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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

January 22, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Petition For Declaratory Ruling Concerning Section 312(a)(7) Of The Communications Act (MM Docket No. 92-254)

Dear Ms. Searcy:

Submitted herewith for filing, are an original and nine (9) copies of Comments in MM Docket No. 92-254, in response to the Commission's October 30, 1992 Public Notice, Request For Comments in this proceeding.

Please direct any inquiries concerning this submission to the undersigned.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

By: _____
Irving Gastfreund

Enclosures

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BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C. 20554

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OFFICE OF THE SECRETARY

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| In the Matter of | ) | |
| | ) | |
| Petition For Declaratory Ruling | ) | MM Docket No. 92-254 |
| Concerning Section 312(a)(7) | ) | |
| Of The Communications Act | ) | |

**To: The Commission**

## COMMENTS

Irving Gastfreund, Esq.

Kaye, Scholer, Fierman, Hays &
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The McPherson Building
901 15th Street, N.W.
Washington, D.C. 20005
(202) 682-3526

January 22, 1993

## SUMMARY

Kaye, Scholer respectfully urges the Commission to expressly recognize that broadcasters have the right to "channel" all broadcast material -- including candidate "uses" -- that they reasonably and in good faith believe to be indecent, within the meaning of 18 U.S.C. §1464. We also respectfully request the Commission to expressly recognize that broadcasters have the right to channel material that, while not indecent, may otherwise be harmful to children. In this regard, "channelling" refers to deferral of a broadcast to those hours when there is no reasonable likelihood of children being in the audience.

We also respectfully request that the Commission expeditiously grant Kaye, Scholer's September 1, 1992 Application For Review, for the reasons set forth therein.

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BEFORE THE

# Federal Communications Commission

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**To: The Commission**

## COMMENTS

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER ("Kaye, Scholer"), on behalf of its clients who are licensees of radio and television stations[1], pursuant to Sections 1.430 and 1.415 of the Commission's Rules, hereby submits its instant Comments in this proceeding in response to the Commission's Public Notice, Request For Comments, ___ FCC Rcd ___, FCC 92-486 (released October 30, 1992) ("Notice"). In support whereof, it is shown as follows:

## I. Introduction

The Commission's Notice was issued in response to the filing, on September 1, 1992, by Kaye, Scholer, on behalf of its broadcast clients of an Application For Review with respect to the action taken by the Chief of the Commission's Mass Media

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1 Kaye, Scholer, Fierman, Hays & Handler is a law firm with offices in Washington, D.C., New York, Los Angeles, Hong Kong and Brussels, which represents, among others, numerous radio and television stations. For the reasons set forth below, all television and radio licensees are adversely affected by any Commission ruling in this proceeding which would establish a radically expanded scope of Commission review over broadcaster judgments in "reasonable access" cases, under Section 312(a)(7) of the Communications Act. Hence, all of Kaye, Scholer's clients who are radio and television licensees are parties in interest in this proceeding.

Bureau in his August 21, 1992 letter ruling (FCC Ref. 8210-AJZ/MJM) (hereinafter "Letter Ruling"), which denied Kaye, Scholer's July 29, 1992 Petition For Declaratory Ruling in this proceeding (hereinafter "Petition For Declaratory Ruling").

Kaye, Scholer's Petition For Declaratory Ruling requested that the Commission issue a declaratory ruling that broadcast licensees may, consistent with the "reasonable access" provisions of Section 312(a)(7) of the Communications Act and the "no censorship" provision of Section 315(a) of the Communications Act, decline to broadcast, during hours when there is a reasonable risk that children may be in the audience, spot announcements or other programming constituting "uses", within the meaning of Section 315(a) of the Communications Act and Section 73.1941(b) of the Commission's Rules, (a) where such spot announcements or programming presents graphic depictions or descriptions of dead or aborted and bloodied fetuses or fetal tissue; and (b) where the licensee reasonably concludes, in good faith, that the graphic depictions in question are "indecent", within the meaning of 18 U.S.C. §1464.[2]

In this latter regard, Kaye, Scholer's Petition For Declaratory Ruling demonstrated that the types of spot announcements at issue are "indecent", within the meaning of 18

---

[2] Kaye, Scholer's Petition For Declaratory Ruling is hereby incorporated herein by reference.

U.S.C. §1464, as measured against the Commission's existing standard of review for assessing broadcast "indecency". Under the Commission's prevailing standard, indecency is defined as material:

> "... that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."
>
> Pacifica Foundation, 56 FCC 2d 94, 98 (1975); Infinity Broadcasting Corp. of Pennsylvania, 2 FCC Rcd 2705 (1987), reconsideration denied, 3 FCC Rcd 930 (1987).

"Indecency analysis will not turn on any mechanistic classification of language," but will, rather, depend largely upon the context in which the allegedly indecent speech was uttered. Infinity Broadcasting Corp., of Pennsylvania, 2 FCC Rcd at 2705-06. Material that dwells "on matters sexual and excretory, in a pandering and titillating fashion," will be actionable under 18 U.S. §1464, which prohibits the broadcast of "indecent" material.

Kaye, Scholer's Petition For Declaratory Ruling also demonstrated that the "reasonable access" provisions of Section 312(a)(7) of the Communications Act and the "no censorship" provision of Section 315(a) of the Communications Act do not compel a broadcaster to air a candidate "use" that contains "indecent" material, within the meaning of 18 U.S.C. §1464, during hours of the day when there is a reasonable risk that

children may be in the audience. Kaye, Scholer noted, in its Petition, that the Commission's staff has previously reached the determination that:

> "A broadcaster would be justified in refusing access to a candidate who intended to utter obscene or indecent language, because Section 312(a)(6) [of the Communications Act], which provides that the Commission may revoke a license for, inter alia, a violation of [18 U.S.C.] §1464 must be read to carve an exception to Section 312(a)(7). . . . The application of both traditional norms of statutory construction as well as an analysis of the legislative evolution of Section 315 [of the Communications Act] militate in favor of reading [18 U.S.C.] Section 1464 as an exception to Section 315. [Emphasis added.]"
>
> Letter from Chairman Mark S. Fowler to Hon. Thomas A. Luken (January 19, 1984).[3]

In its August 21, 1992 Letter Ruling, the Mass Media Bureau denied Kaye, Scholer's Petition For Declaratory Ruling. The Bureau rejected Kaye, Scholer's suggestion that broadcasters be permitted to classify candidate "uses" as "indecent", under the circumstances described above, or to "channel" candidate "uses" containing graphic depictions of aborted fetuses to hours when there is no reasonable risk that children may be in the audience, unless the Commission has held that the material is indecent, within the meaning of 18 U.S.C. §1464. Yet, the Bureau also held, in its Letter Ruling, that it would refuse to rule, in advance of any broadcast, as to whether any particular programming is indecent, on the ground that any such ruling could

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[3] A copy of that document was set forth as Exhibit 1 to Kaye, Scholer's Petition For Declaratory Ruling herein.

be viewed as imposing an impermissible prior restraint in protected speech. Letter Ruling at 2.

Nonetheless, the Bureau held, in its Letter Ruling, that one specific political advertisement, broadcast by Television Station WAGA-TV, Atlanta, Georgia, which contained the types of graphic depictions of bloodied, aborted fetuses described above, was not indecent, within the meaning of 18 U.S.C. §1464. Although the Letter Ruling reaffirmed the Commission's existing standard for measuring broadcast indecency, and although the Letter Ruling reaffirmed that that standard focuses on patently offensive depictions or descriptions of, inter alia, "excretory" activities or organs, the Bureau held that the type of graphic depictions of bloodied, aborted fetuses or fetal tissue here at issue is not the result of an "excretory" activity, under the Commission's indecency definition. Letter Ruling at 4.

Finally, the Letter Ruling reaffirmed the continuing validity of the Mass Media Bureau's prior ruling in Southern Arkansas Radio Company, 5 FCC Rcd 4643 (Mass Media Bureau 1990), in which the Bureau held that a broadcaster may air only "content-neutral disclaimers" in connection with a particular candidate's broadcast "uses", as long as such a disclaimer is broadcast by a station with all subsequent advertising broadcast on behalf of every candidate for the same office. See Letter Ruling at 5 n. 4. Nonetheless, the Bureau held, in its Letter

Ruling, that, where a broadcast licensee determines, in good faith, that the material presented in a "use" by a candidate "could be disturbing to child viewers", the broadcaster would be allowed to air a viewer "advisory". Letter Ruling at 4-5. The Mass Media Bureau prescribed the following as an example of an acceptable viewer advisory:

> "The following political advertisement contains scenes which may be disturbing to children. Viewer discretion is advised."
>
> Letter Ruling at 5.

On September 1, 1992, Kaye, Scholer filed its Application For Review seeking full Commission review of the action taken by the Mass Media Bureau in its Letter Ruling. In its Application For Review, Kaye, Scholer demonstrated that the Letter Ruling is in conflict with established Commission precedent and policy governing the "reasonable access" provisions of Section 312(a)(7) of the Communications Act, the "no censorship" clause of Section 315(a) of the Communications Act, and governing the prohibition against the broadcast of "indecency" under 18 U.S.C. §1464. Furthermore, Kaye, Scholer demonstrated that the Bureau's interpretation and application of Section 312(a)(7) of the Communications Act violates the First Amendment rights of broadcasters by unduly circumscribing their editorial discretion. In addition, Kaye, Scholer demonstrated, in its Application For Review, that, in light of the Letter Ruling and other past precedent, the Commission's standard for assessing whether broadcast matter is "indecent", within the meaning of 18 U.S.C.

§1464, is unconstitutionally vague and unclear. Kaye, Scholer also demonstrated that the Bureau's determinations as to the issues posed in the proceeding were arbitrary, capricious and constituted an abuse of discretion. Kaye, Scholer's Application For Review is hereby incorporated herein by reference.[4]

On October 30, 1992, the Chief of the Mass Media Bureau issued a letter ruling in Daniel Becker, ___ FCC Rcd ___, DA 92-1503 (Mass Media Bureau, October 30, 1992), in response to a complaint filed with the Commission on behalf of Daniel Becker, a candidate for Congress in Georgia, against Television Station WAGA-TV, Atlanta, Georgia. That station had refused to air Mr. Becker's 30-minute campaign program entitled "Abortion In America: The Real Story" outside of the so-called "safe harbor" time period for indecent material[5], because the station argued that, to do otherwise, would violate 18 U.S.C. §1464. The Bureau stated, in Daniel Becker, that, until the Commission provides definitive guidance, it would not be unreasonable for a licensee to rely on a prior informal staff opinion in this area, as set

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4 For convenience, a copy of the Application For Review is annexed hereto as Exhibit 1.

5 At present, the Commission's "safe harbor" for indecent material is between the hours of 8 p.m. and 6 a.m. See Kansas City Television Ltd., 4 FCC Rcd 6706 (1989). However, the Commission has adopted rules that would restrict the "safe harbor" hours for commercial broadcast stations to the hours between the hours of 12 midnight and 6 a.m. See Report and Order In BC Docket No. 92-223, ___ FCC Rcd ___, FCC 93-42 (released January 22, 1993).

forth in Letter from Chairman Mark Fowler to Hon. Thomas A. Luken and to conclude that Section 312(a)(7) does not require a station to air, during hours outside of the "safe harbor", material that it reasonably and in good faith believes is indecent.

To date, the Commission has not acted on Kaye, Scholer's September 1, 1992 Application For Review. However, on October 30, 1992, the Commission issued its Notice in this proceeding to solicit public comment on the issues raised by the rulings described above. Specifically, the Commission solicited comment on all issues concerning what, if any, right or obligation a broadcast licensee has to channel political advertisements that it reasonably and in good faith believes are indecent. The Commission also sought comment as to whether broadcasters have any right to channel material that, while not indecent, may nonetheless be harmful to children. In this latter regard, the Commission invited comments on the proper scope of any such right and the standard by which the Commission should evaluate the reasonableness of broadcasters' judgments rendered in exercising that right. It thus appears that Commission action on Kaye, Scholer's Application For Review will be deferred pending receipt of comments in this proceeding.

For the reasons set forth below, Kaye, Scholer respectfully urges the Commission to expressly recognize that broadcasters have the right to "channel" all broadcast material -- including

candidate "uses" -- that they reasonably and in good faith believe to be indecent, within the meaning of 18 U.S.C. §1464. We also respectfully request the Commission to expressly recognize that broadcasters have the right to channel material that, while not indecent, may otherwise be harmful to children. In this regard, "channelling" refers to deferral of a broadcast to those hours when there is no reasonable likelihood of children being in the audience.

## II. Argument

As shown in Kaye, Scholer's Petition For Declaratory Ruling and in its Application For Review, failure by the Commission to expressly recognize a right by broadcasters to channel political and other material that they reasonably and in good faith believe to be indecent, would, in essence, force broadcasters to choose between violating 18 U.S.C. §1464, or violating Sections 312(a)(7) and 315 of the Communications Act. Furthermore, by forcing broadcasters to air material that they reasonably and in good faith believe to be indecent, the Commission would be impermissibly curtailing broadcasters' editorial discretion, as well as their ability to serve as public trustees by shielding impressionable young children from material that is likely to be harmful to them.

Similar considerations dictate that the Commission expressly recognize that broadcasters have the right to channel material

that, while not indecent, may otherwise be harmful to children, provided that broadcaster judgments as to the harmfulness vel non of the material are made reasonably and in good faith. A hypothetical situation will serve to illustrate the need for recognition of such a right.

For example, assume that a federal candidate requested "reasonable access" to prime time on a television station to present a "use" on behalf of his candidacy. Assume further that the candidate is running for public office on a platform against vivisection and cruelty to animals. If the candidate's "use" contained graphic depictions of an actual vivisection, it is questionable whether such material could reasonably and in good faith be viewed as "indecent", within the meaning of 18 U.S.C. §1464, given the Commission's prevailing standard for indecency. As noted above, indecent matter is defined as material:

> "... that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."
>
> Pacifica Foundation, 56 FCC 2d 94, 98 (1975); Infinity Broadcasting Corp., of Pennsylvania, 2 FCC Rcd 2705 (1987), reconsideration denied, 3 FCC Rcd 1930(1987).

Nonetheless, a broadcast licensee would be acting reasonably and in good faith if it determined that the graphic depiction of vivisection would likely be harmful to impressionable young viewers, and that, therefore, political broadcasts containing

such depictions should be channelling to later evening hours, notwithstanding the fact that the broadcasts are "uses", within the meaning of Section 315 of the Communications Act.[6]

Thus, the mere fact that a candidate proposes to air a "use", within the meaning of Section 315 of the Communications Act, should not guarantee to that candidate the right to demand the ability to cause harm to impressionable young children. The Commission should therefore defer to reasonable, good-faith judgments by broadcasters concerning unsuitability for children of political spots and programming, regardless of whether the material constitutes a "use", within the meaning of Section 315 of the Communications Act.

The proper scope of Commission review of broadcaster judgments in this area should be limited and should parallel the scope of review employed in the area of "reasonable access". The Commission has held, in evaluating broadcaster compliance with the "reasonable access" provisions of Section 312(a)(7) of the Communications Act, the applicable scope of Commission review

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[6] Indeed, television broadcasters have a special obligation to protect children. Congress has recognized the need to protect children in connection with television programming in its enactment of the Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, codified at 47 U.S.C. §§303a, 303b and 394. The Commission itself has also been solicitous to the viewing needs of children by adopting rules to implement the Children's Television Act of 1990. See Policies and Rules Concerning Children's Television Programming, 6 FCC Rcd 2111 (1991).

will be limited solely to determining whether the broadcaster has taken the appropriate factors into account and whether the broadcaster has acted reasonably:

> "In evaluating any 'reasonable access' complaint ... we apply a mode of analysis analogous to that which the courts use in reviewing discretionary decisions by an agency. In determining whether the agency violated the Administrative Procedure Act by acting in a manner that was 'arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law' (5 U.S.C. §706(2)(A)), the reviewing tribunal must take a hard look to see whether the decision 'was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). In the instant context, we may not simply substitute our de novo judgment regarding the access request and the networks' responses, but must 'judg[e] the objective reasonableness' of the networks' explanation of their actions. Straus Communications, Inc. v. FCC, 530 F.2d 1001, 1011 (D.C. Cir. 1976)."
>
> Carter-Mondale Presidential Committee, 74 FCC 2d 631, 642 n. 16 (1979), reconsideration denied, 74 FCC 2d 657 (1979), aff'd sub nom., CBS, Inc. v. FCC, 629 F.2d 1 (D.C. Cir. 1980) D.C. Cir. 1980, aff'd, 453 U.S. 367 (1981).

In its reconsideration order in Carter-Mondale Presidential Committee, supra, the Commission emphasized that:

> "... in carrying out our responsibilities under Section 312(a)(7) we will provide leeway to broadcasters and not merely attempt de novo to determine the reasonableness of their judgments under Section 312(a)(7)."
>
> Carter-Mondale Presidential Committee, 74 FCC 2d 657, 672 (1979).

In affirming the Court of Appeals' decision affirming the Commission's Carter-Mondale decisions, the Supreme Court stated:

> "If broadcasters take appropriate factors into account and act reasonably and in good faith, their decisions will be entitled to deference even if the Commission's analysis would have differed in the first instance. [Emphasis added.]"
>
> CBS, Inc. v. FCC, 453 U.S. 367, 387 (1981).

In CBS, Inc. v. FCC, the Supreme Court rejected the claim that Section 312(a)(7) of the Communications Act, as implemented by the Commission, violates the First Amendment rights of broadcasters by unduly circumscribing their editorial discretion. 453 U.S. at 394-397. However, the Supreme Court's determination to uphold the constitutional validity of Section 312(a)(7), as applied, rested, in large measure, specifically on the narrow scope of Commission review of broadcaster judgments under Section 312(a)(7). See 453 U.S. at 396.

The Commission's narrow scope of review over broadcaster judgments in relation to "reasonable access" was recently reaffirmed by the Commission:

> "As we concluded in 1978: '[A]lthough a candidate for Federal office is entitled under Section 312(a)(7) to varied broadcast times, such candidate is not entitled to a particular placement of his or her political announcement on a station's broadcast schedule. ... Additionally, there may be circumstances where 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 a licensee when and on what date a candidate's spot announcement or program should be aired.' Report and Order [Concerning Commission Policy In Enforcing Section 312(a)(7) of the Communications Act, 68 FCC 2d 1079,] 1091 [(1978)]. We reaffirm our longstanding policy ...."

Codification of the Commission's Political Programming Policies, 7 FCC Rcd 678, 682 (1991), on reconsideration, ___ FCC Rcd ___, FCC 92-210 (released June 11, 1992).

Thus, in determining whether a broadcaster has acted reasonably in channelling to later evening hours candidate "uses" that contain material that may be harmful to children, the Commission should merely assess whether the material in question could reasonably be said to be potentially harmful to impressionable younger viewers. If so, the Commission should recognize the broadcaster judgment as a reasonable one and should defer to it, even if the Commission's own analysis would have differed in the first instance. See CBS, Inc. v. FCC, 453 U.S. 367, 387 (1981). Moreover, the standard of review for assessing whether broadcaster's judgment was made in good faith should be whether the broadcaster's actions were intended to serve the political advantage of any candidate for public office. This is the standard of review by which the Commission judges whether a particular broadcast falls within one of the bona fide news program exemptions to Section 315(a) of the Communications Act. See Request For Declaratory Ruling That Independently Produced Bona Fide News Interview Programs Qualify For The Equal Opportunities Exemption Provided In Section 315(a)(2) Of The Communications Act, 7 FCC Rcd 4681, 4682 (1992). If the Commission concludes that the broadcaster's judgments were not intended to advantage any particular candidate over any other

opposing candidate, those judgments should be held to have been made in good faith.

## III. Conclusion

In sum, the Commission should recognize that broadcasters have the right (if not the duty), as public trustees, to attempt to protect impressionable children from exposure to shocking images and depictions that may be psychologically disturbing or harmful to them.[7] The standard of review and scope of review proposed herein will serve to implement such a right in a manner which will not unduly circumscribe broadcaster editorial discretion and which, at the same time, will be capable of implementation by the Commission with relative ease. Moreover, we respectfully request that the Commission expeditiously grant

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[7] In his concurring opinion in FCC v. Pacifica Foundation, 438 U.S. 726 (1978), Justice Powell emphasized:

> "[C]hildren may not be able to protect themselves from speech which, although shocking to most adults, generally may be avoided by the unwilling through the exercise of choice. At the same time, such speech may have a deeper and more lasting negative effect on a child than on an adult."

Id. at 757-758.

Kaye, Scholer's September 1, 1992 Application For Review for the reasons set forth therein.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

By: _____
Irving Gastfreund

The McPherson Building
901 15th Street, N.W.
Suite 1100
Washington, D.C. 20005

January 22, 1992

**Exhibit 1**

BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C. 20554

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|---|---|
| In the Matter of | ) |
| | ) |
| Petition for Declaratory Ruling | ) |
| Concerning Section 312(a)(7) | ) |
| of the Communications Act | ) |

**To: The Commission**

## APPLICATION FOR REVIEW


Irving Gastfreund, Esq.

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Suite 1100
Washington, D.C. 20005
(202) 682-3526


September 1, 1992

## Summary

The Mass Media Bureau's Letter Ruling is in conflict with established Commission precedent and policy governing the "reasonable access" provisions of Section 312(a)(7) of the Communications Act, the "no censorship" clause of Section 315(a) of the Communications Act, and governing the prohibition against the broadcast of "indecency" under 18 U.S.C. §1464. Furthermore, the Bureau's interpretation and application of Section 312(a)(7) of the Communications Act violates the First Amendment rights of broadcasters by unduly circumscribing their editorial discretion. In addition, in light of the Letter Ruling and other past precedent, the Commission's standard for assessing whether broadcast matter is "indecent", within the meaning of 18 U.S.C. §1464, is unconstitutionally vague and unclear. The Bureau's ruling that the types of graphic depictions here at issue are not "indecent", within the meaning of 18 U.S.C. §1464, involves a question of law or policy which has not previously been resolved by the Commission. The Bureau's determinations as to the issues posed in this proceeding are arbitrary, capricious and constitute an abuse of discretion. For all these reasons, expedited Commission review and reversal of the Bureau's determinations, as described more fully below, is warranted in the public interest.

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To: The Commission

## APPLICATION FOR REVIEW

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER ("Kaye, Scholer"), on behalf of its clients who are licensees of radio and television stations[1], pursuant to Section 1.115 of the Commission's Rules, hereby respectfully seeks review by the full Commission of the action taken by the Chief of the Commission's Mass Media Bureau in his August 21, 1992 letter (FCC Ref. 8210-AJZ/MJM) (hereinafter "Letter Ruling"), which denied Kaye, Scholer's July 29, 1992 Petition For Declaratory Ruling in this proceeding (hereinafter "Petition For Declaratory Ruling"). In support whereof, it is shown as follows:

### I. Introduction

Kaye, Scholer's Petition For Declaratory Ruling requested that the Commission issue a declaratory ruling that broadcast licensees may, consistent with the "reasonable access" provisions of Section 312(a)(7) of the Communications Act and the "no censorship" provision of Section 315(a) of the Communications Act, decline to broadcast, during hours when there is a reasonable risk that children may be in the audience, spot announcements or other programming constituting "uses", within the meaning of Section 315(a) of the Communications Act and Section 73.1941(b) of the Commission's Rules, (a) where such spot announcements or programming presents graphic depictions or descriptions of dead or aborted and bloodied fetuses or fetal tissue; and (b) where the licensee

---

[1] Kaye, Scholer, Fierman, Hays & Handler is a law firm with offices in Washington, D.C., New York, Los Angeles, Hong Kong and Brussels, which represents, among others, numerous television and radio stations. For the reasons set forth below, all television and radio licensees are adversely affected by the Mass Media Bureau's ruling in this case, which establishes a radically expanded scope of Commission review over broadcaster judgments in "reasonable access" cases. Hence, all of Kaye, Scholer's clients who are radio and television licensees are parties in interest in this proceeding.

reasonably concludes, in good faith, that the graphic depictions in question are "indecent", within the meaning of 18 U.S.C. §1464.[2]

In this latter regard, Kaye, Scholer's Petition For Declaratory Ruling demonstrated that the types of spot announcements at issue are "indecent", within the meaning of 18 U.S.C. §1464, as measured against the Commission's existing standard of review for assessing broadcast "indecency". Under the Commission's prevailing standard, indecency is defined as material:

> "... that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."
>
> Pacifica Foundation, 56 FCC 2d 94, 98 (1975); Infinity Broadcasting Corp. of Pennsylvania, 2 FCC Rcd 2705 (1987), reconsideration denied, 3 FCC Rcd 930 (1987).

"Indecency analysis will not turn on any mechanistic classification of language," but will, rather, depend largely upon the context in which the allegedly indecent speech was uttered. Infinity Broadcasting Corp., of Pennsylvania, 2 FCC Rcd at 2705-06. Material that dwells "on matters sexual and excretory, in a pandering and titillating fashion," will be actionable under 18 U.S. §1464, which prohibits the broadcast of "indecent" material.

Kaye, Scholer's Petition For Declaratory Ruling also demonstrated that the "reasonable access" provisions of Section 312(a)(7) of the Communications Act and the "no censorship" provision of Section 315(a) of the Communications Act do not compel a broadcaster to air a candidate "use" that contains "indecent" material, within the meaning of 18 U.S.C. §1464, during hours of the day when there is a reasonable risk that children may be in the audience. Kaye, Scholer noted, in its Petition, that the Commission's staff has previously reached the determination that:

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[2] Kaye, Scholer's Petition For Declaratory Ruling is hereby incorporated herein by reference.