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BOPP, COLESON & BOSTROM  
ATTORNEYS AT LAW

2 FOULKES SQUARE  
401 OHIO STREET  
P.O. BOX 8100

TERRE HAUTE, INDIANA 47808-8100

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

TELEPHONE  
812/232-2434

FAX  
812/235-3685

JAMES BOPP, JR.  
RICHARD E. COLESON  
BARRY A. BOSTROM

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January 21, 1993

Office of the Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, DC 20554

Re: Request for Comments  
Issued October 30,  
1992 Concerning MM  
Docket No. 92-254

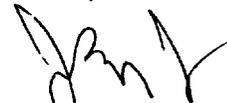
Dear Secretary:

Enclosed herewith are the *Comments Regarding Federal Candidate Political Advertising on Television Involving Abortion* by the National Right to Life Committee, Inc., which are incorporated herein by reference.

Notice is hereby given that Mr. James Bopp, Jr., General Counsel for the National Right to Life Committee, Inc., wishes to testify at any hearing which may be scheduled on this matter.

Sincerely,

BOPP, COLESON & BOSTROM



James Bopp, Jr.  
Richard E. Coleson

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FEDERAL COMMUNICATIONS COMMISSION  
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**COMMENTS REGARDING  
FEDERAL CANDIDATE POLITICAL ADVERTISING**

**ON TELEVISION INVOLVING ABORTION**

**(Solicited on October 30, 1992, MM Docket 92-254)**

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*By the*

**NATIONAL RIGHT TO LIFE COMMITTEE, INC.**

*To the*

**FEDERAL ELECTION COMMISSION**

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*Prepared by*

FCC - MAIL ROOM

**James Bopp, Jr. and Richard E. Coleson**

**January 21, 1993**

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The National Right to Life Committee, Inc. (NRLC) takes this opportunity to submit its comments in response to the *Public Notice, Request for Comments* issued on October 30, 1992 by the Federal Communications Commission (FCC) *In the Matter of Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act*, MM Docket No. 92-254.

The comments relate to whether a television station may determine that a television advertisement by a federal candidate involving abortion is indecent and channel the ad to a "safe

harbor" time period without violating federal laws against censoring the federal candidate's political speech. Specifically, the FCC allowed WAGA-TV, Atlanta, Georgia, to channel to "safe harbor" an ad by federal congressional candidate Daniel Becker depicting the practice of abortion on the television station's sole determination that the ad was or might have been indecent.

The National Right to Life Committee, Inc. asserts that this ruling was improper for the reasons set forth below.

#### **I. INTEREST OF THE COMMENTATOR.**

The National Right to Life Committee, Inc. (NRLC) is a nonprofit organization whose purpose is to promote respect for the worth and dignity of all human life. NRLC is comprised of a Board of Directors representing 51 state affiliate organizations and more than 2,000 local chapters made up of individuals from every race, religious tradition, ethnic background, and political belief. NRLC engages in various political, legislative, legal, and educational activities to protect and promote the concept of the sanctity of innocent human life.

NRLC is opposed to the current regime of abortion on demand and seeks to support and promote political candidates, regardless of political party affiliation, who believe in the sanctity of human life and are willing to advance that traditional interest as public policy through appropriate legislation.

**II. ARGUMENT: ALLOWING TELEVISION STATIONS TO CHANNEL TO "SAFE HARBOR" POLITICAL ADVERTISEMENTS CONCERNING ABORTION WHICH ARE FOUND "INDECENT" BY THE STATION VIOLATES BOTH STATUTORY AND CONSTITUTIONAL LAW.**

**A. *Candidates Have a Right to Reasonable Access to Non-"Safe Harbor" Broadcasting Time and Strong Legal and Constitutional Protections Against Censorship.***

**1. Congress Gave Federal Candidates the Right to Debate Public Issues in the Broadcast Media Without Censorship.**

A federal candidate is provided a right of reasonable access to broadcast time by 47 U.S.C § 312, which provides that:

**(a) Revocation of station license or construction permit**

The Commission may revoke any station license or construction permit —

(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.

This requirement is reiterated at 47 CFR § 73.1940(g).

In allowing reasonable access, two important principles govern. First, from the FCC's 1978 Report and Order, 68 FCC 2d at 1089 n. 14: "Federal candidates are the intended beneficiary of Section 312(a)(7) and therefore a candidate's desires as to the method of conducting his or her media campaign should be considered by licensees in granting reasonable access." Second, "[A]n arbitrary 'blanket' ban on the use by a candidate of a particular class or length of time in a particular period cannot be considered reasonable. A Federal candidate's decisions as to

the best method of pursuing his or her media campaign should be honored as much as possible under the 'reasonable' limits imposed by the licensee." FCC 1978 Report and Order, 68 FCC 2d at 1090.

While these principles relate to reasonable access, i.e., obtaining air time, they also logically apply to allow a candidate to plan his or her own campaign in terms of the content of the communication the candidate chooses to make. No blanket bans on any subject should be permitted where the communication enjoys first amendment protection and the chosen content of a candidate's speech should not be second-guessed by an FCC licensee, i.e., once a candidate acquires access to air time, the substance of the broadcast must be uncensored.

A federal candidate is protected from censorship in his or her discussion of public issues in a political campaign broadcast. 47 U.S.C § 315 provides for equal broadcast opportunities for all candidates for public office if one candidate for that office is given a broadcasting opportunity. Section 315 also provides "[t]hat such licensee shall have no power of censorship over the material broadcast . . . ." 47 U.S.C. § 326 prohibits the FCC from "censorship" of broadcasting by its licensees.

A legally qualified candidate for public office is also protected from censorship by a broadcast licensee over the candidate's political campaign broadcasts by 47 CFR § 73.1940(g), which states:

[I]f any licensee shall permit any . . . candidate to use its facilities, it shall afford equal opportunities to all other candidates for that office to use such facilities. Such licensee shall have no power of censorship over the material broadcast by any such candidate.

**2. Both Candidates and the Public Have Powerful, Constitutional Free Speech Rights With Regard to Political Debate in Campaigns.**

The United States Supreme Court has declared that "[t]he First Amendment interests of candidates and voters, as well as broadcasters, are implicated by § 312(a)(7)." *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981).

Voters have a right to uncensored information concerning matters of public and political debate. They have a right to receive information relevant to making an informed decision in the voting booth. A broadcast licensee is "granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." *Office of Communications of the United Church of Christ v. FCC*, 123 U.S. App. D.C. 328, 337, 359 F.2d 994, 1003 (1966). The public obligation to the voters was expressed by the Supreme Court, in the context of a case considering the duty of a licensee to grant candidates reasonable access to broadcast time, as follows:

*It is the right of the viewers and listeners, not the right of the broadcasters which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to*

countenance monopolization of that market . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experience which is crucial here.

*CBS, Inc. v. FCC*, 453 U.S. at 395 (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (citations omitted) (emphasis added)).

The licensee's obligation to the legally qualified federal political candidate was also set out by the United States Supreme Court in *CBS, Inc. v. FCC*, 453 U.S. at 396:

[I]t is of particular importance that candidates have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.

*Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976)). The Court emphasized the importance of giving candidates free expression: "Indeed, 'speech concerning public affairs is . . . the essence of self-government.'" *Id.* (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964)). Again, the *CBS* Court stressed the point: "The First Amendment 'has its fullest and most urgent applications precisely to the conduct of campaigns for political office.'" *Id.* (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). The *CBS* Court concluded that "[s]ection 312(a)(7) thus makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process." *Id.*

**3. Any Exceptions to a Candidate's Right to Address Public Issues Without Censorship Must Be Justified by a Compelling Interest, Narrowly Tailored to Effect Only that Interest, and Be the Least Restrictive Means to Achieve that Interest.**

The Administrative Procedure Act allows judicial review of agency action. 5 U.S.C. § 704. Such review may

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706. In an action claiming infringement of a constitutional right, a reviewing court has de novo review. *Western Energy Co. v. U.S. Dept. of Interior*, 932 F.2d 807 (9th Cir. 1991).

The standard for reviewing cases where there is an actual restriction on first amendment rights, i.e., content based limitations, is whether the restriction is "a precisely drawn means of serving a compelling state interest." *Action for Children's Television v. FCC*, 852 F.2d 1332, 1343 n.18 (D.C. Cir. 1988). In addition, in considering compelling interests which might justify first amendment restrictions, it is relevant whether less restrictive means exist to advance the compelling

interest. *FCC v. League of Women Voters of California*, 468 U.S. 364, 395 (1984). If less restrictive means exist, they should be employed.

**4. The FCC May Not Delegate to Television Stations a Veto Power Over Candidate Broadcasts or Grant Prior Restraint Authority Which it Lacks Itself.**

While 47 U.S.C. § 312 allows "reasonable" accommodation of candidate broadcasts, this principle extends only to arranging the time. In this context, the United States Supreme Court has warned of allowing television stations total discretion to determine what constitutes reasonable access because to do so would be to right a blank check to the licensees, thereby eviscerating § 312(a)(7). *CBS, Inc. v. FCC*, 453 U.S. at 390 n.12.

Once the time is arranged between the candidate and the licensee, the licensee is neither responsible for nor has control over the candidate's broadcast. Such censorship is prohibited. Even if there is a possible exception to the censorship ban, as discussed below, allowing the licensee free discretion to determine whether the exception is met is to endow the licensee with a blank check to pick and choose candidate messages on the basis of content and shunt disfavored ones to poor broadcasting times. This is unconstitutional. The FCC cannot bestow upon a licensee a veto it does not have over the broadcast content of a candidate, nor can it give a licensee prior restraint authority which it is itself prohibited from using.

**5. While Indecency May be an Exception to the Ban on Reasonable Access and the Ban Against Censorship, the Exception Must Be Narrowly Confined to Be Lawful.**

From the above discussion of the super-protected status of political campaign speech on matters of public concern, it is clear that any content-based restrictions must be justified by a truly compelling interest, narrowly tailored to effect only that interest, and comprise the least-restrictive means for effectuating that interest.

It is the FCC's position that a broadcaster is justified in refusing a candidate advertisement which includes indecent material except during the "safe harbor" time of midnight to six in the morning, on the basis of 18 U.S.C. § 1464, which prohibits licensees from broadcasting, inter alia, indecent material. It is by no means clear that this was Congress' intent. Rather, it seems likely that Congress intended free expression by the candidate, without the licensee bearing any responsibility. Any abuse would be the responsibility of the candidate, and any perceived problems with this arrangement would need to be fixed by further congressional action, not by agency action.

However, even if Congress did intend there to be an indecency exception to a candidate's right to broadcast his or her campaign message without censorship, such an exception would have to be extremely narrow and enforced in the least restrictive means possible. So, for example, if a broadcaster found material by a candidate to be possibly indecent, the broadcaster could

broadcast a properly-worded advisory about the upcoming campaign advertisement, which would suffice to protect the public and the broadcaster. Moreover, the determination of indecency should be made only on the basis of clearest possible guidelines, and any doubts should be resolved in favor of the free speech rights of the candidate to make his or her campaign ad as he or she sees fit.

Because channeling to "safe harbor" times means losing much of a candidate's audience, such channeling, if proper at all, should be done only in the clearest of cases, where there is no doubt of indecency on the basis of clear-cut standards. It should be remembered that candidates have a right to access to prime time, based on the FCC's own ruling. *Report and Order in the Matter of Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 FCC 2d 1079, 1090 (1978). Federal candidates have no right of access to a specific program, *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, 682 (1991), but they cannot be banned from entire dayparts. 68 FCC 2d at 1091. To do so would deprive a candidate of the right to determine how to run his or her campaign.

**B. *The FCC's Grant of Authority to Television Stations to Make Their Own Determination of Decency With Regard to Abortion Ads and to Channel to "Safe Harbor" Ads Found "Indecent" Violates Statutory and Constitutional Law.***

Based on the foregoing principles, it is clear that the FCC's decision to allow an Atlanta television station to make its own decision that a federal candidate's television ad might be

indecent and refuse to sell him time except between midnight and six in the morning violated the candidate's rights.

In the letter of October 30, 1992, from Roy J. Stewart, Chief of the FCC Mass Media Bureau to Daniel Becker (DA 92-1503), federal candidate Becker was advised that "the staff believes it would not be unreasonable for the licensee to rely on [an informal staff opinion] and conclude that Section 312(a)(7) does not require it to air, outside the 'safe harbor,' material that it reasonably and in good faith believes is indecent."

However, a prior letter by Mr. Stewart to Vincent A. Pepper and Irving Gastfreund, dated August 21, 1992 (in reply to 8210-AJZ/MJM) answered most of the questions raised by the October 30th letter and the Atlanta television station in a manner favorable to Mr. Becker. References to this letter will be made throughout the following discussion as the August 21st FCC Letter.

First, it should be noted that access to the "safe harbor" period is inadequate for a candidate who has a topic of great public debate which he wishes to share with the constituency which will vote on his election. Shunting Mr. Becker's abortion ads to the "safe harbor" zone was tantamount to denying his ads altogether, for it seriously limited his audience. This does not merely involve a reasonable time, place, or manner first amendment speech restriction, where the candidate can be simply moved to a different time slot for a reasonable reason because the decision in this case is content-based. Therefore, any

restrictions must meet a high, compelling-interest standard. As noted earlier, candidates have a right to access to prime time slots. Only a compelling-interest-based, narrowly tailored, least restrictive means restriction justifies channeling an abortion ad to "safe harbor."

Second, while the United States Supreme Court has found a compelling interest in "safeguarding the physical and psychological well-being of a minor," *New York v. Ferber*, 458 U.S. 747, 756-57 (1982), this does not automatically mean that ads depicting abortion may not be shown outside the "safe harbor." Children are regularly exposed to news broadcasts showing dead human bodies and human blood. Similarly, human birth has been televised in non-"safe harbor" times. It has also become routine for the national news media when reporting on abortion to show a woman on a table with her feet up in stirrups and an abortionist between her legs performing an abortion. If such portrayals are not "indecent," and the present commentator would assert that they are not, then neither are Mr. Becker's pictures of dead preborn humans and blood. If exposure of the human body in a portrayal of human birth is not indecent, then the exposure of the same parts of the human body in portraying an abortion is not indecent. The interest in protecting minors certainly cannot mean that television can never portray the realities of death and human physiology. Minors are offended by depictions of abortion, but they are also offended by depictions of dead human beings, which are routinely shown on the

television. What minors are most offended about, however, is the fact that human beings kill baby human beings, not the fact that they see the results. It is abortion, not its depiction, that is deeply offensive. Yet it remains a legitimate political issue, central to much of current debate, and its depiction should be allowed, if a candidate chooses to use such materials in his or her political advertisements.

Moreover, even if it were conceded that depictions of abortion are especially harmful to minors, it does not follow that moving all such ads to the time between midnight and six in the morning is not the most narrowly tailored way of effecting the governmental interest involved. As explained in the August 21st FCC Letter, the simple device of preceding an ad containing scenes of an abortion with an advisory statement that the following political advertisement may not be suitable for young viewers would suffice to put adults on notice of the possible need to limit visual access to the screen for the minors in their care. Such an approach is certainly less restrictive than channeling all such advertising to a midnight to six a.m. slot.

Third, it simply is not the fact that portraying an abortion is "indecent" by definition. The FCC has defined indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987). Under this standard,

depiction of dead fetuses or fetal parts simply is not indecent. "Neither the expulsion of fetal tissue nor fetuses themselves constitute 'excrement.'" August 21st FCC Letter (citing dictionary definitions and case law limiting the definition of "excrement" to products of human digestion, especially fecal matter). Moreover, mere depiction of female sexual organs in a non-sexual context, such as childbirth or abortion, does not fit the usual category of being indecent under common community standards. Otherwise, childbirth could never be depicted on television.

Finally, entrusting to a television station the power to ban a political candidate's political ads from daytime and evening viewing times nearly on the eve of an election on its own judgment — purportedly a reasoned and good-faith judgment — that something is indecent, is very disturbing. The FCC's authorization of such action, amounts to the delegation to a licensee of a power to censor matter it finds politically distasteful. This is a violation of the constitutional free speech rights of the candidate and the viewing public in the midst of a political campaign. It is beyond the authority of the FCC to allow, for it bestows upon the licensee the authority to impose a prior restraint on the free speech of a candidate already allotted time on the basis of the content of that speech.

### III. CONCLUSION

While depictions of abortion are offensive, they are not indecent. Abortion is an unsightly, disquieting business by its very nature. It is, however, at the center of a swirling political debate in this Nation, and an appropriate subject of public debate. Photographs have a power to stir human emotion in a manner unmatched by words. Witness the public reaction to pictures of starving people in Somalia, dead and wounded people in Bosnia or Iraq. To deprive a legally qualified candidate for the Congress of the United States of his most powerful tool for presenting his position on the leading issue in our national debate in the midst of a national election, would require an extraordinary public interest, tailored with utmost precision, where no other possible means to effect that interest existed. This was not true in the FCC's action in allowing a television station to determine whether federal candidate Becker could reach his audience as he saw fit with the message he chose to send to advance his candidacy.

The FCC needs to issue a ruling that make clear that depictions of abortion are not indecent and that stations may not on their own initiative shunt depictions of abortion to a late-night, small-audience time slot.