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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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JAN 25 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-265
Development of Competition and Diversity in Video Programming Distribution and Carriage	)	

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COMMENTS OF ROCHESTER TELEPHONE CORPORATION

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FEDERAL COMMUNICATIONS COMMISSION
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Ms. Donna R. Searcy
Secretary
Federal Communications Commission
Washington, DC 20554

Re: MM Docket No. 92-254

Dear Ms. Searcy:

Transmitted herewith on behalf of Gillett Communications of Atlanta, Inc., licensee of WAGA-TV, Atlanta, Georgia, are an original and four (4) copies of its Comments in response to the Public Notice/Request for Comments, FCC 92-486, released October 30, 1992, in the above-referenced proceeding.

Should you or the staff have any questions, kindly contact the undersigned.

Sincerely yours,

Neal J. Friedman
Counsel for
Gillett Communications
of Atlanta, Inc.

Enclosures

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List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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 OF GILLETT COMMUNICATIONS OF ATLANTA, INC.

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January 22, 1993

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SUMMARY

The Commission in this proceeding seeks comment on whether licensees should be permitted to channel indecent political advertisements into the midnight to 6 A.M. "safe harbor" and whether political advertisements that are not indecent, but otherwise harmful to children, should also be channelled. Gillett Communications of Atlanta, Inc., licensee of WAGA-TV, Atlanta, Georgia ("Gillett") supports both proposals. Gillett also goes one step further. It urges the Commission to permit licensees to channel or reject outright political advertisements that contain shocking or offensive material that the station would not otherwise carry as not in the public interest.

Gillett has first-hand experience with this issue. In July, 1992, pursuant to the requirements of §312(a)(7) of the Communications Act of 1934, as amended, it aired a political advertisement containing graphic depictions of aborted fetuses. The station received 160 calls of protest, all of them blaming the station rather than the candidate. When the same candidate sought to air a 30-minute political advertisement that contained ever more graphic material at 4 P.M. on the Sunday preceding the November, 1992 election, WAGA-TV obtained injunctive relief from the United States District Court in Atlanta. The court found the advertisement was indecent under the law. On the same day, the Commission issued a letter to the candidate stating that licensees could channel political advertisements they reasonably and in good faith believed were indecent to the "safe harbor" and issued a request for public comment.

Permitting licensees to channel or even reject shocking and offensive political advertisements is faithful to §312(a)(7). Nowhere in the statute or its legislative history is there even a suggestion that Congress intended the reasonable access provision to cover the sort of unreasonable speech a tiny minority of candidates have sought to force broadcasters to air. These candidates, by admitting that their purpose in running for federal office was to get material on the air that would otherwise be rejected, have perverted and abused §312(a)(7). Broadcasters cannot be faithful to their public trust if they must sacrifice that trust at the whim of a candidate who seeks only to shock or titillate. Permitting licensees to make reasonable good faith judgments on the acceptability and placement of political advertising in the same manner as they do with all other material that goes over the air and for which they bear ultimate responsibility will protect the public interest without doing violence to the rights of political speakers.

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Concerning Section 312(a)(7)	)	
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TO: The Commission

COMMENTS OF GILLETT COMMUNICATIONS OF ATLANTA, INC.

Gillett Communications of Atlanta, Inc. ("Gillett"), licensee of WAGA-TV, Atlanta, Georgia, by its attorneys, hereby submits its Comments in response to the Public Notice/Request for Comments, 7 FCC Rcd 7297 (1992) ("Notice"), in the above-captioned proceeding.

1. The Commission seeks comments in this proceeding on two issues related to political broadcasting: (1) Whether licensees may channel material they reasonably believe, in good faith, to be indecent to the midnight to 6 A.M. "safe harbor" and (2) whether licensees may similarly channel material that is not indecent under the law, but which the licensee reasonably believes in good faith is harmful to children.[1/]

I. BACKGROUND

2. Gillett was plaintiff in Gillett Communications of Atlanta, Inc. d/b/a WAGA-TV v. Daniel Becker, Becker for Congress Committee and the Federal Communications Commission, No. 1:92-CV-2544-RHH, 1992 U.S. Dist. LEXIS 17366, 20 Media L. Rep. 1947 (N. D. Georgia, October 30, 1992), appeal docketed, No. 92-9080, October

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[1/] Gillett has broadened this issue to include other sensitive members of the audience in addition to children.

30, 1992 ("Gillett Decision").[2] In that proceeding, Gillett obtained declaratory and injunctive relief in the United States District Court for the Northern District of Georgia, Atlanta Division, against the Commission and the Becker campaign.

3. Becker, a candidate for the United States Congress from the Ninth Congressional District of Georgia, had sought to air a 30-minute political advertisement on WAGA-TV at 4:00 P.M., immediately following the telecast of the Atlanta Falcons football game, on the Sunday preceding the November 4, 1992 election. Becker had previously aired a one-minute political advertisement at 7:58 P.M. on WAGA-TV on Sunday, July 28, 1992, which graphically depicted aborted fetuses. Becker, who had made his opposition to abortion the major focus of his campaign, planned to show footage of two abortions being performed as well as pictures of aborted fetuses during the proposed half-hour political broadcast.

4. In the 48 hours following the broadcast of the first Becker spot, WAGA received approximately 160 telephone calls from viewers, all of them opposing broadcast of the graphic footage shown in the tape. The callers unanimously condemned WAGA-TV for permitting the broadcast at an hour in which substantial numbers of children were in the audience. See Affidavit of Jack Sander, president and general manger of WAGA-TV, attached to Plaintiff's Application for Temporary Restraining Order and Petition for Declaratory Judgment at Appendix A.

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[2] Gillett's pleadings and the opinion of the court are attached as Appendix A for the convenience of the reader.

5. Becker was involved in a run-off election scheduled for August 11, 1992. WAGA-TV anticipated that Becker would attempt to air the same or similar tape during the run-off election and requested that the Commission issue a declaratory ruling giving it the right to channel the Becker spot, which it deemed indecent, into the "safe harbor" hours of midnight to 6:00 A.M. in which the Commission permits the broadcast of "indecent" material. The Commission failed to rule before the run-off election, but in a letter ruling issued ten days after that election, the Commission determined that the initial Becker spot was not indecent under the law. Gillett Communications of Atlanta, Inc. and Kaye, Scholer, Fierman, Hays and Handler, DA 92-1160 (MMB), released August 21, 1992. The Bureau concluded that the advertisement was not indecent and that licensees could not "channel" the ad to the indecency "safe harbor" without risking violation of Sections 312(a)(7) and 315 of the Communications Act of 1934, as amended.

6. Barely days before the November 3, 1992 general election, Becker notified WAGA-TV that he wanted a half-hour of time on the Sunday preceding the election, immediately following the telecast of the Atlanta Falcons football game on the station. WAGA-TV provided Becker with availabilities and prices pursuant to § 312(a)(7). It also requested and received an advance copy of the videotape from Becker. Upon review, the station determined that the graphic footage of abortions and aborted fetuses rendered the tape indecent under the law and, in any event, not suitable for viewing by the large number of children who would be in the television audience at

that hour of the day. Because of the time constraints involved, WAGA-TV believed that it had a greater likelihood of obtaining a decision before the scheduled broadcast from the United States District Court rather than seeking a declaratory ruling at the Commission.[3/] In the Gillett Decision, the court held that Becker's 30-minute graphic political spot was "indecent" under the law and that WAGA-TV could channel it into the "safe harbor." On the same day that the court released the Gillett Decision, the Commission staff issued a letter to Becker, DA 92-1503, released October 30, 1992 ("Becker Letter") in response to his complaint against WAGA-TV stating that it would not be unreasonable for a licensee to rely on a 1984 letter from then-Chairman Mark S. Fowler, which held that 18 U.S.C. 1464, which prohibits the broadcast of obscene or indecent material, is an exception to Section 315 of the Communications Act. See Letter from Mark S. Fowler to Honorable Thomas A. Luken ("Luken Letter"), dated January 18, 1984. The Commission also released on the same day the Notice that is the subject of this proceeding.

[3/] The Court's decision focused on both jurisdictional and substantive issues. The Commission argued that it had primary jurisdiction to decide the matter but the Court disagreed citing "the time crunch in which the litigants find themselves and the importance of the issues involved." Gillett Decision at p.6 The Court expressed doubt that the Commission would be able to reach a decision in the two days before the scheduled broadcast. Moreover, the District Court determined that it, not the Commission, had jurisdiction because the Becker matter involved a legal question, not a factual matter in which the agency's expertise would be required. Id. at p. 5.

II. LICENSEES SHOULD HAVE THE DISCRETION TO CHANNEL INDECENT MATERIAL INTO THE SAFE HARBOR

7. In the instant proceeding, the Commission seeks comment as to whether broadcasters have a right to channel indecent speech into the "safe harbor." Until the Gillett Decision, there was no reported opinion either by the Commission or the federal courts as to the right of a broadcaster to channel indecent political speech. The Gillett Decision now provides the Commission clear guidance in this difficult area and affirms the view of the Luken Letter.

8. The Commission now has the opportunity to forge the Luken Letter and the staff opinion into policy. The public interest benefits of such a policy cannot be minimized. It is well-established that the rights of viewers and listeners are paramount. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1968). Increasingly, candidates for federal office are taking advantage of §§ 312(a)(7) and 315 to force stations to air graphic material that they would not otherwise permit on the air. In 1992 a number of candidates stated publicly that they were not so much interested in getting elected as they were in having the opportunity to put their message on television against the will of licensees. See ¶ 10, infra. Some stations, confronted with graphic anti-abortion spots as issue advertising, determined that they were not required by §312(a)(7) to air the spots and exercised their independent editorial judgment and chose not to do so. For example, WIVB-TV in Buffalo turned down spots from Operation Rescue, an anti-abortion group, while two other stations exercised their independent discretion to air the adver-

tisement. See New York Times, June 11, 1992, Section A, p. 18.[4] CNN and local stations in Philadelphia and Washington required pro-abortion groups to submit documentation supporting claims in their advertisements before the spots could run. Id. However, because Becker was a legally qualified candidate for federal office, this option was not open to WAGA-TV.

9. WAGA-TV's experience demonstrates that the initial Becker political advertisement offended a large number of persons in the audience. See ¶ 4. The experience elsewhere has been similar. When Becker's graphic abortion spot first ran on WTBS-TV, Atlanta during a Braves baseball telecast, the station's switchboard was so jammed with protests that callers who could not get through called the local newspaper. See Atlanta Journal and Constitution, July 4, 1992, Section A, p. 1. And when Becker's 30-minute abortion spot aired on WVEU-TV, Atlanta at 9 P.M. on October 30, 1992, the station reported receiving 100 calls, 75 percent of them protesting the airing of the ad. See Atlanta Journal and Constitution, November 1, 1992, Section C, p. 8.

10. At least 13 other candidates for federal office took advantage of §312(a)(7) to show graphic abortion spots. See New York Times, December 6, 1992, Section 1, p. 26. Michael Bailey, the first candidate to air graphic abortion spots, freely admitted that he was running for office in order to get the graphic material, which some stations had previously rejected, on the air. "TV

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[4] Newspaper articles referenced in these Comments were obtained from the NEXIS computerized database. Printouts of the entire text of each cited article are attached as Appendix B.

stations never accepted my pro-life scripts before. Running for Congress gave me the opportunity to say, 'Hey, you've got to run them.' " See New York Times, June 11, 1992, Section A, p. 18.

11. There is ample precedent to permit licensees to channel indecent political speech to protect children in their audience.[5/] The Supreme Court has held that the government's interest in "safeguarding the physical and psychological well-being of a minor" is compelling. New York v. Ferber, 458 U.S. 747, 756-57 (1982). "The linchpin of indecency enforcement is the protection of children from inappropriate broadcast material." Action for Children's Television v. FCC, 852 F.2d 1332, 1340 (D.C. Cir. 1988). The stated purpose of indecency enforcement is to "shelter children from exposure to words and phrases their parents regard as inappropriate for them to hear" (or in this instance, to see). Id. The extent to which a broadcast is indecent focuses on whether it is readily understandable to children in the audience. Id.

12. Nor can the sensitivities of adults in the audience be ignored. No amount of warning can protect an unsuspecting adult against a brief political spot containing indecent material. The effect of such material on adults, when presented purely for its shock value, can be devastating. Viewers watching television during

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[5/] Gillett here wishes to emphasize that a distinction should be drawn between its support of a proposal to allow a licensee to channel speech it believes is indecent to a "safe harbor" and proposals that would require licensees to channel indecent speech to a "safe harbor." Gillett herein expresses no opinion on the larger issue of "indecent" speech on radio and television except that, as a matter of policy, such speech is not permitted on WAGA-TV nor on any other station owned by its corporate parent.

election campaigns should not be burdened with the constant worry that they will be assaulted with indecent material without warning.

13. Channelling indecent political programming into the "safe harbor" will not impact on the First Amendment rights of candidates. Gillett recognizes that political speech is entitled to the highest Constitutional protection. See, e. g., FCC v. League of Women Voters of California, 468 U.S. 364, 375-376 (1984)(invalidating ban on editorializing by recipients of grants from the Corporation for Public Broadcasting, in part on ground that political speech "is entitled to the most exacting degree of First Amendment protection"). As the Gillett Decision noted, its order "does not deprive Defendant of the ability to air his advertisement on Plaintiff's programming. It merely channels what is decidedly indecent material to a time slot that sufficiently reduces the chances of injury to the 'psychological well-being' of minors in the community." Id. at p. 14.

14. Channeling would be a reasonable "time, place and manner restriction" on speech. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). Time, place, and manner restrictions are not subject to strict scrutiny and are sustainable if they are content-neutral, are designed to serve a substantial governmental interest, and do not unreasonably limit alternative means of communication. Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986). The Supreme Court has upheld such restrictions so long as they are "narrowly tailored" to serve a significant governmental interest. Clark v. Community for Creative Non-Violence, supra, at

293. Compare, Eu, Secretary of State of California, et al. v. San Francisco County Democratic Central Committee et al., 489 U.S. 214 (1989) (blanket restriction on endorsements of political candidates found to be an unreasonable time, place and manner restriction on speech). Affording licensees the right to channel programming they, in good faith, believe to be indecent into a "safe harbor" is content-neutral in that it would apply to all speech the licensee deemed indecent, it would be narrowly-tailored to serve the significant government interest of protecting children in the audience and it would not unduly restrict alternate means of communication.

15. This last point is critical. As noted in ¶ 9, supra, Becker was able to air his graphic 30-minute abortion spot on another Atlanta television station even after the Gillett Decision. The Commission and the Bureau have declined to render indecency rulings in advance of broadcast. See Becker Letter, supra; Letter to Christian Action Network (MMB, released June 12, 1992). In the Becker Letter the Commission's staff said that it believed that it would not be unreasonable for a licensee to rely on the Luken Letter and "conclude that Section 312(a)(7) does not require it to air, during hours outside the 'safe harbor,' material that it reasonably and in good faith believes is indecent." The Gillett Decision provides further guidance as to what may be considered indecent in the context of protected political speech concerning the abortion issue. Specifically, the court noted the "graphic depictions and descriptions of female genitalia, the uterus, excreted uterine

fluid, dismembered fetal body parts and aborted fetuses" as examples of indecent material in the Becker advertisement. Gillett Decision at p. 11.[6] The court also found that this portion of the video tape depicts these activities and materials in a manner which is "patently offensive according to contemporary community standards." Id.

16. A Commission policy consistent with the Gillett Decision would allow licensees to protect children in the audience against the unexpected intrusion of patently offensive material. Gillett Communications of Atlanta, Inc., therefore, respectfully requests that the Commission adopt a policy that would permit a licensee to channel political advertisements that it reasonably and in good faith believes are indecent to the "safe harbor" in which such material may otherwise be aired.

III. LICENSEES SHOULD BE PERMITTED TO CHANNEL MATERIAL THAT IS NOT LEGALLY INDECENT, BUT OTHERWISE HARMFUL TO CHILDREN

17. The second issue raised in the Commission's Notice, whether broadcasters have any right to channel material that, while not indecent, may be otherwise harmful to children, presents a much more difficult issue. Modern political campaigns have come a long way from the promise of a "chicken in every pot and a car in every garage." America in the late 20th century grapples with complex and emotional political issues. A child exposed to an advertisement or

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[6] In its previous ruling of August 21, 1922, the Mass Media Bureau staff confused the words "excretory" as used in the legal definition of indecency with the separate word "excrement," which it incorrectly used as the basis for determining that the depictions the court cited were not indecent.

longer-form programming discussing economic issues, for example, is not likely to have any interest in or understanding of such material and, more importantly, would not suffer any adverse effects to its psychological well-being. But, to take one example of a controversial issue in the United States today, what if a candidate running a campaign for or against capital punishment decided to show footage of an actual execution? Or, what if a candidate pledging to crack down on drunk driving decided to show grisly footage of automobile accidents depicting shattered bodies? Neither of these would fit neatly into the Commission's definition of indecency since it does not encompass "sexual or excretory activities or organs." Such material, however, may nevertheless be patently offensive to substantial portions of the television audience, and traumatic beyond belief to many viewers.

18. WAGA-TV, out of respect for its audience, exercises careful discretion in the programming and commercial matter it airs. It would not knowingly air indecent material at any hour. WAGA-TV would not broadcast footage of an execution or grisly automobile accidents even in news or public affairs programming designed to inform the audience of these issues of public importance. The station believes that there are ways to use the powerful television medium to inform the audience without shocking or offending the viewer. Station management carefully reviews all program and commercial material before broadcast to ensure that it meets the station's standards of good taste. No written guidelines exist as it would be impossible to craft a policy that would cover all

possible instances. Rather, Gillett relies on the good judgment of its managers in Atlanta to determine the suitability of programs for broadcast based on their intimate knowledge of contemporary community standards.[7]

19. That option is not available to WAGA-TV and other licensees under current law. A candidate for public office is able to force a licensee to air programming that it would otherwise not broadcast even if the licensee felt that material did not meet the station's broadcast standards and would shock or offend its audience. This is precisely what happened in the instance of the first Becker broadcast and why, when faced with even more graphic material, Gillett sought relief from the United States District Court in Atlanta.

20. The First Amendment rights of political advertisers cannot be ignored. Section 315 of the Communications Act prohibits broadcasters from censoring political advertisements. Its purpose is to prevent discrimination against candidates and to allow them a full opportunity to present their views to the public. KVUE, Inc. v. Austin Broadcasting Corporation, 709 F.2d 922 (5th Cir. 1983), aff'd, 104 S.Ct. 1580 (1984). As discussed more fully at ¶ 13, supra, political speech is entitled to the highest Constitutional protection. But, the Supreme Court has also held that the government's interest in "safeguarding the physical and psychological

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[7] This policy extends to each of the stations WAGA-TV's corporate parent controls. As a matter of company policy, local managers have broad discretion over their station's operating policies.

well-being of a minor" is compelling as well. New York v. Ferber, 458 U.S. 747, 756-57 (1982).

21. The pervasive, indeed the invasive, influence of television is well established. WAGA-TV and other broadcasters recognize they are guests in the viewers' homes. As such, they must behave properly. Just as an individual would not present offensive material as a guest in another's home, the responsible licensee would not do so either. An individual might present such material with the consent of his or her host, secure in the knowledge that children would not be inadvertently exposed to the material. That option is not open to the broadcaster. Over the years, WAGA-TV and other broadcasters have developed a certain reputation for programming. In Atlanta, viewers have come to know that they will not see indecent or patently offensive programming on WAGA-TV. They knew they and their children could watch the station confident that they would not be surprised by offensive material. At least that was the case until the July, 1992, airing of the Becker political advertisement with its graphic and shocking scenes of aborted fetuses. The unprecedented outpouring of viewer response to material that the Commission determined was not indecent demonstrates that WAGA-TV's viewers were surprised and offended by what they saw and heard on the station on that July evening and were most unhappy about it. That single broadcast did substantial, perhaps irreparable, damage to WAGA-TV's reputation in the Atlanta community.

22. If safeguarding the physical and psychological well-being of a minor is of compelling interest, New York v. Ferber, supra, and

if the linchpin of indecency enforcement is the protection of children from inappropriate broadcast material, Action for Children's Television v. FCC, supra, then broadcasters must be afforded the ability to protect children in their audience against other such inappropriate material that does not fall within the legal definition of indecency, but which the licensee reasonably and in good faith believes is equally inappropriate for children.

23. To require a broadcaster to air material that it would not otherwise broadcast under color of §§ 312(a)(7) and 315 of the Communications Act is forced speech of the most abhorrent nature. The Supreme Court in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974) struck down a Florida statute that would have required newspapers in that state to grant a right of reply to candidates who did not win the newspaper's editorial endorsement. It was a print version of the Commission's former fairness doctrine. The Court, in subsequent decisions, declined to extend Tornillo to broadcasting on the ground of "spectrum scarcity." Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 101 (1973). But the Court invited the Commission or the Congress to send a signal "that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." FCC v. League of Women Voters of California, 468 U.S. 364, n. 11.

24. This proceeding may, at last, give the Commission the opportunity to send such a signal and put to rest the ancient and fallacious argument that "spectrum scarcity" is a basis for re-

stricting the First Amendment rights of broadcasters. The Commission's recent report, Broadcast Television in a Changing Video Marketplace, 6 FCC Rcd 3996 (1991) and the accompanying rule making proceeding, Review of the Policy Implications of the Changing Video Marketplace, 6 FCC Rcd 4961 (1991), detailed the burgeoning number of sources of expression available. Digital compression will allow today's single-channel telecaster to offer multiple channels. Cable operators are already planning to replace their present 30- to 50-channel systems with new plants that will offer the viewer up to 500 choices of programming! Inexpensive, easy-to-operate video equipment allows virtually anyone to become the 20th Century high-tech reincarnation of the Revolutionary pamphleteer.[8] It is, therefore, time for the Commission to send the signal that the League of Women Voters Court requested.[9]

25. Gillett proposes that licensees be permitted to make a reasonable good faith judgment that material presented to them by a legally qualified candidate for public office may be rejected or channeled to another daypart on the ground that the licensee would

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[8] The Becker tape, aside from the four and one-half minute controversial segment, consisted primarily of a tape of Becker delivering a campaign speech, which appears to have been shot with a home video camera.

[9] The National Association of Broadcasters in its Reply Comments in MM Docket 91-168 on August 23, 1991 questioned the constitutionality of the Commission's political broadcasting rules and attached a memorandum analyzing the constitutional issues. This matter is beyond the scope of this proceeding, but it may be one that the Commission will wish to address voluntarily or other parties may raise before the Commission or in the courts in the context of other proceedings related to the political broadcasting rules.

not otherwise broadcast such material. The burden would be upon the licensee to demonstrate that such material would not otherwise be broadcast either by example of a prior rejection of similar material, a station's pre-existing written policy or by the sworn statement of the licensee that acceptance would violate its general guidelines, written or unwritten, regarding the acceptance of broadcast material. As noted at ¶ 18, supra, it may not be feasible in all cases to prepare written guidelines for the acceptability of broadcast material. Gillett respectfully suggests that the Commission steer away from requiring licensees to draft written guidelines for acceptability or attempting to draft its own. It would be impossible to prepare guidelines that would cover all potential situations. Rather, the Commission should consider these matters on a case-by-case basis under a general standard of reasonableness.

26. This approach would require a spirit of cooperation on all sides. Licensees would have to be reasonable in their willingness to accept political material in order not to impede candidates' rights to deliver their message to the public. Candidates would have to have some sensitivity to the television audience and not put material on solely for its shock value. WAGA-TV would have been pleased to carry Becker's program if it were audio only or if the four and a half minute offending segment were not present. Additionally, candidates would have to be willing to afford licensees and the Commission a reasonable amount of time to react to the material, rather than submitting material days before an

election. Finally, the Commission must be prepared to rule promptly in order to afford all parties an opportunity to react in advance of the scheduled airdate.

IV. GILLETT'S PROPOSAL WILL NOT DENY "REASONABLE ACCESS" TO CANDIDATES

27. Opponents will no doubt argue that Gillett's proposal is inconsistent with the "reasonable access" mandate of §312(a)(7). There is no basis for such an argument. The 1972 amendment to the Communications Act adding §312(a)(7) was part of Federal Election Campaign Act, P.L. 92-225, 86 Stat. 3. The Senate Report accompanying the bill described its purpose as giving "candidates for public office greater access to the media so that they may better explain their stand on issues, and thereby more fully and completely inform the voters ." S. Rep. No. 92-96, reprinted in 1972 U.S. Code Cong. & Ad. News 1822 (emphasis added). Nowhere in the legislative history, the Act itself, or in any interpretation by either the Commission or the courts is there reference to any stated purpose of informing anyone but voters.

28. The voting age in the United States is 18, which is also the age of majority in most states. No children are entitled to vote; therefore channelling indecent political speech into those hours when children are not likely to be in the viewing audience will not deny candidates reasonable access if they insist upon including such material as part of their message. Both the Gillett Decision and the Luken Letter have affirmed the right of a licensee to use its reasonable, good faith judgment in channelling indecent political speech.

29. The Commission must balance the interests of an informed electorate against protecting children from indecent speech. As noted at n. 8, supra, only four and a half minutes of the 30-minute Becker advertisement contained material the court found to be indecent. The rest of the tape contained nothing that could be even remotely considered as indecent and Gillett would have aired it in any daypart the candidate wished. Thus, the electorate could be informed of Becker's message either by means of some judicious editing that would permit it to appear in any daypart or by channelling it into the "safe harbor." Balanced against the overarching public interest in protecting children from indecent speech, the scales tip in favor of the Gillett proposal.

30. But moving indecent speech into the "safe harbor" does not resolve the entire issue. What about speech that is not indecent? What about speech that is, in the reasonable good faith judgment of the licensee, racist? Or bigoted? Or shocking to the sensitivities of persons in the audience? Or speech that would violate every programming policy of the station? Or speech that would not under any circumstances serve the public interest?

31. The word "reasonable" before the word "access" in §312(a)(7) has a meaning and it means more than the amount of time afforded a candidate or the daypart in which the candidate presents his or her message. Did Congress have in mind, when it enacted §312(a)(7), the candidate such as Bailey who wanted to be able to present graphic advertisements to licensees that they had previously rejected so as to be able to tell them, "Hey, you've got to run

them."? Did Congress believe, when it enacted §312(a)(7), that candidates seeking protection under the reasonable access provision would have in mind such unreasonable speech as graphic depictions of abortions, horrible automobile accidents or executions, racist or bigoted speech? There is nothing in the law or its legislative history to suggest anything other than that Congress had in mind the sort of reasonable speech that they themselves and their opponents engaged in.

32. Congress, in adopting §312(a)(7) noted, "The presentation of legally qualified candidates for public office is an essential part of any broadcast licensee's obligation to serve the public interest." S. Rep. No. 92-96, reprinted in 1972 U.S. Code Cong. & Ad. News 1781. The authors could not have dreamed that a candidate would show up at a radio or television station with graphic, racist, bigoted, shocking advertisements and announce, "Hey, you've got to run them." A licensee must be able to make a reasonable good faith determination that graphic, racist, bigoted, shocking material, even when presented by a legally qualified candidate for public office, is not in the public interest and reject such material outright.

33. If Congress had envisioned absolute access, it would have said so. Instead, it mandated reasonable access. The Commission has determined that it will make decisions regarding reasonable access on a case-by-case basis pursuant to the guidelines established in CBS, Inc. v. FCC, supra. Codification of the Commission's Political Programming Policies. 7 FCC Rcd 678 (1991). The CBS,Inc.