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THE WHITE HOUSE

WASHINGTON

July 28, 1975

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR:

DON RUMSFELD

FROM:

JIM CONNOR *JH*

SUBJECT:

CBS Petition for Declaratory Ruling

The attached was received in the President's Outbox.

Don R

## CBS PETITION FOR DECLARATORY RULING

As a result of President Ford's July 8 formal announcement of his candidacy for the Republican nomination for the Office of President of the United States, President Ford is now a "legally qualified candidate" for that nomination. Consequently, CBS and other licensees are confronted with the situation in which, as a result of a 1964 Commission decision,\* the broadcast of press conferences for the next 15 months will give rise to "equal time" obligations for any additional Republicans who declare their candidacies for that nomination.

### REQUEST FOR DECLARATORY RULING

We request, therefore, that the Commission issue a ruling that Presidential press conferences are exempt from the "equal opportunities" provision of Section 315 and that broadcasters who in their bona fide news judgment carry Presidential press conferences will not incur "equal opportunities" obligations. CBS believes, for the reasons set forth in this letter, that in light of legal developments subsequent to the 1964 ruling and the facts here presented,

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\* Columbia Broadcasting System, 40 FCC 395 (1964).

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a Presidential press conference is not a "use" under Section 315. #

#### BACKGROUND

On August 27, 1964, after the major political parties' nominating conventions, CBS asked the Commission whether the broadcast of Presidential press conferences prior to the general election would constitute a "use" under Section 315, thereby requiring the giving of equal time, on proper demand, to all other Presidential candidates. The Commission decided, on September 30, 1964, 34 days before the 1964 election, that such a broadcast would constitute a "use" and would give rise to equal time obligations, since it did not fall within either the "bona fide news interview" or the "on-the-spot coverage of bona fide news events" exemptions to Section 315.\*\*

Because we do not believe that broadcasts of Presidential press conferences are "uses" under Section 315 and because we do not believe that the public interest would be served

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\* This is now a real question facing all licensees. If a press conference is considered a "use," other Republican candidates may announce their candidacies within seven days of the press conference and demand "equal time."

\*\* Columbia Broadcasting System, 40 FCC 395 (1964).

by a 15 months blackout of live coverage of Presidential press conferences -- an important means of communicating information to the American people -- we urge the Commission to reexamine its 1964 ruling. President Ford, in his first 11 months in office, has called eight press conferences in Washington, all of which have been broadcast in full by CBS.\* We believe that this vital channel of communication must be kept open -- and we strongly desire to see it remain open. We do not believe that Congress, when it enacted Section 315 intended to stifle the flow of news in this manner. We believe, instead, that Congress sought to ensure the free flow of news to the public. We believe this was the import of its 1959 amendments to Section 315, which exempted from Section 315 certain candidates' appearances which were, in a licensee's judgment, newsworthy and "bona fide" (i.e., not merely an attempt by a candidate to further his candidacy).

As noted above, the Commission's 1964 ruling was issued 34 days before the election and cut off coverage of press conferences for a shorter period than is here involved. Now,

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\* CBS has also afforded broadcast coverage to Presidential press conferences held outside of Washington if, in the judgment of CBS, they were newsworthy. Thus, CBS broadcast in full -- and live -- the President's April 3, 1975 press conference in San Diego and presented a videotaped summary of Mr. Ford's November 14, 1974 press conference in Phoenix, Arizona.

however, the President's candidacy will effectively preclude live coverage of press conferences for 15 months, a significant portion of President Ford's term of office. Moreover, we suggest that the President's early declaration of candidacy is not atypical. New federal laws provide significant impetus for candidates to declare their candidacies even earlier than has heretofore been the case. The 1974 amendments\* to the Federal Election Campaign Act of 1971, for example, provide that candidates who raise \$5,000 in contributions of \$250 or less in each of at least 20 states can receive matching public funds. These public funds will be available as early as January 1, 1976, thus encouraging candidates to declare early and begin accumulating the necessary threshold amount to be eligible for these public funds. Seven candidates have already announced their candidacy for the Democratic nomination. There is a real possibility that a number of Republicans will come forward as announced candidates for the Republican nomination,\*\* thus making the broadcast of Presidential press conferences now impractical if such broadcasts are considered "uses."

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\* PL 93-443.

\*\* Some persons who have been recently discussed as possible Republican candidates include former Governor Reagan (California), former Governor Connolly (Texas), Governor Thompson (New Hampshire), and Senators Helms (North Carolina), Baker (Tennessee), and Buckley (New York). In addition, there is

We thus believe a reexamination of 1964 ruling is called for in light of developments subsequent to that ruling.\* In addition to these legislative developments which have encouraged earlier announcements by the Commission's candidates to receive Federal financing, the courts and the Commission have since 1964 expressed on a number of occasions the importance and unique status of the Presidency and Presidential communications with the public.

(Footnote continued)

no way to predict if other candidates would announce, including a number of "fringe" candidates. Since candidates have within seven days of a "use" to become legally qualified candidates, there is no way for a broadcaster to assess his "equal time" risks in advance of a broadcast. Assuming additional Republicans do announce, a broadcaster may have to make available many additional time periods as the result of its broadcast of a Presidential press conference. In the event that President Ford becomes the Republican nominee, he will of course, be opposed by a number of candidates in the general election. Since news and program considerations would not justify these additional broadcasts the practical result will be that broadcasters will not cover the press conference live.

\* We believe a reexamination is particularly appropriate in view of the fact that even in 1964 the Commission was split 4-3 on this important issue. Indeed, Commissioner Loevinger noted in his dissent that "no serious argument is made [in the majority opinion] on the basis of either statutory language or legislative history" that Presidential press conferences are not exempt as "on-the-spot coverage of bona fide news events." We suggest that the majority's reliance on a prior decision to the effect that a debate between two California gubernatorial candidates forms a questionable basis for concluding that live "on-the-spot coverage" of Presidential press conferences would not be exempt from Section 315.

NEWSWORTHINESS OF PRESIDENTIAL STATEMENTS

The Commission and the courts have consistently recognized the uniqueness -- and inherent newsworthiness -- of the Presidency. Indeed, it is significant to note that FCC Commissioner Loevinger, in his dissenting statement in Columbia Broadcasting System, supra, took note of the special role of the President in American politics in rendering his judgment that Presidential press conferences should be exempt from Section 315. In his dissent, he stated:

"The basic issue here involves a Presidential press conference.... The President of the United States is the Chief of State of this sovereign nation. The position is wholly unique. To assimilate the President in the performance of his regular functions as Chief Executive to the role of a mere candidate for office, indistinguishable from a sheriff, coroner or mayor, is not merely disrespectful to the President and the nation but is inaccurate, unrealistic and unsound."\*

The dissenting Commissioners in Columbia Broadcasting System, supra, correctly interpreted, in our view, the Congressional history of the 1959 amendments to Section 315 in determining that Presidential press conferences ought to be exempt from the "equal time" requirements of Section 315.

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\* 40 FCC 395, 406.

315, used the Presidency as the prime example of why the amendments were needed. Thus, Senator Pastore stated, if the President were a candidate for reelection he "could not stand up in front of the American flag and report to the American people on an important subject without every other conceivable candidate standing up and saying 'I am entitled to equal time.'"\*

Eight years after its decision in Columbia Broadcasting System, the Commission, in its First Report on Part V of the Fairness Doctrine,\*\* characterized the Presidency as "the nation's most powerful and most important office," and stated, "[a]s the Court [of Appeals, D.C. Circuit] noted in Democratic National Committee v. FCC,...the President's status differs from that of other Americans and is of a superior nature, and calls for him to make use of broadcasting to report to the nation on important matters:

'While political scientists and historians may argue about the institution of the Presidency and the obligations and role of the nation's chief executive officer it is clear that in this day and age it is obligatory for the President to inform the public on his program and its progress from time to time. By the very nature of his position, the President is

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\* Cong. Rec., July 28, 1959 at p. 13189.

\*\* 36 FCC 2d 40 (1972).

a focal point of national life. The people of this country look to him in his numerous roles for guidance, understanding, perspective and information. No matter who the man living at 1600 Pennsylvania Avenue is he will be subject to greater coverage in the press and on the media than any other person in the free world. The President is obliged to keep the American people informed and...this obligation exists for the good of the nation.... (Sl. Op. pp. 26-27)'"\*

Thus, Commission and judicial statements and the legislative history of the 1959 amendments all suggest that the Presidency is a unique news source of significant importance.\*\*

While it is undisputable that he is also the leader of a political party, we believe that his actions in each role can -- and should -- be treated separately. In Democratic

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\* 36 FCC 2d 40, 46.

\*\* Journalists, especially, have recognized the critical need for frequent Presidential press conferences and their importance to the American public. Thus, for example, Washington newspapermen Stuart H. Loory and Jules Witcover, in a January 11, 1971 Letter to the Editors of The New York Times, stated "[b]etween quadrennial elections, [press conferences] are the only mechanism for Presidential accountability to the public"; Marquis Childs, writing in the April 27, 1974 Washington Post, stated that the press conference "is the only medium of exchange between the public and the President...." And such conferences became "all the more important as the claims of executive privilege and national security have narrowed the response of the executive to Congress"; and a May 8, 1975 editorial in Newsday stated that "[t]he press conference is virtually the only setting in which the President appears without absolute control over the way he appears to his audience. It's good for both the Presidency and the country...." The tragedy of Watergate merely underscores the importance of this type of Presidential accountability to the public through the searching questions of professional journalists.

National Committee, the Court stated:

"In matters which are non-political the President's status differs from that of other Americans and is of a superior nature. Of course, as a candidate the President is subject to the same terms of 315 as apply to other candidates. Some will proffer that a first term President is involved in his political reelection campaign from the date of his inauguration, however, we believe that adoption of this view would only serve to frustrate the ability of the President and the licensees to present authoritative Presidential reports to the public."\*

As we interpret the Commission's 1964 ruling in Columbia Broadcasting System, supra, it is unimportant whether President Ford calls a press conference in furtherance of his candidacy or in furtherance of his duty, as Chief Executive Officer, to keep the people informed on important national and international issues. Any such press conference now called by President Ford -- for any reason -- will be effectively barred from live broadcast coverage by licensees. We believe the Court, in Democratic National Committee, supra, recognized the need to determine the capacity in which the President is acting when he calls a press conference, and we believe this determination is one properly left to the professional journalistic judgment of licensees. The responsibility of the Commission is simply to determine

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\* 460 F.2d 891 (1972) at p. 905.

whether a licensee, in exercising this judgment, has acted reasonably.\*

Congress, in our view, provided guidance for licensees to determine when a President, in calling a press conference, is acting to inform the American public of important national or international matters or is acting to further his candidacy. That guidance was provided by inserting the words "bona fide" in the 1959 Amendments to Section 315. To be exempt, a news interview must be "bona fide"; similarly, a news event must be "bona fide." If, for example, a candidate called several press conferences immediately prior to an election, the "bona fides" of these conferences would certainly be in question. Judgments as to the de facto purpose for these press conferences, however, are typical news judgments which ought to be made by professional journalists -- and those judgments should not be second-guessed by the Commission unless they are clearly unreasonable.\*\*

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\* National Broadcasting Company, 25 FCC 2d 735 (1970).

\*\* See Columbia Broadcasting System v. Democratic National Committee, 402 U.S. 94 (1973). The Supreme Court there stated, "[f]or better or worse, editing is what editors are for; and editing is selection and choice of material. That editors--newspaper or broadcast--can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values" (at pp. 124-25).

In the next two sections we discuss why we believe that Presidential news conferences are exempt from Section 315 as "on-the-spot coverage of...bona fide news event[s]" and/or as "bona fide news interview[s]." We believe that Congress so intended, and we believe the public interest would be furthered -- not frustrated -- were the Commission to lodge such judgments with licensees by ruling that Presidential press conferences, subject to "bona fides," are exempt from Section 315.

"ON-THE-SPOT COVERAGE OF BONA FIDE NEWS EVENTS"

We believe that live broadcasts of Presidential press conferences constitute "on-the-spot coverage of bona fide news events" within the meaning of Section 315(a)(4).

In connection with the exemption for "on-the-spot coverage of bona fide news events," the Congressional Conference Committee Report stated that:

"[I]n referring to on-the-spot coverage of news events, the expression 'bona fide news events'...is used to emphasize the intention to limit the exemptions from the equal time requirement to cases where the appearance of a candidate is not designed to serve the political advantage of that candidate."\*

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\* Conference Committee Report, Cong. Rec., September 3, 1959 at p. 16343.

Further, Congressman Harris explained the exemption of 315(a)(4) as follows:

"This requirement regarding the bona fide nature of...news events was not included without careful thought.... It sets up a test which appropriately leaves reasonable latitude for the exercise of good faith news judgment on the part of broadcasters and networks."\*

We believe that the Commission, in Columbia Broadcasting System, supra, has deprived licensees of this "reasonable latitude for the exercise of good faith news judgments" by ruling that Presidential press conferences are not "bona fide news events" within the meaning of Section 315(a)(4). All three dissenting Commissioners disagreed with this aspect of the ruling. Thus, Commissioner Hyde stated "[w]hether a press conference is newsworthy in whole or in part for the purposes of on-the-spot coverage is for the experts in the gathering and dissemination of news."\*\* Commissioner Ford, dissenting, stated "[i]t is my view that the appearance of the President at a news conference attended by newsmen from all over the world is a spot news event, the broadcast of which constitutes an on-the-spot coverage of a bona fide news event within the meaning of Section 315(a)(4).\*\*\*"

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\* Cong. Rec., September 2, 1959 at p. 16313.

\*\* 40 FCC 395, 399.

\*\*\* 40 FCC 395, 400.

Finally, Commissioner Loevinger stated:

"As to the fact that these press conferences are bona fide--and, indeed, bona fide news events--there can be no question from the viewpoint of common sense. It is a fact known to all that the press conference of the President of the United States is the source of some of the most important news, both national and international, in the world today. One of the purposes of the 1959 amendment to the Communications Act was to insure that such news would be available through the broadcasting media to the American people."\*

The Commission has long recognized that some Presidential appearances are news "events" which ought to be exempt from Section 315. In 1956, for example, prior to the amending of Section 315 in 1959, President Eisenhower spoke to the nation on the so-called "Suez crisis." Although opposing candidates demanded "equal time," the Commission did not believe that Congress "when [it] enacted Section 315...intended to grant equal time to all Presidential candidates when the President uses the air lanes in reporting to the Nation on an international crisis."\*\*

Indeed, in considering the validity of the majority rationale in its September 30, 1964 ruling on press conferences, it is significant to note that three weeks later the Commission

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\* 40 FCC 395, 405.

\*\* 14 RR 722 (1956).

held that a speech by President Johnson during the 1964 Presidential campaign was exempt as a "bona fide news event." Mr. Johnson's address concerned nuclear testing in China and a change in leadership in the Soviet Union. The Commission noted:

"In short, we think that the networks could reasonably conclude that statements setting forth the foreign policy of this country by its chief executive in his official capacity constitute news in the statutory sense. Simply stated, they are an act of office of the President of the United States."\*

The phrase "news in the statutory sense," in our view, deserves closer scrutiny. In Columbia Broadcasting System v. Democratic National Committee, supra, the Supreme Court stated:

"[I]t would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the day-to-day editorial decisions of broadcast licensees are subject to the kind of restraints urged by respondents. To do so in the name of the First Amendment would be a contradiction. Journalistic discretion would in many ways be lost to the rigid limitations that the First Amendment imposes on government. Application of such standards to broadcast licensees would be antithetical to the very ideal of vigorous, challenging debate on issues of public interest."\*\*

What is "news," then, "in the statutory sense," has been seen by the Supreme Court to be a judgment clearly within

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\* 3 RR 2d 647, 650 (1964).

\*\* 412 U.S. 94, 120-121 (1973).

the province of the licensee. And the Commission's role -- lest it impinge on First Amendment values, -- is restricted to a review of the "reasonableness" of these judgments.

While the Commission did characterize its decisions in President Eisenhower's "Suez crisis" speech and President Johnson's "foreign policy" address as "extraordinary reports," the Commission has also determined far less "extraordinary" reports to be "on-the-spot coverage of bona fide news events" within the meaning of Section 315(a)(4). Thus, in its Letter to Thomas R. Fadell, Esq.,<sup>\*</sup> the Commission concluded that station WWCA's broadcast of the Gary City Court proceedings four times weekly constituted "on-the-spot coverage of [a] bona fide news event." The Commission there ruled that the appearance of presiding Judge A. Martin Katz, a candidate for Mayor of Gary, Indiana, in each of these broadcasts did not create equal time obligations. The broadcasts dealt, according to the ruling, with "the actual trial of traffic cases and all other cases on the agenda of an average city court."<sup>\*\*</sup> The Commission believed it relevant that the court proceedings had been broadcast by the station long before the judge's candidacy and the Commission

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\* 40 FCC 380 (1963).

\*\* Id. at p. 380.

stated that it was "persuaded" that the broadcasts were exempt by the fact that the broadcasts concerned not only "the operation of an official government body" but also the "'news' interest of the court."

Is this Commission now prepared to state that the broadcast of traffic court proceedings can be exempt as "on-the-spot coverage of a bona fide news event" but a Presidential press conference covering Cambodia, the economy, the energy crisis, arms limitation negotiations, the CIA or other topics of national significance, is not exempt? We submit that such a decision cannot be rationally supported.

As noted above, President Ford has held eight Washington press conferences open for broadcast coverage in his 11 months in office. In each of these conferences, the President discussed topics relating to the security and foreign relations of the United States, as well as significant domestic matters. Such topics ranged from President Ford's discussions of the U.S. involvement in the affairs of Vietnam, Cambodia, South Korea, and mid-east countries to the activities of the CIA at home and abroad. Clearly, Presidential press conferences are regularly the source of major Presidential news announcements concerning both national and international issues. A few recent examples of significant

news reports emanating from press conferences are: the June 9, 1975, President Ford announcement that he was forwarding the Rockefeller Report on the CIA to the Justice Department for possible prosecution; the May 6 plea to the nation by the President asking it to "open its doors" to Vietnamese and Cambodian refugees; and his April 4 statement warning enemies of the U.S. not to mistake this nation's recent setbacks as a sign of weakness. In addition, we submit that Presidential press conferences are considered to be of great news value to all media -- not just broadcasters. We attach, for example, The New York Times' front page reports on each of President Ford's Washington press conferences broadcast by CBS. The Times also prints the text of each press conference in its entirety.\*

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\* Just as the Times publishes these texts, CBS News wishes to retain the right to determine, on the basis of newsworthiness, whether to broadcast the entire Presidential press conference.

We believe that Presidential press conferences are "news interviews" within the meaning of Section 315(a)(2).

Presidential press conferences consist of an interrogation of the President by various representatives of the broadcast and print news media, and answers by the President to such questions. These conferences are held on a periodic basis throughout the year. In some instances, the President may make a short statement prior to the commencement of the question and answer session. The range of the questions posed by reporters is unlimited; often questions are penetrating; often they are adversary.

One factor to be considered in examining the applicability of the "bona fide news interview" exemption to Presidential press conferences is the Congress' principal concern with respect to news interviews -- possible attempts by local broadcasters to further the candidacy of local candidates. Thus, Congressman Harris, House Manager of the 1959 bill to amend Section 315 stated that "[t]he great problem is that on the local level a broadcaster might set up panel discussions or news interviews that are not regularly scheduled... [but are] an effort to...further the candidacy of some

political candidate."\* In the Senate, Senator Engle stated that he had

"[N]o objection to the programs 'Meet the Press' and 'Face the Nation,' which are nationwide affairs, because...there are only a few men of national prominence who would appear.... Those broadcasts could be carefully monitored. But I was afraid of...panel discussions at the local level."\*\*

In addition, Senator Scott stated that the fear of the Senate Conference Committee was that "in some local areas, there would be rigged news interviews for the benefit of one candidate or the other."\*\*\*

Nor do we believe that Congress intended the strict, mechanistic definition of the word "regular" that the Commission has applied in its rulings. As Commissioner Loevinger stated in his dissent in Columbia Broadcasting System, supra, the word regular has "a wide variety of meanings" and that "it seems most reasonable to construe 'regularly scheduled' as meaning 'recurrent in the normal and usual course of events' rather than as 'recurrent at fixed and uniform time intervals.'" And with respect to the regularity of Presidential press conferences, Commissioner Loevinger stated:

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\* Cong. Rec., September 2, 1959 at p. 16309.

\*\* Cong. Rec., September 3, 1959 at p. 16344.

\*\*\* Cong. Rec., September 3, 1959 at p. 16347.

"There is not, and cannot be, any question that Presidential news conferences have been held over many years, are recurrent in the normal and usual course of events, and are regular in every meaning of the term except the most narrow."\*

The second major requirement, the Commission has stated, for a news interview to be bona fide is that it be under the "exclusive control" of the network or station. In Columbia Broadcasting System, supra, the Commission held that press conferences are not under the control of the network or licensee since:

"[N]ot only the scheduling but, in significant part the content and format of the press conference is not under the control of the network. Thus, the candidate determines what portion of the conference is to be devoted to announcements and when the conference is to be thrown open to questions."\*\*

We believe that Congress' primary concern with "control" of news interviews was that such control be out of the hands of a candidate -- an "exercise of [a licensee's] bona fide news judgment and not for the political advantage of the candidate for public office."\*\*\* While a President, admittedly, occasionally makes a statement before opening the session

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\* 40 FCC 395, 404.

\*\* 40 FCC 395, 397.

\*\*\* Conference Committee Report, Cong. Rec., September 3, 1959 at p. 16343.

to questions, the crux of the conference is the questions and answers themselves.\* And these questions are clearly out of the hands of the President.

As Commissioner Loevinger stated in his dissent:

."What Congress did mean, as the legislative history shows, is that the questions were not to be controlled by the candidate. There is no ground for suspicion that the questions asked of the President at a press conference are anything other than bona fide questions put by the reporters at their own instance or that of their editors. Indeed, this is one of the elements that makes such an event newsworthy. Consequently, it seems clear... that the element of control by the news media which was contemplated by Congressional intent is present in such press conferences."##

In 1962 the Commission decided that a weekly press conference of a governor, during which reporters would phone in questions and the governor would answer over the air, was a "bona fide news interview." As Commissioner Loevinger pointed out, the only difference between this "interview" and a Presidential press conference is that the governor's conference was held weekly "whereas the Presidential press

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\* There is, of course, no reason to support a holding that a short opening statement at a press conference on an important issue facing the public is not exempt, while a longer report to the public may be exempt. Yet this is the result flowing from the 1964 Commission decision.

\*\* 40 FCC 395, 405.

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conference is held only when the President believes that there is news."

Thus, while we believe that the regularity of a news interview and its control by the licensee are relevant considerations in determining whether or not such an interview is exempt from Section 315, we submit that the Commission's prior interpretation has been too narrow. We submit that Congress' primary concern was that such interviews be "bona fide" -- not merely a thinly guised vehicle for the political advantage of the candidate. Further, we believe that the judgment of "bona fides" is properly that of the licensee. In consequence, we urge the Commission to rule that Presidential press conferences, subject to "bona fides," are exempt from the "equal opportunities" provision of Section 315.

#### CONCLUSION

We urge the Commission to preserve -- not inhibit -- the free flow of news from the President to the people by ruling that Presidential press conferences are exempt from the "equal time" provision of Section 315. We believe such a ruling would serve to implement the intent of Congress when it passed the 1959 amendments and to enhance the prospect

of an informed public on major national and international issues of the day.

CBS requests this ruling from the Commission in view of the great and immediate importance of this matter which affects licensee obligations under Section 315.

Respectfully submitted,  
CBS INC.

By /s/ Ralph E. Goldberg  
Ralph E. Goldberg

/s/ Allen Y. Shaklan  
Allen Y. Shaklan

/s/ Kevin P. Conway  
Kevin P. Conway

Its Attorneys

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July 16, 1975