[US] FCC Receives Strong Rebuke as Personal Attack and Political Editorial Rules Are Repealed

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In a decision highly critical of the Federal Communications Commission ("FCC"), the United States Court of Appeals for the District of Columbia directed the FCC to immediately repeal its personal attack and political editorial rules.

Generally, the personal attack rule provides that when an attack is made on a person's integrity during a program on a controversial issue of public importance, the broadcast licensee must inform the subject of the attack and provide an opportunity to respond on the air. Similarly, the political editorial rule provides that if a broadcast licensee airs an editorial supporting a political candidate, it must notify other candidates for that office of the editorial and provide them an opportunity to respond on the air.

The rules have long been criticized by broadcasters and subject to various legal challenges over the past twenty years. Proponents of the rules claim that they promote diversity of opinion and the right to information whereas critics complain that the rules' reply requirements discourage the discussion of controversial topics and political coverage. The rules' critics received some support for their position in 1999 when the D.C. Court of Appeals held that the rules "chill at least some speech and impose at least some burdens on activities at the heart of the First Amendment." In light of this finding, the court remanded the case to the FCC with the instruction to expeditiously "explain why the public interest would benefit from rules that raise these policy and constitutional doubts."

Despite the court's emphasis on expeditious action, the FCC took more than nine months to advise the court that any such action had been taken. Finally, on 4 October 2000, the FCC released an "Order and Request to Update the Record." In the Order, the FCC suspended the personal attack and political editorial rules for sixty days and asked interested parties to then submit evidence on the effect of the suspension of the rules in order to create a record upon which the FCC could review the rules. Among the evidence requested was (1) the number of political editorials run during the suspension period; (2) the number of editorials run during prior election cycles; (3) the nature of the elections on which they editorialize; and (4) whether other media outlets editorialized on those races.

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The Order was approved by a 3-2 majority, with the two Republican Commissioners critical of the delay in reaching a decision and of the decision itself. Both Commissioners favored a repeal of the rules. However, the three Democratic Commissioners voted to approve the Order.

The criticism of the Order by the Commission's Republican members was supported and magnified in the court's recent decision. Upon its review of the Order, the court stated that "Neither the timing nor the substance of the Order responds to the court's remand." Of the delay between the earlier decision and the FCC's Order, the court held that "[we] can only conclude that [our] remand order for expeditious action was ignored." The court was equally critical of the substance of the Order, stating "it is folly to suppose that the 60-day suspension and call to update the record cures anything" and "the Order provide[s] short notice for broadcasters to change their plans [and] their conduct will in any event be affected by the fact that the rules will be reinstated on 3 December 2000." Moreover, the court expressed little confidence that the Order would lead to a timely review of the impact of the rules' suspension, stating "The Order provides no assurance whatsoever that the Commission will proceed expeditiously once it receives the requested information."

As a result of its findings, the court issued a writ of mandamus directing the FCC to immediately repeal the personal attack and political editorial rules. Whether the repeal of the rules effected television coverage of political or controversial issues during the recent election campaign is open to debate. However, it is likely that the outcome of the Presidential election may determine whether the FCC institutes a new rulemaking to determine whether the public interest requires the rules: the Republican Party has generally maintained that the rules should be abandoned while the Democratic Party has called for broader public interest obligations for broadcasters.

Order and Request to Update the Record, In the Matter of Repeal or Modification of the Personal Attack and Political Editorial Rules, MM Docket No. 83-484, FCC 00-360 (4 October, 2000)

Radio-Television News Dirs. Ass'n et al. v. FCC,___ at ___ (D.C.Cir. 2000)

Radio-Television News Dirs. Ass'n v. FCC, 184 F.3d 872, 887 (D.C.Cir. 1999)

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