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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

REPLY COMMENTS OF MARK VAN LOUCKS IN
SUPPORT OF APPLICATION FOR REVIEW

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February 22, 1993

No. of Copies rec'd 045
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SUMMARY

The Commission should allow the Broadcast licensee, or Cable operator to refuse to carry political advertisements that seek to deliver a message employing a manner of delivery that is, in the good-faith judgement of the station's management, not in keeping with the standards of decency prevalent in the community it serves, or that it believes is potentially harmful to viewers-when there is another method available to the advertiser for the delivery of said message, which method of delivery is acceptable within community standards.

The Commission should distinguish, and allow the licensee to so distinguish, as between the expression of a message, in the political context, and the method by which said message is delivered via television. Sections #312 and #315 of the Communications Act intend to protect the former, not(necessarily) the latter.

Channeling the instant political advertisements to the safe harbor of hours not earlier than midnight, nor later than 6:a.m. is correct, but not sufficient as this action does not adequately protect other groups of population that are uniquely susceptible to harm therefrom.

Placing "warnings" immediately preceding the broadcast of the instant political advertisements does not provide adequate nor reasonable warning to viewers. At the very least, political candidates who wish to air these kinds of advertisements should be required to publish their broadcast schedule in the traditional sources for such schedule publication, such as local and national print media.

The management of a broadcast licensee, or cable TV system, is currently charged with operating in the "public good", and it is best qualified to ascertain and adhere to it's community standards for decency, etc, in the broadcast of television programming. The provisions of sections #312 and #315 of the Communications Act should not serve to lessen that responsibility. Further, there currently exists sufficient review and remedy available to the public and the political advertisor in the event of error on the part of station management.

The Commission has full authority (and responsibility) under the Communications Act and applicable law to sustain station management's authority in the instant matter.

The Commission has the authority to protect the vital provisions of sections #312 and #315 from fradulant and dangerous use. And it has a duty to the public to do so.

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To: The Commission

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BACKGROUND

This matter initially came before the Commission by way of an Application For Review filed by Kaye, Scholer, Fierman, Hays & Handler (Kaye, Scholer) of an action taken by the Mass Media Bureau in a letter dated August 21, 1992 (FCC Ref. 8210-AJZ/MJM). In this action, the Commission declined to grant Kaye, Scholer's Petition for Declaratory Ruling (July 29, 1992) requesting Commission approval to "channel" television ads being run by candidates for federal office which presented graphic depictions of dead or aborted and bloody fetuses or fetal tissue to those hours where children are not watching television. On September 25, 1992 I filed "Comments of Mark Van Loucks in Support of Application for Review", supporting the Kaye, Scholer Application.

On October 30, 1992 (Ref. DA92-1503), in response to a complaint filed on behalf of Daniel Becker, a candidate for federal office from Georgia, the Commission issued its Request For Comments. By letter to the Commission dated January 11, 1993, I requested that the Comments I filed in support of the Kaye, Scholer Application For Review be considered, also, Comments filed in response to the Commission's instant Request For Comments. The Commission has granted that request.

I seek herewith to submit my Reply to certain Comments filed in response to the Commission's instant Request For Comments.

INTRODUCTION

By way of preface, I would incorporate here by reference the "STATEMENT OF MARK VAN LOUCKS" which commences on Page 17 of my earlier submission "COMMENTS OF MARK VAN LOUCKS IN SUPPORT OF APPLICATION FOR REVIEW". To summarize that

Statement, I first became aware of the instant problem when the local Denver television stations began airing a political advertisement of one Matthew Noah, a candidate for federal office from Boulder, Colorado. Mr. Noah's ads show graphic, detailed, close-up views of bloody, aborted fetuses. When I learned that the stations were required under certain provisions of Sections 312 and 315 of the Communications Act to air the spots, without censorship, I took actions which include, but are not limited to, the following:

1. I sued Mr. Noah in Boulder, Colorado District Court to prevent the further airing of the ads.
2. I contacted several District Attorneys in Colorado seeking criminal prosecution.
3. I obtained the schedule of the ads from the stations' Public Files and published that schedule in both Denver newspapers as a warning to parents.
4. I obtained the assistance of several prominent Colorado psychologists to evaluate the potential harm these ads might cause, and submitted their opinions as part of my earlier Comments.
5. I purchased several television spots on Denver media in which I warned parents of the upcoming Noah spots, and encouraged them to write to the FCC complaining thereof.
6. I published full-page ads in the Denver print media encouraging people who objected to the airing of Noah's spots to write to the FCC - and those letters have been included as submissions under the Commission's Request For Comments in this matter.

Further, I again wish the Commission to know that I am not associated with any political or abortion rights group with respect to my activities in this matter, nor will I be. And my opinions, for example, on abortion are irrelevant to these proceedings and are otherwise none of anyone's business. I am funding my efforts regarding these activities entirely myself, refusing financial offers from various groups. In short, I am concerned about the effect of these spots on my children - Charlie (3 1/2) and Brandon (7). My standing in this matter is simple.

I'm just a dad.

REPLY TO COMMENTS

I. Are These Ads Indecent Or Obscene? Probably.

It would be utterly convenient if all human conduct fit neatly into a criminal code, or some Section under the Communications Act and related decisions. It does not. Some of the Commentors would have this Commission believe that conduct and material is not "indecent" or "obscene" unless it is sexual. The instant matter, showing bloodied, aborted fetuses on television, is certainly an example.

I agree with Gillett^{1/}:

"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..."

Simply, if the Commission needs to craft a new definition of "indecency", for example, to cover the instant matter, let it do so.

II. What About The Other Bad Stuff On Television?

Some Commentors have cited other examples of violent or "indecent" material on television, and have suggested therefore that since we don't ban them we can't ban this. That's a common cop-out!

I am concerned about this argument for three reasons: first, it suggests, typically, since we can't do everything, let's do nothing; second, it ignores the precedent which is established by such thinking; and finally, it fails to distinguish between material which carries adequate warning, and material that does not.

As regards other objectionable material on television, it is not subject to the instant proceedings. If the Commentors object to other such material, let them bring it forward for review before this Commission. That they fail to so act on their belief concerning that material, should not - and does not - relieve the Commission from acting on this material.

As regards precedent, if we allow this kind of conduct on behalf of federal candidates to be protected, what's next? Will we have an animal rights candidate showing graphic demonstrations of cruelty to animals by cutting the heads

1/ COMMENTS OF GILLETT COMMUNICATIONS OF ATLANTA, INC. - January 22, 1993, pg. 19.

off of cats in his/her spots? The potential list is mind-boggling, and the Commission must take swift action here to prevent a precedent of such abuse of the instant provision⁶ of the Act.

And as regards the issue of warning, the Commentors who complain of other objectionable material on television apparently fail to notice a major distinction here - that material, all of it, is scheduled and published. A viewer and/or a parent who is concerned about potentially objectionable material on television can review published schedules in the local newspapers, in national newspapers, in publications like "T.V. Guide", and various other sources to determine what's coming up on television. Further, that person can make such review of the schedules at a time providing reasonable advance notice of the airing of the programs.

A federal candidate's television advertisements are not, by definition, scheduled and published in advance in the manner just discussed for other objectionable material. If these candidates seek to be likened to this other objectionable material, let them at least be required to similarly publish, in the newspapers and other television guides, similar schedules and appropriate warnings.

III. "If It's Tuesday, This Must Be Belgium"

Some Commentors in the instant proceeding who support the showing of bloody aborted fetuses on the television suggest, simply, 'If it's speech, it's protected!' Nonsense. There is abundant evidence in Communications law and Supreme Court decisions that the doctrine of free speech ~~has~~ never meant the right to say anything, anywhere, at any time, without regard to appropriate circumstances. You can't shout "fire!" in a crowded theater.

One must look beyond a mere collection of words and letters to language, and language is merely a tool to convey the message, the meaning. And that is the "speech". It seems to me one should then test the "speech" given, among other things, its context: you can't shout "fire!" in a crowded theater? Sure you can - if there's a fire! And even if there isn't, if the theater is crowded with, say, elephants and not human beings, you'd be allright.

The same exact "speech", it seems to me, enjoys First Amendment protection depending, in part, on the context in which it is given. Certainly to a comedian, the words themselves - without regard to meaning or message - might be protected speech, for in the context of "art", the words themselves are like

brush strokes on a canvas. But, in the context of the instant matter - political speech, it's the message that must be protected, not summarily the words (or pictures) themselves.

In the instant matter, Daniel Becker, and the other "candidates" for federal office, seek to hide behind the provisions of the Communications Act, and include in the definition of "speech" not only their (political) message, but the manner in which it is delivered - and there's the rub!

Several Commentors had trouble with this notion - for example, consider the Comments of Mr. Becker^{2/}:

"Broadcasters should not be arbiters of political speech even when limited to the context of indecent speech. It would be too easy for a broadcaster to censor an unpopular political message under the guise that the message is indecent. It is a potential recipe for disaster to allow a broadcaster that already has tremendous power to influence through its programming to judge the content of political expression." (underlining added by author)

Here Becker confuses the message with the manner of its delivery. Broadcasters are not, nor am I, attempting to forbid Becker from delivering his "political speech", or his "unpopular political message", or the "content of (his) political expression".

Similarly, the National Right to Life Committee, Inc.^{3/} is troubled with the same distinction:

"...allow a candidate to plan his or her own campaign in terms of the content of the communication the candidate chooses to make. No blanket bans on any subject should be permitted...The substance of the broadcast must be uncensored. A federal candidate is protected from censorship in his or her discussion of public issues... voters have a right to uncensored information concerning matters of public and political debate...It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas...it is the right of the public to receive suitable access to social,

2 / COMMENTS OF DANIEL BECKER, Page 5.

3/ COMMENTS Regarding Federal Candidate Political Advertising on Television Involving Abortion, Pages 4 - 6.

political, esthetic, moral and other ideas...It is of particular importance that candidates have the...opportunity to make their views known...and their positions on vital public issues..." (underlining added by author).

Again, no one seeks to abridge the free speech of the National Right to Life Committee, Inc. in this way - at least not in the Comments I have read submitted in these proceedings, nor do I. No one in these proceedings seeks to abridge the candidates' "content of communication", nor his or her "subject", nor the "substance" of his or her message, nor his or her "discussion of public issues", nor his or her "right to uncensored information", nor his or her "ideas", nor his or her "views", nor his or her "positions on vital public issues".

If Becker, the candidate, or the National Right to Life Committee, Inc., the group, wanted to come on television and say, "Look, folks, you shouldn't have abortions - and here are the reasons why...", there isn't a broadcaster in the land that would dare to censor that message. The issue here is not the free speech protection of the message, the issue is the manner of its delivery.

IV. Free Speech - Message Versus Manner

If I had included a low-grade bomb with this letter in order that I might assure myself the attention of the Commission here, would the bomb be protected speech? If one sets an abortion clinic afire in order to deliver his anti-abortion message, is the fire setting protected speech? Clearly there is difference between the message of the speech delivered (especially in a political context), and the manner in which it is delivered.

The candidates for federal office in the instant matter have two purposes in mind with their anti-abortion ads showing bloody aborted fetuses: one is protected - the message that people ought not to have abortions; and the other is not protected - the assault on the viewer. The Commission must make, and allow the station management to make, the critical distinction between the message, and its manner of delivery. And the test, it seems to me, is simple.

V. Let The Station Manager Do His Job

If a station manager determines, in good faith, that the manner of delivery of a political message offends the "community standard" for decency, etc. in the community he serves, he should be allowed - indeed required - to determine

if there is another manner of delivery which would not so offend his community. And if another manner of delivery is available which would not, to any degree whatsoever, lessen the content of the political message, then he should require the use of that manner of delivery, or refuse to run the ad.

Daniel Becker, and Matthew Noah, two anti-abortion candidates for federal office, want the world to know that they are against abortion. They want to persuade people not to have abortions. That is their political message. Is there a manner available to them to deliver that message without showing bloody aborted fetuses on television? Certainly there is - people have been convincing others not to have abortions for many years using communicative techniques other than showing bloody aborted fetuses on television. We can teach children to cross the street safely without showing the bloody, dead body of a five year old child who has just been run over by a cement truck; and Mr. Becker and Mr. Noah can find ways in which to teach us not to have abortions without assaulting my children!

VI. Should The Station Manager Decide?

Under our laws - the rules of the Communications Act and this Commission, it is the broadcast licensee that is charged with conducting the affairs of his station and its programming "in the public good". This Commission, and a variety of Supreme Court cases, have remanded issues of obscenity and indecency to be related to the local "community standard". Well, in the business of broadcasting, who else should be required to have knowledge of, and uphold, the "community standard" in this area?! Should the FCC, or its staff look down on my community from Washington and decide what are appropriate community standards here? Should Daniel Becker or Matthew Noah, or any other candidate for federal office make that decision? The American Civil Liberties Union^{4/} seems to suggest no one should decide such a standard:

"It is axiomatic that speech does not lose its Constitutional protection because it appears in a disturbing form or even because an overwhelming majority in a community regards it as unbecoming or unseemly." (underlining added by author)

4/ COMMENTS OF THE AMERICAN CIVIL LIBERTIES UNION, Pages 3, 7.

Further:

"A 'harmful to minors' rationale, whether based on indecency or other authority, cannot justify evasion of the Communication Act's 'reasonable access' and non-censorship requirements for the political advertisement of federal candidates."

The ACLU would ^{have us} believe that even if an "overwhelming majority" in the community regards this kind of programming harmful, and even if it is "harmful to minors", it is still protected! Does the ACLU suggest that children (and their parents) don't have any "civil liberties" like the right to privacy, like the right not to be psychologically harmed, or like the right of the parents to educate their children on matters such as abortion when they are judged by their parents to be mature enough to receive such education?

No, no one is more appropriate to make this decision as regards community standards than the licensee - not even the ACLU!

VII. What If The Station Management Is Wrong?

So the station management decides that the manner in which a political candidate has chosen to deliver his message violates the standards of the community which his station serves and further determines that there is another manner of delivery for the same message - and requires same of the advertiser. What if he's wrong?

Certainly there are adequate remedies for errors in this area - including the process we are going through here. As I understand it, the system is simple:

- The licensee uses public airwaves and is accountable to the public therefore;
- He must protect the "community standards of decency, etc." in the community he serves;
- His actions (for example, requiring a different manner of delivery for a political message) are subject to scrutiny by the public in the community he serves, and the advertiser he affects;
- If challenged, his actions are subject to the review of this Commission, and ultimately the review of the Courts;
- If he's wrong, and has acted in bad faith, among other sanctions he could lose his license.

The system works just fine. It ain't broke, don't fix it!

VIII. The Intent Of Section 315 Of The Communications Act

While lawyers (and others) will, and in the instant matter have quite successfully, convulsed and blurred the issues in a debate, they have failed to degrade or confuse the intent behind the provisions of Section 315 of the Communications Act which are at issue here. Clearly, Congress intended that candidates for federal office be allowed to deliver their political message on television without someone tampering with that message. Congress did not intend to allow someone to make fraudulant use of these provisions of the Communications Act in order to deliver a message in a manner that would otherwise be prohibited. It is the message they sought to protect, not the assault!

IX. Channeling To A Safe Harbor

The current condition of FCC rule on the instant matter, as I understand it, is that upon making a good faith judgement that these political ads are indecent or potentially can harm children, station management can channel them to the safe harbor of programming not earlier than midnight nor after 6:00 a.m. Several of the Commentors have objected to the notion of channeling to get these spots out of view of children. The National Right To Life Committee, Inc.^{5/} indicates that channeling is inappropriate because warnings can be run immediately prior to the spots...

"...the simple device of preceding an ad containing scenes of an abortion with an advisory statement that the following political advertisement may not be suitable for young viewers would suffice to put adults on notice of the possible need to limit visual access to the screen for the minors in their care."

And anyway, according to the National Right To Life Committee, Inc., minors don't even need this protection:

"What minors are most offended about, however, is the fact that human beings kill baby human beings, not the fact that they see the results."

5/ COMMENTS Regarding Federal Candidate Political Advertising on Television Involving Abortion, Page 13.

(This kind of nonsense makes me wonder if these National Right To Life folks have any children!) My 3 1/2 year old son, Charlie, is offended when his big brother steals his toys; when he's old enough and mature enough, he will be taught about abortion and the pros and cons of the issue - by his parents, and not by the National Right To Life Committee, nor by "political" ads dangerous to him!

As some of the Commentors indicated, a mere "advisory statement" on the very front of these kinds of political advertisements - that the following programming might not be suitable for young viewers - is certainly not adequate. That would suggest that the parent or guardian is in the room at the precise moment the warning comes up; that children never watch television without mom or dad present; it would ignore all of the institutionalized children who watch a lot of television without adult supervision; and so on. It is clearly not adequate. As indicated earlier, what would be adequate in terms of reasonable notice and warning is for this kind of programming to be subjected to the same kind of scheduling and notice requirements as other (offensive) programming - publication in the television schedule sections of newspapers, "T.V. Guide", etc.

Channeling to the safe harbor of after midnight and before 6:00 a.m. is, in my judgement, reasonable and correct, but not sufficient. None of the Commentors in this proceeding - as I read them - made notice of the other groups of people who are potentially harmed by this material. I refer to women who have undergone an abortion; women who have undergone an unwanted pregnancy; women who are contemplating an abortion; women who have undergone a miscarriage; and (let's not forget) the men involved. Imagine a couple who has just gone through the agony of a miscarriage being subject, without adequate warning, to the televised view of a bloody aborted fetus - even at 2:00 a.m. (especially, at 2:00 a.m.!).

Channeling certainly assists in getting these terrible images away from view by children, but it does not protect other groups of people who are susceptible to tragic emotional reactions. And further, channeling merely avoids the central issue - choosing this manner of delivering a political message is not protected by the provisions of Section 315 of the Communications Act and otherwise should be prohibited.

X. The Authority Of The FCC

Several of the Commentors have challenged the authority of the Federal Communications Commission to allow a licensee to forbid these kinds of political advertisements.

In objecting to the FCC's authority here, the ACLU^{6/} says:

"It is worth noting that speech that is 'indecent but not obscene is protected by the First Amendment' and may only be regulated to serve a compelling interest by means 'carefully tailored to achieve those ends'."

Those carefully tailored means are available in the instant matter:

1. Allow the licensee, subject to review by the public he serves and this Commission, to make a good faith decision as to whether the manner of delivery of a political message is indecent or offensive;
2. Allow the licensee, in the case indicated above, to require a different method of delivery of a political message;
3. (At least) allow the station manager to channel the instant programming to a safe harbor out of view of children;
4. Require those who would seek to require the publication of this kind of material to purchase advertisements in local television schedules and other television schedule publications warning viewers in adequate time.

The National Right To Life Committee^{7/} indicates:

"...entrusting to a television station the power to ban a political candidates political ads...on its judgement... that something is indecent, is very disturbing. It is beyond the authority of the FCC to allow, for it bestows upon the licensee the authority to impose a prior restraint on the free speech of a candidate already allotted time on the basis of the content of that speech." (underlining added by author)

Once again, this Commentor fails to make the distinction between the "content" of the speech, and the manner with which it is delivered. In my judgement, it certainly would be outside the authority of the FCC to abridge the content (the message) of protected speech. However, it is not only within the authority of the FCC to stop the delivery of political messages done in this manner, it is your job!

6/ COMMENTS OF THE AMERICAN CIVIL LIBERTIES UNION, Page 10

7/ COMMENTS Regarding Federal Candidate Political Advertising on Television Involving Abortion, Page 14

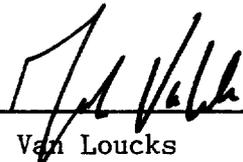
CONCLUSION

It can be suggested that the doctrine of freedom of speech is at once this country's greatest strength and almost its greatest curse, for it seems to suggest to some that everything be subject to evaluation, argument, dissection and debate. It suggests to some that, unless one can win the argument with the mathematical precision of the words of law, the debate ends.

Look at these spots. Show them to parents of little children; show them to little children; show them to people who have undergone the agony of abortion and miscarriage; consider them yourself. If you are left with nothing more legal or scholarly than the notion that "this is wrong", that's okay. If the conduct of our society is to be left without adherence to one's moral code of conduct, without feelings of the heart and the sometimes inexplicable standards of decency in a community, then who would need a Federal Communications Commission with human beings running it? We'd need only a computer.

This is wrong. Change it.

Respectfully submitted,



Mark Van Loucks

Dated February 22, 1993