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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

June 3, 1983

Honorable Michael D. Pearson
Senate Chairman

Honorable Gregory G. Nadeau
House Chairman
Joint Standing Committee on Election Laws
Maine Legislature
State House
Augusta, Maine 04333

Dear Senator Pearson and Representative Nadeau:

You have inquired as to whether Legislative Document No. 1615, "AN ACT Concerning Control of the Content of Rebuttals to Media Editorials" currently pending before your Committee, would, if enacted, be unconstitutional. For the reasons which follow, it is the Opinion of this Office that the bill does not violate rights of freedom of speech and of the press protected by the United States and Maine Constitutions, and it may well also not be found to violate the Supremacy Clause of the United States Constitution by virtue of the operation of the Federal Communications Act of 1934, 47 U.S.C. § 151 et seq.

The bill would enact a new section of the Maine statutes, providing, in its entirety, as follows:

> When any broadcasting station broadcasts editorial remarks, opinions or statements, the station shall make time available for the presentation of conflicting viewpoints. A presentation of a conflicting viewpoint shall be presumed to be a rebuttal to the original editorial remark, opinion or statement.
>
> The station may not control the content of material in any such rebuttal, except that

the station may reasonably limit the length of time available for rebuttal, and may prohibit the use of any obscene, slanderous or libelous statements.

As set forth in its Statement of Fact, the purpose of the bill is to require that whenever a broadcasting station[1] editorializes,[2] it shall afford an unspecified amount of time to unspecified persons for purposes of rebuttal. The bill further prohibits the station from censoring the content of the rebuttal, except for obscene or libelous material.

I. First Amendment.

The First Amendment to the United States Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .[3]

The first question which you raise is whether the bill would violate this constitutional proscription. It would appear fairly clear, however, that the bill would not be found unconstitutional on this ground, in that the United States Supreme Court has sustained against First Amendment challenge a policy of the Federal Communications Commission, which is substantially similar to that contained in the bill. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969).

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[1] The bill does not define this term. Presumably, it means radio and television stations whose signals originate within the State of Maine, not those whose signals originate out-of-state but which are received within the state either through the air or through community access antennae (cable television).

[2] This term is also undefined. It is thus unclear whether the bill is intended to cover editorials on any subject, or only those of some controversy and public importance.

[3] The provisions of this amendment have been made applicable to the states through the operation of the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). In addition, the Maine Constitution contains a similar provision. Me. Const. art. I, § 4.

Pursuant to the general authority granted to it by the Federal Communications Act of 1934 ("the Act"), 47 U.S.C. § 151 et seq., to regulate the broadcasting industry, the Federal Communications Commission ("the F.C.C.") developed over the course of several decades a policy, known as the "Fairness Doctrine," by which it advised those whom it licensed to engage in broadcasting over the nation's airwaves as to the standards which the Commission would impose as a condition of the retention of licenses. That Doctrine, set forth in the 1949 Report on Editorializing by Broadcast Licensees, 13 F.C.C. 1249 (1949), reprinted as Appendix A to Applicability of Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415 (1964), provides, among other things, that licensees may editorialize on "controversial issues of public importance," but only if such editorializing "is exercised in conformity with the paramount right of the public to hear a reasonably balanced presentation of all responsible viewpoints." Id. at 10424. See generally the discussion of the application of these terms contained in Fairness Doctrine and Public Interest Standards, 39 Fed. Reg. 26372, 75-78 (1974).

In addition to the provisions regarding editorializing on issues of public importance, the Fairness Doctrine encompasses rules regarding rebuttal time for persons who are the subject of broadcast attacks, 47 C.F.R. § 73.1920, and for candidates for public office who are the subject of editorials, 47 C.F.R. § 73.1930. In 1969, these latter sets of rules were the subject of challenge under the First Amendment in the United States Supreme Court. The Court, however, unanimously sustained the Commission's rules on the ground that, while they did operate as a restriction on the freedom of the broadcasters, in view of the unique position which the broadcast media occupied in First Amendment law, such restrictions were constitutionally acceptable in order to insure the "rights of the viewers and listeners" to balanced reporting of the candidacies of persons running for public office. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969). The Court did not, however, review the constitutionality of the portion of the Fairness Doctrine relating to editorializing unrelated to candidates, the subject of L.D. 1615. It did, however, set forth without criticism the history of the evolution of the Fairness Doctrine, including that portion of it relating to editorializing on issues of public importance. Id. at 375-79. It seems fair to conclude, therefore, that the Court was not offended by the concept that a broadcasting station may editorialize only to the extent that it permits other viewpoints to be heard as well.

L.D. 1615 departs from this branch of the Fairness Doctrine only in one significant respect.[4/] The bill requires that the presentation of views different from those of the broadcasting station be by a rebuttal prepared by someone other than the station. As indicated above, the Fairness Doctrine only requires that if a station editorializes on a controversial issue of public importance, it must insure that opposing viewpoints are adequately presented as well, but such presentations may be accomplished through its general mix of programming and not necessarily by the affording of rebuttal time to persons outside the station. It is difficult to see, however, how this refinement of the Doctrine would be of any First Amendment significance. Thus, since the Fairness Doctrine itself does not violate the First Amendment, L.D. 1615 does not do so.[5/]

4/ As indicated above at note 2, the bill, on its face, also applies to all editorials, rather than those on controversial issues of public importance as is the case with the Fairness Doctrine. Since it is doubtful that such a broad application was intended by the sponsor, a limiting amendment may be appropriate.

5/ One other point concerning the free speech consequences of L.D. 1615 is worthy of note. As indicated above, the bill permits broadcasting stations to censor rebuttal broadcasts for, among other things, "libelous statements." In Farmers Educational & Cooperative Union of America v. WDAY, 360 U.S. 525 (1959), the United States Supreme Court held that in enacting a codification of the provisions of the Fairness Doctrine relating to rebuttal broadcasts for candidates personally or editorially attacked, 47 U.S.C. § 315, the Congress intended to exempt broadcasters from the operation of state libel laws, and therefore no censorship of such rebuttal broadcasts for libelous material was to be permitted. The Legislature should therefore be aware that if it enacts L.D. 1615 with the provision allowing for the censorship of rebuttal broadcasts for libelous statements, it may be interpreted by the courts as intending that such stations be vulnerable to suits for libel, in addition, of course, to the person or persons actually making the statements at issue. In addition, the provision of the bill authorizing censorship may also present constitutional problems under the Supremacy Clause, see Part II of this Opinion, since it would appear to be in conflict with the policy of Congress set forth in Section 326 of the Communications Act, which prohibits the F.C.C. from censoring broadcasts in any manner. Such problems could, of course, be obviated by an amendment to the bill.

II. Supremacy Clause.

A. General Preemption Principles

The Supremacy Clause, Article VI, cl. 2 of the United States Constitution, provides:

> This Constitution, and the Laws of the United States which shall be made in pursuance of . . . shall be the supreme Law of the Land. . . .

Thus, in passing legislation, the Congress has the constitutional power to "preempt" state legislative action. The most direct way for the Congress to exercise this power is simply by so stating in express terms. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). If not, the Court may imply a Congressional intent to preempt if there is "a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it," or "because the act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." Fidelity Federal Savings & Loan Ass'n. v. de la Cuesta, --U.S.--, 50 U.S.L.W. 4916, 4919, (U.S. June 28, 1982); Rice v. Santa Fe Elevator Corp., 31 U.S. 218, 230 (1947), quoted with approval in Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, -- U.S.--, 51 U.S.L.W. 4449, 4452 (U.S. April 20, 1983). In addition, "[e]ven where Congress has not entirely displaced the state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law." Id.; Florida Lime & Avacado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941). Notwithstanding all of this, however, the court "is generally reluctant to infer preemption," especially when "the basic purposes of the state statute and the [federal statute] are similar." Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 132 (1978).

The first question presented here, therefore, is whether the Federal Communications Act contains any expression of congressional intent with regard to the preemption of state regulation of broadcasting. The Act is completely silent on its face regarding the displacement of state power, providing only that in order to grant a license, the F.C.C. need find

that the "public convenience, interest or necessity will be served thereby." 47 U.S.C. § 307(a). As indicated above, pursuant to this broad grant of authority, the F.C.C. adopted the Fairness Doctrine, setting forth the conditions which licensees would be expected to meet with regard to the broadcasting of public affairs in order to retain their licenses. But there is no indication either in the Act, or in the Fairness Doctrine, as to whether the Congress, or the Commission, intended that state law be preempted.

B. Judicial Determinations as to the Preemptive Effect of the Federal Communications Act.

As to whether such an intention should be inferred from the Act, the courts have reached differing results. Among the earliest decisions, the United States Court of Appeals for the Third Circuit struck down a Pennsylvania statute which required that motion pictures be reviewed and approved by a state board of censors before being shown on television. Allen B. Dumont Laboratories, Inc. v. Carroll, 184 F.2d 153 (3rd Cir. 1950), cert. den. 340 U.S. 929 (1951). The Court held that, in denying the power of censorship to the F.C.C. in Section 326 of the Act, Congress had not intended to permit state censorship for obscenity, or any other purpose, and that Pennsylvania's attempt to engage in such activity was therefore preempted. Id. at 156. The Court went on to state that "We think it is clear that Congress has occupied fully the field of television regulation and that that field is no longer open to the States." Id.

The breadth of this statement was subsequently called into question by the decision of the United States Supreme Court in Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424 (1963). There, the Court sustained a New Mexico statute generally prohibiting the advertising of optometry practices against a claim that such a prohibition was preempted by the Act to the extent that it applied to radio and television. Id. at 429-32. The Court first swept aside the suggestion that, notwithstanding the silence of the Act on the subject of preemption, there was something "comprehensive" about the nature of federal regulation under it. Next, it rejected the contention that there is something inherent about the communications field which required a finding of implied preemption. The sole question presented, therefore, was whether a conflict existed between the Act and the New Mexico statute. Id. at 429-39. The Court then concluded that the mere grant of authority by the Congress to the F.C.C. to

consider the advertising practices of stations in determining whether to renew their licenses was not sufficient to oust state regulation of advertising.6/ Id. at 430-32. States, therefore, were free to prohibit specific advertising practices without unconstitutionally interfering with the business of the F.C.C..

The next case of importance bearing on the preemptive effect of the Act arose here in Maine. In 1970, the Supreme Judicial Court, in State v. University of Maine, 266 A.2d 863 (Me. 1970), invalidated as preempted by the Act a state statute which prohibited, inter alia, the use, "directly or indirectly," of an educational television system operated by a state university for the "promotion, advertisement or advancement of any political candidate." 20 M.R.S.A. § 2606. Echoing the Supreme Court opinion in the Head case, the Law Court observed that there was nothing in the Act in the way of a "clear declaration of federal supremacy in the communications field." Id. at 865-66. The Court noted, however, that the failure of a station to broadcast programs with political content might endanger the renewal of its license under Section 307 of the Act, because it might be found by the F.C.C. not to be conducting itself in "the public interest". Thus, the Court concluded that the State "has no . . . valid interest in protecting [its citizens] from the dissemination of ideas as to which they may be called upon to make an informed choice. In the latter area, Congress has preempted the field." Id. at 868-69.

The most recent decision to address the question of the preemptive consequences of the Act was McGlynn v. New Jersey Public Broadcasting Authority, 439 A.2d 54 (N.J. 1981). There, the Supreme Court of New Jersey sustained against preemption challenge a state statute which required that elections be covered by state-owned television stations with "balance, fairness and equity." The Court found, inter alia, that Congress could not be found to have "preempted the field" of broadcasting generally, and that since the New Jersey statute

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6/ It is important to note that although the Supreme Court has since accorded a measure of protection to commercial speech which was not available at the time of Head, see, e.g., Central Hudson Gas & Electric Corp. v. Public Service Comm'n., 447 U.S. 557 (1980); Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 748 (1975), the fact that the New Mexico statute today might be found to violate the First Amendment does not cast any doubt upon the vitality of the court's ruling on the preemption question.

was not inconsistent with federal law, most notably Section 315 of the Act, it was not preempted. Id. at 69. In reaching this holding, however, the Court noted that, "[w]ere this a case involving a privately owned broadcasting station, the pre-emption issue would be more difficult to resolve." Id. at 67.

Any attempted reconciliation of the four cases just summarized is perilous. Some major themes, however, appear to emerge. It is clear that, notwithstanding the broad statement of the Dumont court that Congress has "occupied the field" of broadcasting, there is room in the Communications Act for at least some kinds of state regulation. The question in any particular case then appears to become whether the state regulation in question actually conflicts with some specific provision of the Act, or perhaps with some rule of the Commission promulgated pursuant thereto, sufficient to frustrate federal law. Thus, in Dumont, an attempt at state censorship was found to conflict with Section 326 of the Act, prohibiting the F.C.C. from engaging in such conduct. And in University of Maine, an attempt by the state to keep all matters relating to candidates for public office off the air was found to conflict with the requirement in Section 307 of the Act, amplified by F.C.C. rule, that "the public interest" requires that broadcasters cover such activities as a condition of holding their licenses. But where Congress or the Commission has expressed no policy, as in the case of commercial advertising (Head), or where the state's regulation is not inconsistent with federal law (McGlynn), no preemption was found.

C. Comparison of the Federal Communications Act and the Bill.

Since the Congress, through Section 315 of the Act, and the F.C.C., through the Fairness Doctrine, have enunciated a policy in the area of editorializing, the question presented by L.D. 1615 thus becomes whether it would conflict with such federal policy. As indicated above in Part I of this Opinion, the bill is nearly identical to the Fairness Doctrine.7/ Thus, far from interfering with that policy, the bill might well be viewed as complementary to it. It is possible, of course, that a court may find that even if the bill does not frustrate any federal purpose, it might still be preempted on the ground of some implied intention on the part of Congress or

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7/ Also as indicated above, most notably at note 5, to the extent that the bill differs from the Fairness Doctrine, such differences could be eliminated by amending it.

the Commission not to permit concurrent but not inconsistent state regulation in the area of regulation of broadcast editorials. But no court has as yet so held. Thus, it may be that so long as the bill does not deviate significantly from the Fairness Doctrine, it will not be found to be preempted.

* * *

In summary, therefore, it is the Opinion of this Office that Legislative Document No. 1615, because of its similarity to the Fairness Doctrine of the Federal Communications Commission, would not be found to violate the First Amendment of the United States Constitution. Further, because of its lack of conflict with that doctrine, and because of the absence of a clearly enunciated judicial decision on the point, the bill may well be found not to be preempted by federal law.

I hope the foregoing is of some assistance to you and the Legislature. Please feel free to call on me or members of my office for further assistance if necessary.

Sincerely,

JAMES E. TIERNEY
Attorney General

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