

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DUPLICATE

GILLETT COMMUNICATIONS OF
ATLANTA, INC., d/b/a WAGA-TV5,

Plaintiff,

v.

DANIEL BECKER, DANIEL BECKER
FOR CONGRESS COMMITTEE, and
THE FEDERAL COMMUNICATIONS
COMMISSION,

Defendants.

CIVIL ACTION

FILE NO. 1:92-CV-2544-RHH

**PLAINTIFF'S SUPPLEMENTAL BRIEF IN SUPPORT OF
APPLICATION FOR TEMPORARY RESTRAINING ORDER
AND PETITION FOR DECLARATORY JUDGMENT**

Pursuant to the direction of this Court, Plaintiff Gillett Communications of Atlanta, Inc. d/b/a WAGA-TV ("WAGA-TV") files this Supplemental Brief in support of its Application for Temporary Restraining Order and Petition for Declaratory Judgment. Specifically, WAGA-TV addresses the jurisdiction and exhaustion of administrative remedies issues raised by the Court.

I THIS COURT HAS JURISDICTION OVER THIS MATTER AND SHOULD EXERCISE IT IN THIS CASE

Contrary to the assertions of the Defendants, this Court has jurisdiction over this matter, and ought to exercise it. The Court's jurisdiction over this matter is based on 28 U.S.C. § 1331, since this action arises under federal law. Specifically, this case arises under 47 U.S.C. §§ 312(a)(6)-(7), 315, and 18

U.S.C. § 1464. Jurisdiction is proper in this Court, and not the Eleventh Circuit or the D.C. Circuit because this is not a case falling within the exclusive jurisdiction of the federal courts of appeal. 28 U.S.C. § 2342 provides:

The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

(1) all final orders of the Federal Communications Commission

28 U.S.C. § 2342. This case does not involve a "final order" of the FCC. In fact, there is no order from the FCC that WAGA-TV asks this court to address, let alone a final order. WAGA-TV merely asks this Court to make an emergency determination, in line with the FCC's only pronouncement on this issue in its 1984 memorandum (attached to Application), that Becker's paid political program is indecent under 18 U.S.C. § 1464, and that it therefore may properly be channeled to the safe harbor hours between midnight and 6:00 a.m. (See Section III, infra.) Thus, neither the Eleventh Circuit nor the D.C. Circuit has exclusive jurisdiction over this matter,¹ and this Court can rule upon it.

WAGA-TV recognizes that the Federal Communications Commission ("FCC") has the primary responsibility to enforce the

¹It should be noted that if there was a final order from the FCC, which there is not, then jurisdiction over the appeal of that order would be proper in either the Eleventh Circuit or the D.C. Circuit, not solely the D.C. Circuit as Defendants argue. The D.C. Circuit enjoys exclusive jurisdiction only over the appeal of certain specified decisions relating to licensing and construction permits, none of which apply to the relief sought in this action. See 47 U.S.C. § 402(b).

indecentcy prohibitions of 18 U.S.C. § 1464 with respect to broadcast licensees. However, the FCC completely failed to exercise that responsibility when it did not act on WAGA-TV's petition concerning Becker's previous, much less graphic advertisement until nearly two-weeks after the August run-off election for which the petition was filed. WAGA-TV received the much more graphic, 30-minute program at issue here only six days prior to the time Becker wanted to broadcast it. The FCC's failure to act in a timely manner with respect to the previous ad despite being given a fair opportunity to do so makes it perfectly clear that petition to the FCC in this case would be completely futile.

The equivocal, noncommittal response given by the United States' Attorney when asked by the Court whether the FCC would rule on Becker's complaint against WAGA-TV prior to Sunday, November 1, illustrates exactly WAGA-TV's point. The FCC is a political animal and as such is difficult to pin down, and its decisions are subject to bias. See CBS, Inc. v. F.C.C., 453 U.S. 367, 419 & n.* (1981) (White, J., dissenting). In this case, the FCC's own attorney could not tell the Court, when asked, whether her client would make a decision on Becker's complaint prior to Sunday. It is in this environment of extreme uncertainty that WAGA-TV brings this matter before the Court. Without judicial intervention by this Court, WAGA-TV will be forced to broadcast material which is patently offensive as measured by contemporary community standards and potentially harmful to children, all under the cloak of "political speech". All the while, the FCC

has given every indication that it intends to do nothing but sit on its hands.

Further, WAGA-TV need not exhaust its alleged administrative remedies in this case since all such "remedies" would be completely futile given the emergency nature of this action and the manifest inability and/or unwillingness of the FCC to rule in a timely fashion. The "remedies" Defendants assert WAGA-TV should have pursued in this case are found in 47 U.S.C. § 405. However, that provision encompasses only situations where an appeal is taken from an "order, decision, report, or action" taken by the Commission. This is not an appeal from any such decision, and as such, the "remedies" contained in Section 405 are simply inapplicable.

Federal district courts have frequently intervened to award injunctive and declaratory relief during the pendency of proceedings before a federal agency. It is well settled that the application of the exhaustion of administrative remedies doctrine is within the sound discretion of the trial court. Southeast Alaska Conservation Council v. Watson, 697 F.2d 1305, 1309 (9th Cir. 1983); Dow Chemical USA v. Consumer Product Safety Commission, 459 F. Supp. 378, 389 (W.D. La. 1978) . Numerous cases have held that exhaustion of administrative remedies

is not required where administrative remedies are inadequate or not efficacious, where pursuit of administrative remedies would be a futile gesture, where irreparable injury will result unless immediate judicial review is permitted, or where the administrative proceeding would be void.

Southeast Alaska Conservation Council, 697 F.2d at 1309 (district court had jurisdiction to enjoin, pending reconsideration by the Forest Service, and to set forth guidelines for the Forest Service to use in deciding the factual issue presented). See also Lyons v. U.S. Marshals, 840 F.2d 202, 205 (3d Cir. 1988) (exhaustion doctrine not intended to preclude judicial relief, but merely to postpone the timing of it; however, exhaustion is not required if administrative remedies would be futile or if the administrative procedure is clearly shown to be inadequate to prevent irreparable injury, and pre-trial detainees may seek injunctive relief in federal district court); Atlantic Richfield Co. v. United States Dept. of Energy, 769 F.2d 771 (D.C. Cir. 1984) (in action for declaratory and injunctive relief from administrative levy of discovery sanctions in two proceedings before the Department of Energy involving price control regulations, exhaustion is not required where, as here, it is "highly unlikely that the [agency] would change its position"); Hark v. Dragon, 611 F.2d 11, 14 (2d Cir. 1979) (plaintiffs seeking injunctive and declaratory relief and class certification may proceed in district court where exhaustion of administrative remedies probably would have been futile and where public interest in resolution of the issue at the earliest appropriate opportunity was great); Far West Federal Bank, S.B. v. Director, Office of Thrift Supervision, 744 F. Supp. 233, 238 (D. Ore. 1990), aff'd, 930 F.2d 883 (Fed. Cir. 1991) (no exhaustion required where remedies would be futile, the outcome "preordained", and where matter must be quickly resolved for the

thrift industry); Dow Chemical, 459 F. Supp. at 388-389 (W.D. La. 1978) (action to enjoin and restrain Consumer Product Safety Commission from enforcing or applying interim regulations may proceed in district court, and exhaustion requirement does not apply, since exhaustion requirement presupposes that the remedy is an effective one, and is available "more or less immediately"). Under these standards, exhaustion of administrative remedies is not required in this case. Thus, this Court has jurisdiction over this action, and it should exercise it because of the clear futility of administrative relief in this emergency matter.

Simply put, if this Court does not grant the relief WAGA-TV seeks, WAGA-TV will be forced to broadcast Becker's program and thereby subject many thousands of children to unnecessary psychological and emotional trauma. The FCC has given no indication that it will issue any decision relating in any way to this case or this particular program prior to the time it is supposed to be broadcast. Since the "linchpin" of indecency enforcement is the protection of children in the viewing audience, WAGA-TV submits that the Court should exercise its discretion to protect the children in WAGA-TV's viewing audience by granting the relief it seeks.

II. WAGA-TV HAS SATISFIED ALL THE PREREQUISITES FOR PRELIMINARY INJUNCTIVE RELIEF.

Like the exhaustion of administrative remedies doctrine, the grant or denial of preliminary injunctive relief is within the

discretion of the trial court. Haitian Refugee Center, Inc. v. Nelson, 872 F.2d 1555, 1561 (11th Cir. 1989), aff'd, 111 S. Ct. 888. That discretion is guided by four requirements for granting such relief:

- (1) a substantial likelihood of success on the merits;
- (2) the suffering of irreparable injury if the injunctive relief is not granted;
- (3) the threatened injury to the movant outweighs the potential harm to the opposing party; and
- (4) the relief sought is not adverse to the public interest.

Id. at 1561-1562. WAGA-TV meets all four of these requirements. First, WAGA-TV has shown a substantial likelihood of success on the merits in that it has presented persuasive evidence that Becker's program is indeed indecent, and that it should and ought to be channeled to the safe harbor hours between midnight and 6 a.m. Second, WAGA-TV has shown that WAGA-TV's reputation and standing in the community will be irreparably injured, and the children in WAGA-TV's viewing audience irreparably harmed, if this relief is not granted. Third, WAGA-TV has shown that the threatened harm to it and the children in its viewing audience outweighs the potential harm to Becker and his Campaign if he is merely required to move his paid political program to a time period when children, who cannot vote, are not likely to be in the viewing audience. Fourth, the relief WAGA-TV seeks is clearly in the public interest--the protection of children from exposure to shocking and indecent television programming. For these reasons, WAGA-TV submits that it has met the prerequisites for the relief sought.

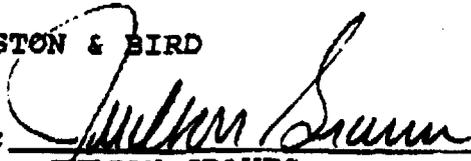
III THE SAFE HARBOR HOURS FOR THE BROADCAST OF INDECENT MATERIAL ARE BETWEEN THE HOURS OF MIDNIGHT AND 6:00 A.M.

Finally, Congress, the President and the FCC have all stated clearly that the "safe harbor" hours for the broadcast of indecent material are between the hours of midnight and 6:00 a.m. Specifically, the Telecommunications Act of 1992, signed into law on August 29, 1992 by President Bush, requires the FCC to implement regulations prohibiting the broadcast of indecent material "between 6 a.m. and 12 midnight" for broadcasters like WAGA-TV. See Telecommunications Act, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954 (to be codified at 47 U.S.C. § 303); FCC Commences Proceedings to Implement Regulations to Restrict Broadcasting of Indecent Programming, 1992 Lexis 5392 (September 17, 1992) (copies attached). Thus, there can be no dispute that the safe harbor hours to which Becker's indecent program should be moved are the late-night hours between midnight and 6 a.m.

IV. CONCLUSION

For the foregoing reasons, and for those contained in WAGA-TV's Complaint, Application and original Memorandum in Support, WAGA-TV submits that the Court should issue an Order declaring Becker's program to be indecent and allow WAGA-TV to channel it to the safe harbor hours between midnight and 6 a.m. when children are not likely to be in the viewing audience.

ALSTON & BIRD

By: 

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PL 102-356, 1992 HR 2977

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SEC. 15

(CITE AS: 106 STAT 949, *954)

<< 47 USCA § 303b >>

CLARIFICATION OF CONGRESSIONAL INTENT

SEC. 15. Section 103(a) of the Children's Television Act of 1990 (47 U.S.C. 303b(a)) is amended by inserting "commercial or noncommercial" immediately before "television broadcast license".

<< 47 USCA § 303 NOTE >>

BROADCASTING OF INDECENT PROGRAMMING

* SEC. 16. (a) FCC REGULATIONS.--The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming--

- (1) between 6 a.m. and 12 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and
- (2) between 6 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).

The regulations required under this subsection shall be promulgated in accordance with section 553 of title 5, United States Code, and shall become

PL 102-356, 1992 HR 2977

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SEC. 16(A)

(CITE AS: 106 STAT 949, *954)

final not later than 180 days after the date of enactment of this Act.

(b) REPEAL.--Section 608 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1989 (Public Law 100-459; 102 Stat. 2228), is repealed.

READY-TO-LEARN TELEVISION CHANNEL

SEC. 17. (a) The Congress finds that--

- (1) many of the Nation's children are not entering school "ready to learn";
- (2) next to parents and early childhood teachers, television is probably the young child's most influential teacher;
- *955 (3) a vital component in meeting the Nation's first education goal is the development of interactive programming aimed exclusively at the developmental and educational needs and interests of preschool children;
- (4) television can assist parents and preschool and child care teachers in gaining information on how young children grow and learn; and
- (5) there is a need for quality interactive instructional programming based on worthwhile information on child development designed for children, parents, and preschool and child care providers and teachers.

(b) Within 90 days following the date of the enactment of this Act, the Corporation for Public Broadcasting shall report to the Congress as to the most effective way to establish and implement a ready-to-learn public television

3RD ITEM of Level 1 printed in FULL format.

ACTION IN DOCKET CASE
FCC COMMENCES PROCEEDING TO IMPLEMENT REGULATIONS TO
RESTRICT BROADCASTING OF INDECENT PROGRAMMING (MM DOCKET
92-223)

Report No. DC-2233, MM DOCKET 92-223

FEDERAL COMMUNICATIONS COMMISSION

1992 FCC LEXIS 5392

September 17, 1992

ACTION: [*1] NEWS (24861)

OPINIONBY: SIKES; QUELLO; MARSHALL; BARRETT; DUGGAN

OPINION:

The FCC has begun a proceeding to implement Congressionally mandated regulations which will prohibit the broadcasting of indecent programming (a) between 6 a.m. and 10 p.m. by any public broadcast station that goes off the air at or before 12 midnight; and (b) between 6 a.m. and 12 midnight for any other radio or television station.

On August 26, 1992, President Bush signed into law the Public Telecommunications Act of 1991, which generally concerned appropriations for the Corporation for Public Broadcasting. Section 16(a) of the Act contained the provision for the FCC to promulgate the regulations restricting the broadcasting of indecent programming.

The focus of this proceeding is quite narrow and is confined to the matter of updating the Commission's factual record with regard to the presence of children in the viewing and listening audience.

Action by the Commission September 17, 1992, by Notice of Proposed Rulemaking (FCC 92-445). Chairman Sikes, Commissioners Quello, Marshall, Barrett, and Duggan, with Commissioners Marshall and Duggan issuing separate statements.

CONCURBY: MARSHALL; DUGGAN

CONCUR:

September 17, 1992

STATEMENT OF COMMISSIONER [*2] SHERRIE P. MARSHALL

Re: Enforcement of Prohibitions Against Broadcast Indecency

I am pleased the Commission is moving so swiftly to implement this extension of our indecency enforcement authority which President Bush signed into law just three weeks ago.

By extending our hours of enforcement until midnight, this statute authorizes the Commission to take up the merits of many indecency complaints that it would otherwise have had to dismiss simply because the offending material was aired after 8 p.m. Our previously compiled record, not to mention common sense,

1992 FCC LEXIS 5392, *2

leaves little doubt that a significant number of children remain in the nightly listening and viewing audience well beyond 8 p.m.

I look forward to our prompt conclusion of this proceeding and, if necessary, our successful defense of this policy in the courts. In my view, this statute and our proposed rules fully comport with existing judicial interpretations of the First Amendment and, thus, should be expeditiously implemented.

September 17, 1992

Separate Statement of Commissioner Ervin S. Duggan

In the Matter of Enforcement of Prohibitions Against Broadcast Indecency in 18 U.S.C. Section 1464 (GC Docket No. 92- [*3])

Our action today responds to a growing concern of Congress and the public, that media programming has become too violent, too sexually explicit, too generally unmoored from widely accepted moral norms. The signs of this concern are easy to find:

* A recent Gallup poll suggests that 64 percent of adults -- up 10 percent from a year ago -- believe that current television and cable programs portray "negative values." The respondents, says Gallup, cite a "preoccupation with sex, excessive violence, cursing and foul language and vulgarity."

* A new TV Guide study observed 1,846 individual acts of violence in just one day of television fare.

* Fox Entertainment Group President Peter Chernin recently told an audience that Vice President Quayle, when he raises the issue of television's moral values (or lack of them), is clearly responding to a "legitimate, genuine concern" felt by millions of Americans about what they see on TV.

I do not think it an exaggeration to say that the public is losing faith in the people who manage and program the media. This loss of faith could be one reason why the broadcast networks are losing audience share, and one reason why family-oriented cable [*4] TV channels are earning growing success.

Because the institutions of government do reflect public opinion, Congress and President Bush have now directed the Commission to establish regulations prohibiting indecent broadcast programming between 6 a.m. and midnight: hours that children can be presumed in the audience in greatest numbers. Although the courts have held that broadcast indecency is constitutionally protected speech, those same courts have stated that it is permissible for the Commission to channel such speech to times when there is less risk that children will be in the audience.

The rules proposed in this proceeding attempt to strike a reasonable balance between the First Amendment rights of broadcasters and the adult audience and the government's compelling interest in protecting young people from indecent broadcasts. I have every reason to believe that the record in this proceeding will demonstrate that children constitute a significant portion of the broadcast audience until midnight, if not later.

1992 FCC LEXIS 5392, *4

I therefore support the steps that we take today. If broadcasters are concerned about the issue of government intervention in their programming decisions, I can suggest [*5] a remedy: that they exercise greater self-restraint in response to what Peter Chernin calls a "legitimate, genuine" public concern. Clearly this is a moral and ethical problem, as well as a legal one -- and so the most effective solution, in my judgment, will come not from government action but from the efforts of broadcasters and programmers to act as responsible electronic publishers and editors. If recent opinion polls are any guide, exercising such decent editorial restraint would improve audience ratings at the same time.

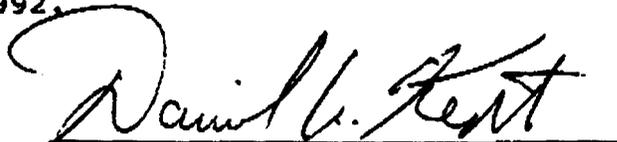
CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing PLAINTIFF'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER AND PETITION FOR DECLARATORY JUDGMENT upon all counsel of record by hand-delivery of same to:

Donald W. Johnson
The Johnson Law Firm
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Atlanta, Georgia 30339-2022

Jane W. Swift
Assistant United States Attorney
Suite 400, Richard Russell Federal Building
75 Spring Street
Atlanta, Georgia 30335

This 30th day of October, 1992.



DANIEL A. KENT
Georgia Bar No. 415110

TAB

Copies served
By Courtroom Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CHAMBERS
10-30-92
Luther D. Thomas, Clerk

By: *D. Schaeffer*
Deputy Clerk

GILLETT COMMUNICATIONS OF)
ATLANTA, INC., d/b/a)
WAGA-TV5,)

Plaintiff,)

vs.)

1:92-CV-2544-RHH

DANIEL BECKER, DANIEL BECKER)
FOR CONGRESS COMMITTEE, and)
THE FEDERAL COMMUNICATIONS)
COMMITTEE.)

Defendants.)

ORDER

This case is before the Court on Gillett Communications of Atlanta, Inc., d/b/a WAGA-TV5's ("WAGA-TV") Application for Temporary Restraining Order and Petition for Declaratory Judgment, filed on October 28, 1992. A hearing was held on October 29, 1992. The Court GRANTS IN PART and DENIES IN PART the Application and Petition.

BACKGROUND

WAGA-TV is engaged in the business of television broadcasting in Atlanta and the surrounding area and operates under a license granted by the Federal Communications Commission ("FCC"). Defendant Daniel Becker is a legally qualified candidate for the United States Congress in Georgia's Ninth Congressional District. Defendant Federal Communications Commission is an agency of the United States government and has regulatory

authority over WAGA-TV as a broadcast licensee. This case arises out of Defendant Becker Campaign Committee's ongoing attempt to purchase air time on WAGA-TV for paid political advertising.

On October 26, 1992, Defendant Becker presented to WAGA-TV for airing a paid political advertising videotape, the approximate length of which is thirty minutes. Defendant Becker has requested WAGA-TV to air the videotape between 4:00 and 5:00 p.m. on Sunday, November 1, 1992, immediately following the broadcast of the National Football League game between the Atlanta Falcons and the Los Angeles Rams.

At issue in this case is one particular segment of the videotape entitled "Abortion in America: The Real Story." WAGA-TV contends that the videotape is indecent, and therefore, it should not be required to air it during the requested hours.

DISCUSSION

A. Jurisdiction of the Court

Before the Court can address the merits of the petition, it must determine whether it has subject matter jurisdiction. WAGA contends that Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1346 because this action arises under the Constitution and laws of the United States and is an action against an

agency of the United States. Defendant Becker contends that this Court does not have subject matter jurisdiction. In support, Becker relies on 47 U.S.C. § 402 which provides that appeals from the decisions and orders of the Commission may be taken to the United States Court of Appeals for the District of Columbia in certain cases.¹ 28 U.S.C. § 2342 provides that various federal courts of appeal have exclusive jurisdiction to enjoin, set aside, suspend, or to determine the validity of all final orders of the FCC as made reviewable by 47 U.S.C. § 402.

Thus, it is clear that the court of appeals, not this Court, would have exclusive jurisdiction to review any decision made or order issued by the FCC concerning the subject matter of this case, except in limited circumstances as addressed in caselaw. However, that is not the issue before the Court. The Court must determine whether it has jurisdiction in the absence of FCC action

In Allnet Communications Service v. NECA, 965 F.2d 1118 (D.C.Cir. 1992), the plaintiff filed a complaint in the district court for a declaration that he was not liable for certain charges because they had not been published as required by the Communications Act, 47 U.S.C. § 203. The district court dismissed for lack of subject matter jurisdiction.

¹ The section lists seven instances.

On appeal, the D.C. Circuit noted that there was "no want of subject matter jurisdiction in the conventional sense. Diversity jurisdiction under 28 U.S.C. § 1332 is not disputed...." Id. at 1120. However, the court did affirm the dismissal of the suit because the FCC has primary jurisdiction over the case. Id.

In support of jurisdiction, WAGA cites 28 U.S.C. § 1331, which provides jurisdiction in all cases arising under federal law.² To determine whether a claim falls within § 1331, the court must determine whether "a federal cause of action would appear on the face of a well-pleaded complaint." Hudson Ins. Co. v. American Elec. Corp., 957 F.2d 826, 828 (11th Cir. 1992). When faced with a declaratory judgment action, the court must determine whether the claim "anticipated by the declaratory judgment plaintiff arises under federal law." Id. Here, it clearly does. WAGA anticipates that both administrative and penal sanctions may be sought against it for violation of federal law. See 18 U.S.C. § 1464 and 47 U.S.C. § § 312 and 315. Thus, like the situation in Allnet, there is no want of subject matter jurisdiction in the traditional sense.

However, that does not end the Court's inquiry. The argument can be made that this court should defer to the

² WAGA also cites 28 U.S.C. § 1346. However, it is clear that this section "grants federal courts jurisdiction over actions for money damages only, not suits seeking declaratory judgment." Travelers Indem. Co. v. United States, 593 F.Supp. 625 (N.D. Ga. 1984) (Hall, J.).

primary jurisdiction of the FCC, the agency charged with enforcement of the sections at issue. As the Supreme Court has stated:

No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present or whether the purposes it serves will be aided by its application in the particular litigation.

United States v. Western Pacific Railroad Co., 352 U.S. 59, 64 (1956). One reason for invoking the doctrine is to benefit from the specialized expertise of the agency. Miss. Power & Light v. United Gas Pipe Line, 532 F.2d 412, 420 (5th Cir. 1976). Here, the Court acknowledges that the FCC has developed an expertise in the application § 1464 regarding indecent broadcasts. However, the Court also notes that the standard to be applied is one that references contemporary community standards, not a highly technical field of knowledge. Furthermore, the FCC has already spoken on the other issue before the Court: namely, whether there is an indecency exception to the reasonable access and no censorship requirements. The Court adopts the same position, finding it sound as a matter of statutory construction. Furthermore, the Court notes that this is a legal question, not a factual question which would require the agency's expertise. "When the agency's position is sufficiently clear or nontechnical . . . courts should be very reluctant to refer" to the agency under the doctrine of primary jurisdiction. Miss. Power & Light, 552

F.2d at 419; see also Atlantic Richfield Co. v. U.S. Dept. of Energy, 769 F.2d 771, 781-782 (1984) (exhaustion of administrative remedies is not necessary where resort to agency would be futile); Erdman Technologies Corp. v. US Sprint Communications Co., 1992 U.S. Dist. LEXIS 4585 (S.D. N.Y. 1992) (doctrine of primary jurisdiction represents a version of the doctrine of administrative exhaustion).

The strongest factor militating against dismissal of this case based upon the doctrine of primary jurisdiction is the time crunch in which the litigants find themselves and the importance of the issues involved. Based upon the evidence presented, it is doubtful that the FCC will be able to reach a decision in this case prior to Sunday, a mere two days away. The election will be held in four days. After that, the issue becomes effectively moot. Defendant FCC contends in its brief that it is able to rule on matters in a timely fashion. However, the FCC ignores the fact that WAGA petitioned the FCC for declaratory ruling prior to the August 11, 1992 run off election concerning a prior political advertisement of Mr. Becker, and yet, the FCC did not respond until nearly two weeks after the election was held. Failure to rule in a timely fashion thwarts the whole purpose behind the indecency prohibition: the protection of children. WAGA-TV has indicated that without some type of relief, they will run

the video. This Circuit has instructed: "the court must always balance the benefits of seeking the agency's aid with the need to resolve disputes fairly yet as expeditiously as possible." Miss. Power, 532 F.2d at 419.

Having resolved the jurisdictional issue, the Court turns to the merits in this case.

B. Declaratory Ruling

WAGA-TV petitions this Court for a declaratory ruling that WAGA-TV may "channel" the videotape to the "safe harbor" hours between 12:00 midnight and 6:00 a.m., without violating the "reasonable access" and "no censorship" provision of the Federal Communications Act. The Court so rules.

This suit involves two different statutory provisions regulating WAGA-TV's broadcasting of Mr. Beckers' political advertisement. First, 47 U.S.C. §§ 312(a) and 315(a) provide:

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 amount of time for the use of a broadcasting station by a legally qualified candidate for Federal Elective office on behalf of his candidacy.

47 U.S.C. § 312(a)

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such

candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section.

47 U.S.C. § 315.

Second, 18 U.S.C. § 1464 provides:

Whoever utters any obscene, indecent or profane language by means of radio communications shall be fined not more than \$10,000 or imprisoned not more than two years, or both.³

Violation of either statute constitutes grounds for revocation of a broadcaster's FCC license. 47 U.S.C. §§ 312(a)(6) and (7), 315.

With regard to these statutes, the Court is faced with the following issues: (1) Does the prohibition against the broadcasting of indecent material constitute an exception to the requirements of reasonable access, equal opportunities and no censorship? (2) Is the videotape indecent under 18 U.S.C. § 1464? and (3) If so, may WAGA-TV channel the videotape into the safe harbor hours of 12 midnight and 6:00 a.m.? (4) Does this violate the First Amendment?

The Court will address each in turn.

³ This prohibition has been recognized as applying to television as well as radio broadcasts. Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991).

1. Does the prohibition against the broadcasting of indecent material constitute an exception to the requirements of reasonable access, equal opportunities and no censorship?

Yes. Apparently, there is no reported decision concerning this legal issue. However, it is the FCC's position 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) . . . must be granted 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 USC] section 1464 as an exception to Section 315.

Memorandum by FCC Staff, Jan. 6, 1984, attached as exhibit to Plaintiff's Memorandum.

The Court gives due deference to a construction of the statutes put forth by the agency charged with implementing the acts. Furthermore, the Court finds that this conclusion does not significantly undercut the purpose of the "reasonable access" and "no censorship" provisions of the Communications Act: namely to prevent discrimination against candidates and to allow candidates a full opportunity to relate to the public their political stand. KVUE, Inc. v. Austin Broadcasting Corp., 709 F.2d 922 (5th Cir. 1983), aff'd, 104 S.Ct. 1580 (1984); Flory v. FCC, 528 F.2d 124 (7th Cir. 1975).

2. Is the videotape indecent under 18 U.S.C. § 1464?

Upon careful consideration of all of the evidence, the Court answers this question in the affirmative.

The FCC defines 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.

In re Goodrich Broadcasting, Inc., 6 FCC Rcd 7484 (1991).

In FCC v. Pacifica Foundation, 438 U.S. 726 (1978), the Supreme Court ultimately affirmed the FCC's application of this definition in regulating the broadcast under review.

"The linchpin of indecency enforcement is the protection of children from inappropriate broadcast material." In re Liability of Sagittarius Broadcasting Corporation, (citing Action for Children's Television v. F.C.C., 852 F.2d 1332, 1340 (D.C. 1988)). The extent to which a broadcast is indecent focuses on whether it is readily understandable to children in the audience. Id.

The Court has viewed the videotape in its entirety and found that it contains descriptions and depictions in violation of § 1464. Specifically, beginning with the segment "Abortion in America: The Real Story," the videotape depicts the actual surgical procedure for abortion. During a short segment, approximately 4 minutes