C.C.2d 604; accord, Honorable Pete Flaherty, 48 F.C.C.2d 838, 848 (1974);
licensee's judgment represented "a reasonable, good-faith attempt to accommodate both the . . . [candidate and the listeners' interests in the regular format], this Commission will be disposed to affirm such judgments and policies as reasonably fulfilling the obligations of a licensee under Section 312(a)(7)."\textsuperscript{129}

The Commission's position was further explained in \textit{Holden E. Sanders,}\textsuperscript{130} wherein a Tennessee radio station refused to sell a local candidate fixed position spot ads, even though the station's regular business advertisers were allowed to purchase such ads. The candidate protested to the FCC, alleging that the disparate treatment violated his political broadcast rights.\textsuperscript{131} The Commission ruled that it was "contrary to the Congressional objective . . . to deny such candidates the opportunity to purchase spot announcements of the type and length which are available to commercial advertisers."\textsuperscript{132}
Unlike these three cases, WKKQ treated political advertisers as it treated commercial advertisers. WKKQ had neither denied Senator Anderson access to 1-minute spots nor foisted upon him the higher campaign costs of making available only lengthy ads, one of the principal targets of the 1971 FECA amendments. Rather, the WKKQ case is more like those cases in which the Commission has allowed stations to limit the length of ads purchased by candidates.

In Anthony Martin-Trigona, for example, the request to buy time for political ad programs of one-half hour and 1 hour in length for a candidate was denied by local television stations. The candidate, Mr. Anthony Martin-Trigona, petitioned the FCC that his political access rights had been violated and that he should be allowed to purchase program-length ads during prime time. The stations countered that their refusals were justified because there were ten mayoral candidates running, they had covered Mr. Martin-Trigona’s candidacy on their newscasts, and Martin-Trigona had been offered primetime spot ads.

The FCC ruled that Mr. Martin-Trigona did not have a right to program-length ad time during prime time. The Commission reasoned that because the candidate had been offered prime-time, 1-minute spots, he had not been denied access to the airwaves.

The Carter-Mondale decision is also important because it decided that the reasonable access requirements apply to networks as well as to individual broadcasters, No. 79-750, slip op. at 10, and apply before the period immediately preceding the election specified in § 315(b), id. at 8. The Court of Appeals for the District of Columbia Circuit has granted a temporary stay of the Commission’s order, and their decision on the merits is pending. Broadcasting, Jan. 14, 1980, at 32.

See note 10 supra.


Id. at 1087. Because the petitioner was a candidate for a non-federal office, the reasonable access provision of § 312(a)(7) did not apply. While licensee discretion regarding access of non-federal candidates is limited by the reasonableness and good faith standards, Rosenbush Advertising Agency, 31 F.C.C.2d 782, 783 (1971), the standard for non-federal candidates is not as strict as the standard for federal candidates, see Melbourne Noel, Jr., 66 F.C.C.2d 1063, 1084 (1976); A. Shapiro, Media Access 44-46 (1976); Reasonable Access, supra note 4, at 1302-04.

64 F.C.C.2d at 1088. The candidate advanced the now-familiar argument that programs of one-half and 1 hour were necessary in order to explain his views adequately. In addition, he put forth the “parity” argument of § 315(b). Id. at 1088-89.

Id. at 1089.

Id. at 1090. Six commissioners concurred in the result that the denial of program time was not unreasonable, but only four joined in the rationale that § 315(b) does not demand parity between the types of program-length ads made available to commercial advertisers and those made available to political advertisers. Id. at 1087.

Id. at 1090.
As viewed in the decision, Martin-Trigona had only been denied access to the type of ad length he considered most advantageous.\textsuperscript{140} It was declared that to the extent the 1974 Public Notice and the Campaign '76 Media Communications, Inc. case granted access to 5-minute lengths based on section 315(b), they were overruled.\textsuperscript{141} The decision continued that whether a station can refuse to sell 5-minute ads to candidates "is left to a determination of reasonableness under Section 312(a)(7)."\textsuperscript{142}

The FCC maintained a similar posture in \textit{Honorable Donald W. Riegle},\textsuperscript{143} wherein a candidate for the Democratic nomination for the United States Senate from Michigan sought to purchase 5-minute ads during prime time on a Kalamazoo television station. The station refused, claiming ads of such length would disrupt its format and none of its regular business advertisers could purchase 5-minute ads.\textsuperscript{144} Instead, it offered the candidate 30-minute programs and 5-minute programs during non-prime time and various spots.\textsuperscript{145} Mr. Riegle appealed to the FCC, contending the station's refusal to sell him 5-minute ads during prime time denied him the reasonable access required by section 312(a)(7).\textsuperscript{146} Deciding that exact issue, the Commission unanimously voted in the negative,\textsuperscript{147} holding: "There is no evidence to suggest that through the passage of the reasonable access provision the licensee is now required to sell [specific lengths of time for political ads]."\textsuperscript{148}

\textsuperscript{140} Id. at 1089. Consonant with past decisions, the Commission was unwilling to find a licensee to have denied reasonable access where it allowed a candidate some prime-time spots and non-prime-time program-length ads, although not of the duration or in the placement the candidate considered most desirable. Despite Commissioner Hooks' biting dissent, see id. at 1092 (Hooks, Comm'r, dissenting), the Commission did not subrogate a candidate's right to conduct his campaign to the whim of a licensee. Allowing the candidate to specify how and when his political programming is to be aired would lead inevitably to the same type of private control of the airwaves and infringement of the licensee's first amendment rights that the Supreme Court has tried to prevent. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 389-90 (1969).

\textsuperscript{141} 64 F.C.C.2d at 1091.

\textsuperscript{142} Id. at 1090.

\textsuperscript{143} 59 F.C.C.2d 1314 (1976).

\textsuperscript{144} Id. at 1314-15.

\textsuperscript{145} Id. at 1315.

\textsuperscript{146} Id.

\textsuperscript{147} Commissioner Robinson was not present.

\textsuperscript{148} Id. The Commission initially concluded that the amounts of time and types of ads the licensee offered Mr. Riegle were sufficient to satisfy § 312(a)(7). It then turned to the question whether the refusal to air a specific length ad at a particular part of the day violated § 312(a)(7). Id. Relying on the pre-section 315 ruling in Humphrey for President Campaign, 34 F.C.C.2d 471 (1972), the FCC refused to alter its longstanding view that the candi-
The Commission's position remained consistent in WALB-TV, Inc.,149 when Presidential candidate Jimmy Carter attempted to purchase a 5-hour block of time on an Albany, Georgia, TV station to air a fund-raising telethon. The station refused, citing its policy of not accepting programs in excess of 30 minutes and arguing that, in its judgment, 5 hours of time was simply too much to sell one political candidate.150 A petition filed with the FCC contended the station's refusal violated the reasonable access provisions of section 312.

The Commission denied the petition, ruling that although the licensee denied Mr. Carter access to its air for a particular length of time he sought on this occasion, that "alone does not establish a violation of Section 312(a)(7)."151 The FCC noted that the candidate had otherwise been accorded access in blocks of time—both spots and 30-minute segments—considered appropriate by the station and that reasonable access therefore had been provided.152 The thrust of the decision was that reasonable access did not include unlimited access on demand to particular lengths of political ad time.153

In a similar decision, Don C. Smith,154 a Kansas Congressional candidate attempted to buy a half-hour segment during mid-prime
time from four radio and television stations. When the licensees refused and offered only shorter 5-minute segments, the candidate petitioned the FCC that the stations’ policies violated section 312. The Commission upheld the licensees’ refusals and stressed that candidates enjoyed no right to purchase “program time of any particular or minimum duration.”

The decision also emphasized that a candidate has no right to demand placement of his ad at a specific time of the broadcast day, that the FCC defers to licensee discretion in this area, that the FCC does not intend to substitute its judgment for that of the licensee, and that the reasonable access requirement of section 312 is one of general, total amounts of time afforded a candidate and not absolute, specific, particular lengths of ads.

The Commission also declined to order the sale of political ad time in Honorable Pete Flaherty. There, a 1974 candidate for the United States Senate from Pennsylvania attempted to purchase a 5-minute block of political ad time for a telethon from fifteen Pennsylvania television stations. When the stations refused, the candidate, Mayor Pete Flaherty of Pittsburgh, filed a complaint with the FCC alleging the refusals violated section 312(a)(7) and the 1974 Public Notice of the Commission interpreting it. Flaherty explained that there was not a multiplicity of candidates and

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155 Id. at 680 (quoting Honorable Pete Flaherty, 48 F.C.C.2d 838, 848 (1974)). The Commission interpreted the complaint not as one for refusal to give reasonable amounts of time, but as one for refusal to schedule program time during the part of prime time which the candidate considered most advantageous. Id. at 680. When the facts are viewed in this light, Flaherty's language that a candidate is not entitled to any particular scheduling or mix of time applies directly. Sensitive to first amendment problems that would arise were it to specify how access is to be scheduled and programmed, the FCC continues to avoid setting up norms, despite the requests of candidates. See, e.g., Anthony Martin-Trigona, 64 F.C.C.2d 1087, 1090 (1977); Senator James L. Buckley, 63 F.C.C.2d 952, 954-55 (1976); Honorable Donald W. Riegel, 59 F.C.C.2d 1314, 1315 (1976). The WKOK rationale, however, erodes that position somewhat.

156 49 F.C.C.2d at 680. Placement of an ad is initially the province of the licensee. In fact, however, compliance with the reasonable access requirement is the product of candidate/licensee negotiation after a series of offers and counter-offers. See Reasonable Access, supra note 4, at 1293-94.

157 49 F.C.C.2d at 680. A single refusal of a candidate’s requested advertising time alone does not constitute a violation of § 312(a)(7). Instead, in evaluating a complaint, the Commission usually will look at how the licensee is fulfilling the reasonable access requirement and its other affirmative obligations as a “public trustee.” See id.; Rockefeller for Governor Campaign, 59 F.C.C.2d 649, 650 (1976). But see Senator Wendell Anderson, 69 F.C.C.2d 1265 (1978) (FCC seemingly ignores over-all performances of licensee in declaring single denial of access unreasonable).

therefore the *Summa* exception was inapplicable\(^\text{109}\) and argued that he needed the longer time blocks to discuss issues that could not be covered in spot announcements.\(^\text{109}\) The stations vigorously protested, contending that their format would be disrupted.\(^\text{110}\)

The Commission denied the *Flaherty* complaint, holding the stations’ refusals did not violate section 312(a)(7).\(^\text{112}\) The FCC flatly declared that it “declined to recognize any right, by a Federal candidate, to program time of any particular or minimum duration.”\(^\text{113}\) The decision eased the thrust of the 1974 Public Notice by not “prescribing any precise formula for measuring licensee performance in honoring [the right of access] so as not to interfere unnecessarily with licensee scheduling and program discretion.”\(^\text{114}\) The

\(^\text{109}\) Id. at 846; see note 127 *supra*; cf. Penny Manes, 42 F.C.C.2d 878, 882 (1973) (number of races and other contests in area factors for finding station’s coverage of individual race reasonable).

\(^\text{110}\) 48 F.C.C.2d at 838-39. The 4½-hour telethon was intended to explain the candidate’s stand on various issues and to solicit viewer support, financial and otherwise.

\(^\text{111}\) Id. at 842-47. The 10 licensees answered generally by asserting that they all provided 30-minute programs and spot announcements in prime and non-prime time in satisfaction of § 312(a)(7).

WTAE-TV, Pittsburgh, argued Flaherty’s request would disrupt its format and that it did not sell extended periods of time to any sponsor. Id. at 839. WIIC-TV, Pittsburgh, expressed a similar format disruption argument. Id. at 843. WJAC-TV, Johnstown, explained it was reasonable to refuse the request because it would disrupt the network movie scheduled to be shown at the particular time. Id. at 842.

\(^\text{112}\) Id. at 848. Using the reasonableness test of licensees’ conduct, the Commission found that the refusal to air the telethon was not unreasonable, especially in light of the overall time allotments the licensees had made available. In doing so, it refused to weigh the relative values of the licensees’ choices of programming vis-a-vis the candidate’s program preference:

As we have here indicated, our scope of review over licensee action in this area is narrow, and, were we to call upon licensees to justify their programming selections or program scheduling, the matter would come down to a judgment as to what was presented, and when, as against what should have been presented, and when — a judgmental area for licensees exercising their sound journalistic discretion and one which this Commission must avoid.

Id. at 849 (citation omitted); see A. SHAPIRO, MEDIA ACCESS 43 (1976). The FCC has not found denials of access to candidates for lengthy political telethons on radio or television to be unreasonable, at least where the licensees had provided shorter time periods. WALB-TV, Inc., 59 F.C.C.2d 1246, 1248 (1976).

\(^\text{113}\) 48 F.C.C.2d at 848. In addition, the candidate is not entitled to any particular placement of program-length ads by virtue of § 312(a)(7). *Id.*; accord, Don C. Smith, 49 F.C.C.2d 678, 680 (1974). Nevertheless, *Flaherty* recognized the obligation of a licensee under § 312(a)(7) to permit access to prime-time, program-length ads, at least under the facts peculiar to that situation. The exact length and amount of total time afforded, however, are still within the realm of licensee discretion, subject to FCC review. *Id.* See notes 199-205 *infra*.

\(^\text{114}\) 48 F.C.C.2d at 848. For a discussion of the balancing of FCC regulation with licensee first amendment protection, see notes 175-222 and accompanying text *infra*.
Commission emphasized that a licensee had discretion to decide how to accommodate political access demands, that the scope of review employed by the FCC, given the sensitive first amendment area, would be narrow in order to avoid debates over programming judgment, and that the Commission shunned substituting its programming judgment for that of the licensee.\textsuperscript{165}

In the final significant FCC case, \textit{Humphrey for President Campaign},\textsuperscript{166} a Wisconsin television station followed a policy of selling only 1-minute and 30-minute political ads. When Presidential candidate Hubert Humphrey sought to purchase a 15-minute segment, he was refused. In his petition, Senator Humphrey insisted he had a right to buy 15-minute ads and that a candidate's decision with respect to the length of his ads should be honored by the broadcaster.\textsuperscript{167} The station justified its refusal on the grounds that its regular format would be disrupted and its audience diminished. The FCC upheld the views of the licensee as reasonable under the circumstances and ruled against Humphrey, reasoning that the Act neither required format disruption nor sale of "specific periods of time for political broadcasts."\textsuperscript{168}

As in \textit{Humphrey for President Campaign} and \textit{Honorable Donald W. Riegle}, WKKQ had refused to sell the 5-minute segments to Senator Anderson based on a concern for its listening format.\textsuperscript{169} Furthermore, WKKQ argued, as in \textit{Honorable Pete Flaherty} and \textit{WALB-TV, Inc.}, that Senator Anderson had no absolute right to 5-minute segments.\textsuperscript{170} Consistent with \textit{Don C. Smith} and \textit{Anthony Martin-Trigona}, WKKQ's own business judgment had been that it would meet Senator Anderson's political needs by selling him a total of ninety-six segments but not any specific 5-minute periods.\textsuperscript{171}

It is submitted that in factual contexts quite analogous to the

\textsuperscript{165} 48 F.C.C.2d at 849.
\textsuperscript{166} 34 F.C.C.2d 471 (1972).
\textsuperscript{167} \textit{Id.} at 471-72. The Humphrey campaign committee wished to exercise its right to "equal time," see note 188 infra, by purchasing two 15-minute segments to be aired separately. The committee claimed that it could not afford to purchase a single 30-minute segment as the other candidates had done. WITI-TV refused this request because having to accommodate segments shorter than the usual 30-minute ones would "fractionalize" its nighttime programming. \textit{Id.} at 472. Rather than letting the licensee decide the permissible length of ads, the campaign committee urged that it should be for the candidate to determine all aspects of his advertising needs, including length of ads. \textit{Id.} at 471.
\textsuperscript{168} \textit{Id.} at 472.
\textsuperscript{169} See notes 143 & 166 and accompanying text supra.
\textsuperscript{170} See notes 149 & 158 and accompanying text supra.
\textsuperscript{171} See notes 134-54 and accompanying text supra.
instant case, the FCC over several years has established unwavering case precedent only for a result affirming WKKQ’s policy.

3. Conclusion on Policy and Case Precedent

The inconsistencies that have been woven into this pre­cedent­ial crazy quilt have not gone unnoticed by at least one Commissioner. In his dissent to the Martin-Trigona decision, former Commissioner Benjamin Hooks noted the Commission’s vacillation in interpreting sections 312 and 315:

[I]f the majority is correct, and we do continually fumble the ball in administering political equal time, it is sure as sin (a) impossible to expect our licensees to accurately interpret Section 315 . . . and (b) unreasonable to expect the courts to give ‘great deference’ to our ‘administrative expertise’ when we ourselves do not. 172

Indeed, no deference is due in the WKKQ case.

It is submitted that basing this decision on chameleon-like policy statements which are so internally inconsistent that they could have been used as policy precedent for any result the majority chose173 and basing it on case precedent that is unshakably inconsistent and unexplainedly irreconcilable with the result,174 renders it prime for reversal by the Court of Appeals.

4. The Substitution of Judgments—First Amendment Issues

The WKKQ decision is also particularly vulnerable to reversal on first amendment grounds.175 Broadcasters unquestionably enjoy

172 64 F.C.C.2d at 1093 (Hooks, Comm’r, dissenting)(emphasis in original).
173 See notes 87-94 and accompanying text supra.
174 See notes 120-58 and accompanying text supra.
175 Despite the fact that the first amendment mandates that there be “no abridgment” of the freedoms of speech or press, these freedoms are not absolute. Schenck v. United States, 249 U.S. 47, 52 (1919). See generally G. Gunther, Cases and Materials on Constitutional Law 1049-54 (9th ed. 1975). Nevertheless, these freedoms are broad and have been extended into areas formerly considered not deserving of constitutional protection. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964)(libel and commercial speech). Although it combines elements of speech and press, broadcasting is regulated extensively by the government through the FCC in ways that would be unconstitutional were they applied to the press. Compare Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), with Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). Regulation of broadcasting has been sustained against the challenge that it violated the licensee’s first amendment rights. National Broadcasting Co. v. United States, 319 U.S. 190, 226-27 (1943).
It is clear that a broadcaster’s rights are not as extensive as a newspaper publisher’s because of the unique characteristics of broadcasting, see note 179 and accompanying text.
certain free speech and press rights, but because of the unique characteristics of broadcasting, such as radio spectrum scarcity and the pervasiveness of the electronic media, the first amendment rights are diminished by the federal regulation of licensees' programming and operation.

In recognition of these free speech and press rights, the federal regulation of broadcasting has been cautious over the decades.

infra, and because of a broadcaster's duties as a "public trustee." Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117-18 (1973). These limits, however, must be reconciled with a broadcaster's wide discretion regarding editorial judgments. As the Supreme Court declared:

Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations. Only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the [Communications] Act.

Id. at 110. For these reasons, FCC censorship is precluded by statute. See text accompanying note 181 infra. This places the FCC in the precarious position of "overseer," regulating protected speech without infringing on a licensee's broad discretion. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 188 (1973). Further, the FCC may not substitute its judgment for that of the licensees. See National Broadcasting Co. v. FCC, 516 F.2d 1101, 1117-20 (D.C. Cir. 1975), cert. denied, 424 U.S. 910 (1976).

The argument that there ought to be no distinction between broadcasting and other forms of expression traditionally protected against government interference was rejected in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969). The Court disagreed, enunciating the "frequency-scarcity" rationale for the first time: "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." Id. at 386.

See, e.g., American Security Council Educ. Foundation v. FCC, 607 F.2d 438, 444-45,
The sensitivity of the Congress to those rights is evidenced by its adoption of section 326 of the Communications Act which provides that "[n]othing in this [Act] shall be understood or construed to give the Commission the power of censorship over the radio communications ... and no regulations or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." Since 1934, the FCC has exercised self-restraint in its regulation of broadcasting. This cautious, disciplined regulation has been approved by the courts. In a landmark political broadcasting decision involving the fairness doctrine, Chief Justice Burger spoke of...
the first amendment interests justifying restraint by the
government:

[T]he initial and primary responsibility for fairness, balance, and
objectivity rests with the licensee. This role of the Government as
an “overseer” and ultimate arbiter and guardian of the public in-
terest and the role of the licensee as a journalistic “free agent”
call for a delicate balancing of competing interests. The main-
tenance of this balance for more than 40 years has called on both
the regulators and the licensees to walk a “tightrope” to preserve
the First Amendment values written into the Radio Act and its
successor, the Communications Act.185

In this regard, the Commission has deliberately deferred to
certain judgments of its licensees when appearing reasonable.186
This principle has been a robust tenet in the enforcement of the
two major Commission political broadcasting rules that specifically
delegate responsibility and discretion to the licensees—the fairness
doctrine187 and the reasonable access provision.188 The fairness

mittee, No. 79-750, slip op. at 12, (Nov. 21, 1979), discussed at note 132 supra. See generally

183 Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117
(1973)(plurality opinion). The Court again expressed the tension in the roles of both licensee
and FCC. The licensee is caught between his interests as an entrepreneur and his obligations
as a public trustee who is “using” the broadcasting facilities for the 3-year licensing period.
The FCC, similarly, is caught between its role as regulator and that as preserver of licensee
discretion. Enmeshed in this conflict also is the public whose right to robust political debate
and multi-faceted presentation of information is served by both FCC and broadcaster. See id. at 114-21; Red Lion Broadcasting Co. v. FCC,
395 U.S. 367, 389-90 (1969). In Columbia Broadcasting, the Court balanced the competing interests by upholding the fairness doctrine
with its mandated right of reply but denying a private party the right to have access to
licensee's facilities. 412 U.S. at 121-32.

184 Georgia Power Project v. FCC, 559 F.2d 237, 239-40 (5th Cir. 1977) (per curiam);

185 See note 146 supra.

186 The other political broadcasting rules are mechanical in operation and allow for little
discretion on the part of the licensee. These include the equal opportunities/equal time pro-
vision, see 47 U.S.C. § 315(a) (1976), requiring that equal time or opportunity be given com-
peting candidates if one candidate appears on the station; the personal-attack rules, 47
C.F.R. § 73.123(a), (b) (1978), obligating a broadcaster to notify, supply a transcript, and
offer reasonable opportunity for reply to any person or group attacked on the air; the politi-
cal editorial provision, 47 C.F.R. § 73.123(c) (1978), requiring stations which editorially en-
dorse or oppose a candidate to offer reasonable, free reply time to those candidates opposed;
and the lowest unit charge section , 47 U.S.C. § 315(b) (1976), mandating a broadcaster to
charge political candidates only the lowest advertising rates it charges its volume business
sponsors, see 47 C.F.R. § 73.1940(b) (1978).

The fairness doctrine is distinct from the equal opportunities doctrine. Rather than the
licensee's obligations being mandated by statute, the fairness doctrine arises from a licen-
doctrine requires the presentation of contrasting viewpoints when controversial issues of public importance are discussed on a program.\textsuperscript{189} The Commission has plainly detailed the areas of fairness doctrine licensee discretion:

[T]he licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation — as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming.\textsuperscript{190}

The Commission has also explained that licensees have discretion to make two access judgments, if reasonable: balancing the candidate's access demands against the interests of the listeners in the regular programming and determining exactly how their facilities will be used to accord access to qualified candidates.\textsuperscript{191} It has been emphasized that the FCC will defer to good faith judgments in this area, will not substitute its judgment for that of the licensee, and will only override a licensee's decision if unreasonable.\textsuperscript{192}

The principle of deference to licensee judgments is especially vital when editorial-type decisions are involved in determining what program will be aired. In the political broadcasting context, this deference has been affirmed and given force by the courts.

In National Broadcasting Company v. FCC (NBC),\textsuperscript{193} the Court of Appeals for the District of Columbia Circuit reversed an FCC fairness doctrine ruling and vigorously criticized the Commission for attempting to substitute its judgment for that of the licensee.\textsuperscript{194} The licensee had broadcast a program dealing with pension plans. Exercising the discretion given it by the Commission's policy statements, the station concluded a controversial issue was not in-

\textsuperscript{189} See note 184 supra. Most litigation surrounds three questions: whether a controversial issue has been presented, whether the presentation of a controversial issue has been one-sided, and defining the precise issue dealt with in the broadcast. See, e.g., National Broadcasting Co. v. FCC, 516 F.2d 1101 (D.C. Cir. 1975), cert. denied, 424 U.S. 910 (1976); Healey v. FCC, 460 F.2d 917 (D.C. Cir. 1972). See generally S. Simmons, The Fairness Doctrine and the Media 146-88 (1978).

\textsuperscript{190} Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598, 599 (1964).

\textsuperscript{191} See note 92 supra. See generally Reasonable Access, supra note 4, at 1295-98 & n.38.

\textsuperscript{192} See notes 92, 101 & 111 supra.

\textsuperscript{193} 516 F.2d 1101 (D.C. Cir. 1975), cert. denied, 424 U.S. 910 (1976).

\textsuperscript{194} Id. at 1118.
volved and therefore the fairness doctrine was not triggered.\textsuperscript{195} The FCC scrutinized the program, reached the opposite conclusion, and ordered compliance with the fairness doctrine.\textsuperscript{196} The court of appeals employed strong language in reversing the FCC:

The Commission's error of law is that it failed adequately to apply the message of applicable decisions that the editorial judgments of the licensee must not be disturbed if reasonable and in good faith. The licensee has both initial responsibility and primary responsibility. It has wide discretion and latitude that must be respected even though, under the same facts, the agency would reach a contrary conclusion.\textsuperscript{197}

The court ruled that before the FCC could overrule a licensee's fairness doctrine judgment as unreasonable, it must either have "extrinsic evidence that the licensee's characterization . . . was not made in good faith"\textsuperscript{198} or bear "the burden of demonstrating that the licensee's judgment was unreasonable to the point of abuse of discretion [which] requires a determination that reasonable men viewing the program would not have concluded that its subject was as described by the licensee."\textsuperscript{199}

The NBC decision is helpful in analyzing the WKKQ case for several reasons. First, the subject matter is similar because the fairness doctrine and reasonable access provision are comparable: each alone constitutes one of the six main political broadcasting rules and together comprise the only two that leave certain judgments to the licensees.\textsuperscript{200} The regulatory issues are also the same:

\begin{itemize}
\item \textsuperscript{195} Id. at 1106-08.
\item \textsuperscript{196} Id. at 1118.
\item \textsuperscript{197} Id. The decision also declared: "There may be mistakes in the licensee's determination. But the review power of the agency is limited to licensee determinations that are not only different from those the agency would have reached in the first instance but are unreasonable." Id. (footnote omitted).
\item \textsuperscript{198} Id. at 1121.
\item \textsuperscript{199} Id. (footnote omitted). The court concluded by admonishing the FCC and strengthening the principle of deference:

[There must be] a vigilant concern that a government agency is not to intervene or burden or second-guess the journalist given primary discretion and responsibility, unless there is documentation of unreasonableness on the part of the licensee . . . . [Here] the Commission did not guide itself by the appropriate restrictive standards.

Id. at 1133.
\item \textsuperscript{200} Because licensees are allowed more discretion in complying with the fairness doctrine and the reasonable access requirement than the equal opportunity and personal attack rules, the FCC's role is more restricted in reviewing compliance with the two former provisions. Id. at 1120; \textit{Applicability of the Fairness Doctrine in the Handling of Controversial Issues of
When must the Commission defer the discretion of the licensee? When can the licensee's judgment properly be overruled? Further, both cases involve editorial judgments of licensees. In each, the licensee must decide whether the political broadcast rules require the broadcast of particular programming or advertising material.

The significance of the NBC case is twofold. First, it sets forth a standard for the substitution of a licensee's judgment by the FCC. The Commission must, for one, produce extrinsic evidence of licensee bad faith. There was no such evidence that WKKQ's decision-making process here could be characterized as such. The record does, however, indicate its good faith by its treatment of Senator Anderson on the same basis as all other candidates and business sponsors, and its agreement to sell him nearly 100 spots before the election.

Absent extrinsic evidence of bad faith in a fairness doctrine case, the FCC must demonstrate, under NBC, that a reasonable listener would have concluded that the program's subject was a public issue. Applying this reasoning to the WKKQ facts, the FCC would have to show that a reasonable listener would have concluded that there was not reasonable access. Yet it is arguable that the average, reasonable WKKQ listener, selecting the station for its country and western music, upon hearing possibly ninety-six spots for Senator Anderson in 4 weeks would have concluded that the Senator had been fully allowed reasonable access.

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201 Great deference is due broadcasters' judgments regarding how they meet requirements of the fairness doctrine. The NBC court was acutely aware of the "chilling" effect that day-to-day FCC interference with program content would cause especially in the area of investigative journalism. 516 F.2d at 1123-25. Similarly, great deference is due broadcasters' judgments regarding balancing a candidate's right to access with the listeners' interests in diversified programming. Mandating that a 5-minute ad be offered by a day-time only station, knowing that such a "use" will trigger the equal time requirement, takes the primary discretion from the licensee and puts it in the FCC. This will frustrate Congress' intent. See Reasonable Access, supra note 4, at 1295 n.38.

202 516 F.2d at 1117-22. NBC crystalized the circumstances under which a licensee's judgment about the scope of issues can be violative of the fairness doctrine. The court emphasized that the Commission must satisfy a heavy burden in order to overturn a licensee judgment in a discretionary area. Id. at 1121.

203 Id. at 1121. Actual hostility to the candidate evidenced by discriminatory treatment or direct testimony may be required for a showing of bad faith. See Reasonable Access, supra note 4, at 1295 n.41.

204 516 F.2d at 1121. The court interpreted the reasonableness requirement to be met if "reasonable men viewing the program would not have concluded that its subject was as described by the licensee." Id. (footnote omitted).
The *NBC* case is also significant for its unambiguous affirmation of the principle of deference to licensee discretion unless plainly unreasonable.\(^{205}\) The proposition that the FCC cannot substitute its judgment for that of the licensee is so strong that the court refused to allow a licensee's decision to be overruled even if it was mistaken.\(^{206}\) Under this reasoning, even if the FCC would show WKKQ had been mistaken in not understanding that certain provisions of certain policy statements required it to accept 5-minute ads, the Commission could not overrule the station's access accommodation judgment unless it could also, by the standard promulgated, demonstrate WKKQ had abused its discretion. Absent the unreasonableness as determined by the standard of the *NBC* case, the *WKKQ* decision smacks of the Commission's improperly substituting its judgment for that of the licensee.

5. Fifth Amendment Due Process Issues

The *WKKQ* decision, based on the statutory mandate of reasonable access as interpreted by the Commission's four major policy statements in the area, is susceptible to a constitutional due process challenge. It could credibly be argued that the reasonable access obligations of section 312(a)(7) fail to comport with the fifth amendment's due process requirements with respect to definiteness and notice.\(^{207}\) This failure is compounded by the numerous internal inconsistencies of the FCC's interpretive policy statements.\(^{208}\) The statute at issue obligates broadcast licensees to "allow reasonable

\(^{205}\) *Id.* at 1113, 1115, 1118-21.

\(^{206}\) *Id.* at 1118. Errors of judgment are not violative of the fairness doctrine, as long as the licensee exercised reasonable good-faith judgment in making his decision. *Id.*

\(^{207}\) The fifth amendment prohibits the federal government from depriving a person of life, liberty or property without due process of law. One way such deprivation occurs is when a statute or standard in which a person is convicted or found liable is vague. The term "vagueness" denotes the situation where legislation is so uncertain that men of ordinary intelligence must guess at its meaning. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); International Harvester Co. v. Kentucky, 234 U.S. 216, 221 (1914). Because of the law's indefiniteness, the person punished does not have fair notice of the conduct that is proscribed. As a further consequence, vague regulations allow for discriminatory and arbitrary law enforcement. Papachristou v. City of Jacksonville, 405 U.S. 156, 168 (1972). In a first amendment context, courts are even more sensitive to the problem of vagueness because of the additional fact that such vagueness may chill protected speech. E.g., Smith v. Goguen, 415 U.S. 566, 573 (1974). In an effort to comply with a vague law, a person may refrain from exercising even protected speech because he is unsure of the parameters of the punishable speech.

\(^{208}\) See notes 87-117 and accompanying text *supra.*
The argument could be raised that neither the statute nor the Commission's interpretations of it were sufficiently definite to provide WKKQ with notice that it would violate section 312(a)(7) by refusing the ads in question. The proposition is well-settled that a statute which lacks sufficient definiteness is unconstitutional for


210 See notes 87-117 supra. The paramount problem is the conflict whether a licensee must afford program-length ads even if he reasonably decides that they are format-disruptive. While some language in both Summa Corp. and Campaign '76 may be read to require licensees to offer program-length ads, they do not state this squarely and unequivocally. Further, while both of those rulings invalidated a ban on certain length ads, there were extenuating circumstances that were absent from WKKQ which could lead WKKQ reasonably to believe that its ban was lawful. First, both weighed the total amount of time made available to the complainant in finding the denial to be unreasonable. Second, the television station in Summa Corp. had offered commercial advertisers the length of ads they denied to the candidate. Because neither of these factors were present in WKKQ, the licensee was reasonable in making the judgment it did. The policy statements did not clear up the dilemma the licensee faced. Instead, they further muddied the water. See notes 87-117 and accompanying text supra.

211 1978 Report and Order, supra note 12.

212 1974 Public Notice, supra note 49.

213 1978 Political Primer, supra note 35.

214 The 1974 Public Notice, for example, stated that a licensee was obligated to sell program-length time to candidates pursuant to § 312(a)(7). 1974 Public Notice, supra note 49, at 518. In spite of this, the 1978 Report and Order suggested that in some instances licensees need not sell program time if doing so would disrupt normal scheduling or commercial practices. 1978 Report and Order, supra note 49, at 36, 382-83.

215 See notes 87-123 and accompanying text supra.

216 See notes 113 & 114 and accompanying text supra.
vagueness. The Supreme Court early ruled that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violate[d] the first essential of due process of law." Here, it could be asserted that the statute and interpretations were so vague that the WKKQ management, although knowledgeable in communications, was forced to guess whether it was obligated by law to sell the ads. Further, a rather cogent contention might include the point that licensees certainly must be said to differ about the statute's application because even the FCC, as the expert administrative agency charged with national broadcast regulation, has issued differing, inconsistent interpretations of it.

Additionally, the Supreme Court has held that the standard of definiteness for a civil statute is "whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." With respect to the instant case, WKKQ could protest that the common understanding and practice of the broadcast industry, as evidenced by licensee conduct in the FCC cases, was that section 312 did not require licensees to sell particular lengths of ads to political candidates that were disruptive of format and not available to business sponsors. Of course, with reference to those very cases, arguably the Commission itself greatly contributed to such an industry understanding by not requiring the sale of specific length ads in numerous contexts. It could vigorously be maintained that, when measured by industry practice and understanding, the language of section 312 requiring reasonableness did not convey warning to

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219 Jordan v. DeGeorge, 341 U.S. 223, 231-32 (1951) (citation omitted). Jordan scrutinized a civil immigration statute and held that the phrase "crime involving moral turpitude" was sufficiently definite. Id. The Court reasoned that because of the long history of the use of the term without confusion by the courts, its meaning had become precise enough to warn individuals of the consequences of certain conduct. Id. at 227-28.

220 See Anthony Martin-Trigona, 64 F.C.C.2d 1087 (1977) (ban on ads in excess of 5 minutes upheld); WALB-TV, Inc., 59 F.C.C.2d 1246 (1976) (ban on all ads over 30 minutes upheld); Honorable Donald W. Riegle, 59 F.C.C.2d 1314 (1976) (ban on 5-minute prime-time ads upheld); Honorable Pete Flaherty, 48 F.C.C.2d 838 (1974) (ban on all ads but spots and 30-minute programs upheld); Humphrey for President Campaign, 34 F.C.C.2d 471 (1972) (ban on all ads but spots and 30-minute programs upheld).
WKKQ that it would violate the statute by refusing the ads.\textsuperscript{221}

The severity of the penalty for violation of a civil statute will justify the Court's scrutiny for vagueness.\textsuperscript{222} Likewise, the penalty for violation of section 312 is severe—revocation of the broadcaster's license to operate.\textsuperscript{223} Such a license, representing an investment of at least hundreds of thousands of dollars and comparable expected earnings, represents the licensee's livelihood, and its revocation is a sanction of unquestionable severity.

\textbf{B. The Eighty Dollar Rate Issue—Ordering WKKQ To Justify Or Revise its Advertising Rate}

1. Analysis of the Majority's Reasoning

While there is conflicting precedent and authority regarding the access issue, there is no conflict or inconsistency on the rate regulation issue, simply because there is no precedent or authority authorizing the Commission to set, fix, or in any way regulate the advertising rates broadcast stations charge to advertisers, political or business.\textsuperscript{224} Initially, the majority cites the 1978 Political Primer as authority for its decision: "[A] station's charging higher than its regular commercial rates for political broadcasts that are not 'uses' might raise serious questions as to whether the station was serving the public interest."\textsuperscript{225} The reasoning was that similar questions were raised by WKKQ charging a rate for the 5-minute ad that was thirteen times its 1-minute rate. It was the concern that such rate might have the effect, or even the intention, of discouraging purchase of the 5-minute ads.

This statement from the crevices of the 1978 Political Primer unquestionably does not stand as authority for the majority's conclusion, because it was admittedly taken completely out of context.

\textsuperscript{222} Id. at 231. In Jordan, the penalty was deportation. Id.
\textsuperscript{224} The FCC has not ignored the problem of rates charged candidates by licensees. Its activity in this area, however, has been limited. Under § 315(b), the FCC may act to ensure that the lowest unit charge is being afforded a political advertiser. E.g., RKO Gen. Inc., 61 F.C.C.2d 1183, 1184 (1976); see note 15 supra. In addition, it has ruled frequently that free access is not mandated by § 312(a)(7). See, e.g., Dennis J. Morrisseau, 48 F.C.C.2d 436, 436-37, aff'd, 380 F. Supp. 512 (D. Vt. 1974); Dr. Benjamin Spock, 44 F.C.C.2d 12, 20 (1973). Further, it has indicated that it would upset seasonal rate changes if they are shown not to be "bona fide." Anthony Martin-Trigona, 64 F.C.C.2d 1087, 1091 (1977).
\textsuperscript{225} 69 F.C.C.2d at 1268.

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and refers to situations in which the candidate is not heard and therefore does not trigger the lowest unit charge provisions of section 315(b). Senator Anderson, however, was heard on his radio ads and so was fully entitled to the lowest unit charge rates.

Neither oblivious to the total absence of any policy or case authority for its conclusion, nor willing to do anything other than simply ignore the precedential and statutory brick wall preventing it from regulating broadcast rates, the majority chose alternate reasoning: that it was not regulating, fixing, or setting ad rates at all. This constituted perhaps the only path out of the quagmire. Despite the protests of the majority, WKKQ plainly involved rate regulation, and such regulation is unquestionably beyond the Commission's statutory authority.

The result reached regulated WKKQ's 5-minute ad rate. Although the station justified its rate, citing factors such as audience loss, business sponsor alienation, and format disruption, the Commission spurned those justifications and ordered WKKQ to either otherwise justify its rate or revise it to a charge that would "bear a reasonable relationship to the existing lowest unit charge for a spot announcement." The response of the station, of course, was to revise the 5-minute rate to one directly proportional to its 1-minute rate. Thus, the Commission had determined the station's quoted rate was unreasonable and had ordered it changed.

Beyond having set the WKKQ rate, this decision stands as generic ratemaking for the broadcast industry as well. With this case as precedent, henceforth a broadcaster's political ad rates could be scrutinized and ordered rolled back by the FCC if they were not directly proportional to the 1-minute lowest unit charge rate. This obviously constitutes rate regulation.

Those instances where candidates do not appear or are not heard during the ad are not "uses of broadcast facilities" within the meaning of § 315(b). Consequently, the equal opportunities aspect of the fairness doctrine and the "lowest unit charges" which apply to these ads are not triggered. See, e.g., Lane Denton, 61 F.C.C.2d 1163, 1165 (1976). Because § 315 only applies to "uses" by a legally qualified candidate, many FCC rulings deal with what constitutes a use, e.g., Gloria W. Sage, 63 F.C.C.2d 148, 149 (1977); Sally V. Hawkins, 62 F.C.C.2d 86, 87 (1976); The American Independent Party, 62 F.C.C.2d 4, 10-11 (1976), and whether the complainant is a legally qualified candidate, e.g., Socialist Workers Party, 66 F.C.C.2d 1080, 1084-85 (1976); Ken Bauder, 62 F.C.C.2d 849, 849 (1976).

Because questions about rates charged to political candidates by a licensee usually arise in a context where there is a rate for commercial ads of the type and length requested by the candidate, e.g., Mrs. Joyce Burland, 48 F.C.C.2d 1086, 1087 (1974), the FCC has never been in the position where its order resulted in the licensee's creation of a new rate
2. The Distinction Between Common Carrier and Broadcast Regulation

The Communications Act of 1934 empowers the FCC to regulate only the rates charged by interstate communications common carriers.\(^{230}\) Armed with such mandate, the Commission, with a certain degree of public visibility, expends a great deal of regulatory energy, resources, and manpower ensuring that the rates charged by telephone, telegraph, and communications satellite companies are "just and reasonable."\(^{231}\) Determining the reasonableness of rates is the cornerstone of the Commission's common carrier jurisdiction.

The Act does not grant the FCC the authority to regulate the rates or charges of any other communication modes; only rates charged by common carriers can be regulated. In drafting, debating, enacting, and amending the Communications Act over the decades, the Congress has made one point explicitly clear: "[A] person engaged in radio broadcasting shall not . . . be deemed a common carrier."\(^{232}\)

The legislative history of the Radio Act of 1927, the precursor and touchstone of the 1934 Act and the legislation after which the 1934 Act was substantially modeled, indicates that attempts by certain members of the Congress to classify radio stations as common carriers were deliberately rejected.\(^{233}\) One proponent, Congressman Davis, unsuccessfully argued: "[W]e are going to have to regulate the radio public utilities just as we regulate other public utilities. We are going to have to regulate the rates and the service . . . ."\(^{234}\) Articulating the prevailing sentiment, Senator Dill

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\(^{230}\) 47 U.S.C. §§ 201-205 (1976). A communications common carrier is one who "makes a public offering to provide, for hire, . . . facilities by wire or radio whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing between points on the system of that carrier." Amendment of Parts 2, 91, and 99 of the Commission's Rules Insofar as They Relate to the Industrial Radio-location Service, 5 F.C.C.2d 197, 202 (1966) (citation omitted).

\(^{231}\) 47 U.S.C. § 205(a) (1976). Section 205 provides in pertinent part:

[If the Commission shall be of [the] opinion that any charge . . . . is or will be in violation . . . . of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge . . . . or charges to be thereafter observed, . . . . and to make an order that the carrier or carriers shall cease and desist from such violation . . . .]


\(^{233}\) See notes 131-32 and accompanying text infra.

\(^{234}\) 67 CONG. REC. 5247 (1926)(remarks of REP. DAVIS); accord, 67 CONG. REC. 12,503 (1926)
countered: "[Ilt seemed unwise to put the broadcaster under the hampering control of being a common carrier and compelled to accept anything and everything that was offered him so long as the price was paid."235

Likewise, the courts have unequivocally held the Commission to the distinction between common carriage and broadcasting. The Supreme Court has acknowledged the clear statutory language on the issue, and has noted the legislative history revealing the deliberateness with which Congress excluded radio broadcasting from the common carrier definitional and regulatory category.236

Most recently, the Supreme Court set aside Commission rules that required certain cable television systems to provide access channels and facilities in *FCC v. Midwest Video Corp.*237 The effect of the rules238 was to "prescribe a series of interrelated obligations ensuring public access to cable systems of a designated size and regulate the manner in which access is to be afforded and the charges that may be levied for providing it."239 Cable TV operators had protested that the access channel rules deprived "the cable operator of the power to select individual users or to control the programming on such channels, [and thus] the regulations wrest[ed] a considerable degree of editorial control from the cable operator and in effect compel[led] the cable system to provide a kind of common carrier service."240

At the outset of the proceedings, the Commission admitted that "common carrier obligations . . . are beyond our authority to impose."241 Its position in the case, however, similar to its position

(remarks of Sen. Howell). Those favoring classifying broadcasters as common carriers were concerned with the possibility that a few private persons would control what the public hears. For a brief discussion of the development of the Communications Act and the problem of common carriage, see *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.,* 412 U.S. 94, 103-09 (1973).

67 CONG. REC. 12,515 (1926)(remarks of Sen. Dill). Senator Dill and others were concerned that imposing common carriage obligations on the broadcaster, combined with equal opportunity obligations, would inundate a licensee with public discussions by private individuals. In 1973, the Supreme Court refused to recognize a private right of access to broadcast facilities for just this reason. *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.,* 412 U.S. 94, 120-27 (1973).

Id. at 699.


242 Id. at 699.

243 *CABLE TELEVISION REPORT AND ORDER, supra* note 238, at 299.
in the WKKQ case, was that the access channel requirements did not impose common carrier obligations nor did the Commission's action in adopting them constitute common carrier rate or service regulation. Insisted the FCC: "[W]e do not think [the access rules] can be held beyond our authority merely by denominated them as somehow 'common carrier' in nature." Yet, the Court of Appeals for the Eighth Circuit was unpersuaded and held the rules in question imposed common carrier obligations on cable television systems contrary to the express language of the Communications Act that broadcasting is not to be regulated by the FCC as common carriage.

On review, the Supreme Court affirmed the decision with forceful language regarding the common carrier issues. Reasoned the Court: "Effectively, the Commission has relegated cable systems, pro tanto, to common-carrier status." Such imposition, concluded the Court, was beyond the statutory authority of the FCC: "The Commission is directed explicitly by § 3(h) of the Act not to treat persons engaged in broadcasting as common carriers." Elaborating, the decision continued: "The language of § 3(h) . . . forecloses any discretion in the Commission to impose access requirements amounting to common-carrier obligations on broadcast systems."

The relevance of the Midwest Video case to WKKQ is obvious and constitutes strong, contemporary authority for the proposition that the FCC cannot, inter alia, impose common carrier rate obligations on broadcasters even though the Commission insists while doing so that it, in reality, is not.

From 1934 until the 1978 WKKQ decision, the FCC had unfailingly respected the clear statutory language. The Commission had even recently emphasized the issue: "The Communications Act makes a fundamental distinction between common carrier and broadcast regulation . . . ." Obliquely implicit in the WKKQ

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1 Id.  
3 440 U.S. at 699-700 (emphasis in original) (footnote omitted).  
4 Id. at 705 (footnote omitted). At this point, the Court was quick to assert that this holding did not foreclose "less intrusive regulation" from being promulgated by the FCC. Id. at 705 n.14.  
majority’s discussion of the rate issue, however, is the notion that section 312(a)(7) or section 315(b) authorizes the Commission to determine the reasonableness of advertising rates. That is plainly not the case. Section 312(a)(7) mandates “reasonable access to or to permit purchase of reasonable amounts of time.” The section speaks in terms of amounts of time that must be made available to candidates; it ensures their right to reasonable amounts of time to communicate with the electorate. The purpose of the reasonable access provision was explained by Senator Pastore, one of its sponsors, in these terms: “It attempts to give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters.”

It is the total amount of time a station offers a candidate that must be reasonable—not the rate charged by the station.

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248 See 69 F.C.C.2d at 1266-68. The rationale represents the view of two commissioners that a reasonable rate is mandated by § 312(a)(7). They reason that an unreasonable rate could discourage a candidate’s making use of his right to reasonable access in direct opposition to the aim of the statute. Further, a licensee’s setting such an unreasonably high rate may be some evidence that a licensee intends to violate his obligation to afford reasonable access. Id. at 1268. Dissenting, Commissioner White stated that such an “expansion” of § 312(a)(7) to cover the reasonableness of rates charged is “unprecedented” and “beyond the intent of Congress and the Commission’s statutory authority.” Id. at 1271 (White, Comm’r, dissenting). But see Reasonable Access, note 4 supra, at 1292 nn. 23-24. The exactness with which Congress delineated the rate-supervision powers of the FCC over common carriers makes the silence of § 312(a)(7) in this regard resound. In support of the Commission’s rationale, however, it seems at least possible that Congress did not foresee a situation where a licensee would not have a commercial rate for every type and length of ad which could be applied to political advertisers.


251 According to the statute and FCC interpretations of it, it is the access which must be reasonable, not the total amount of time or the rate. The FCC, in evaluating complaints, determines whether a licensee’s conduct has denied the candidate reasonable access. Such determination involves deciding whether the licensee’s judgment to deny a candidate’s request for time was unreasonable under the facts of the case or made in bad faith. Typically, the licensee’s judgment regards the total time offered or a ban on certain length ads. Where a ban is involved, as in WKKQ that ban may be deemed “unreasonable” and therefore violative of § 312(a)(7), even though the total amount of time may not be “unreasonable.” Usually, no question arises regarding a licensee’s judgment about the rate to be charged.
not one word in section 312(a)(7) about rates, and its reasonableness-of-time mandate cannot be twisted into a reasonableness-of-rates requirement.

Nor does section 315(b) grant the Commission authority to establish rates, although the section does impose rate obligations on licensees. In pertinent part, those are: "The charges . . . shall not exceed (1) . . . the lowest unit charge of the station for the same class and amount of time for the same period . . . ." The legislative history reveals that the lowest unit charge provision "[does] no more than place the candidate on par with a broadcast station’s most favored commercial advertiser." In WKKQ, of course, the station had not previously offered 5-minute ads to any commercial advertisers it had no 5-minute lowest charge rate. The majority stated it was thus the responsibility of the station to set a 5-minute lowest unit charge rate for Senator Anderson. The majority’s argument is that such a rate must bear a reasonable relationship to the 1-minute lowest unit charge rate and that absent such relationship the rate is ipso facto unreasonable. The result, according to this argument, is that the unreasonable rate would discourage candidates from buying time and that such discouragement would "thwart the underlying purpose of the reasonable access provisions."

Nothing in section 315(b) can be so construed. The section applies only to rates already in existence. It empowers the FCC to take notice of these existing rates, ascertain the lowest rate available to volume business advertisers, and insure that candidates are

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226 69 F.C.C.2d at 1268.
227 That § 315(b) applies to existing rates can be gleaned from its legislative history: [Section 315(b)] was enacted in 1952 to correct an abuse by some broadcasters who were charging candidates for public office rates in excess of those charged commercial advertisers for . . . comparable time. . . .

In this context requiring broadcasters to offer candidates for public office the same rates given their most favored commercial buyers is nothing more than a particularization of the broad public interest obligation incumbent on them. S. REP. No. 96, 92d Cong., 2d Sess. 20 (1971), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 1773, 1775. It seems, however, that Congress did not foresee a situation where there would not be a commercial rate to be used for comparison, for the same report declared: "All commercial radio and television stations have published rate cards which purport to state the rates at which they sell spot and program time." Id. at 22, U.S. CODE CONG. & AD. NEWS at 1780.
placed on a pricing par with those business advertisers. Section 315(b) contains not one word about restricting political ad rates, such as WKKQ had to set, for time segments never before offered for sale, which existed along and which could not be compared to business advertiser rates charged for similar length segments.

Thus, as the sections of the Act authorizing and defining the Commission's powers prohibit radio rate regulation, the political broadcast sections cannot be read to permit such a radical departure from more than 5 decades of communications regulation.

VIII. CONCLUSION

In conclusion, it is submitted upon the foregoing analysis that the WKKQ decision is in error on any of several grounds, including unexplained inconsistencies in precedent, the first amendment proscription on the Commission substituting its judgment for that of the licensee, the fifth amendment due process deficiencies, and the unauthorized intervention of the Commission into the area of broadcast rate regulation.