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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Petition For Declaratory Ruling)
Concerning Section 312(a) (7))
Of The Communications Act)

MM Docket No. 92-55

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To: The Commission

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY COMMENTS

Media Access Project and the Washington Area Citizens Coalition Interested in Viewers Constitutional Rights (MAP/WACCI-VCR) hereby submit these reply comments in response to various comments filed in response to the Request for Comments, 7 FCCRcd 7297 (1992) ("Request") in the above-referenced docket. These comments, filed by broadcasters and attorneys representing broadcasters, (hereinafter "broadcasters")¹ argue variously that the Commission may interpret Section 312(a) (7) to permit a broadcaster to channel certain candidate advertisements into particular day parts, or even refuse to air them. In so doing, they misconstrue the meaning of "reasonable access" in Section 312(a) (7), wholly ignore the no-censorship provisions of Section 315, and reinterpret the First Amendment to escape the controversial nature of some of these advertisements.

INTRODUCTION

This proceeding has its genesis in a request for declaratory ruling on the propriety of "channeling" candidate advertisements depicting bloodied fetuses to the later hours of the day. What it has evolved into is a referendum about whether, under the guise of "editorial discretion," a broadcaster can refuse to air any political advertisement

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¹Specifically, these reply comments address comments filed by Kaye, Scholer, Fierman, Hays and Handler ("Kaye Scholer"), Louisiana Television Broadcasting Corp. ("LTBC") and Gillette Communications Of Atlanta, Inc. ("Gillette").

that it believes might "offend" any member of its viewing audience.²

MAP/WACCI-VCR submit that, when read together, Sections 312(a)(7) and Section 315 prohibit the channeling or the outright prohibition of non-obscene political advertisements containing indecent or even non-indecent material.³ While the "reasonable access" provision of Section 312(a)(7) gives some "reasonable" latitude to a broadcaster as to when it can broadcast political advertisements, it does not permit that discretion to be exercised based on the content of such ads. The no-censorship provision of Section 315 further strengthens the protection for political speech.

While broadcasters may have understandable concerns over airing political advertisements containing arguably "indecent" matter, they should have no such qualms when the material is not indecent. The comments to the effect that broadcasters should have the right to refuse political advertisements that may upset or offend certain viewers are so blatantly contrary to the First Amendment that they hardly warrant comment. It is indeed ironic that those broadcasters who view themselves as staunch defenders of the First Amendment in their battle against the Fairness Doctrine and the Supreme Court's Red Lion case, are quick to pull the plug on any speech that might be the slightest bit

²The Commission's Request is ambiguous as to the intended scope of this proceeding. The Request seeks comment "as to whether broadcasters have any right to channel material that, while not indecent, may be otherwise harmful to children." Request at ¶3 [emphasis added]. This statement could be construed as requesting comment of the propriety of channeling any non-indecent material other than that contained in political advertisements. However, since the broadcasters here have addressed only that material which appears in political advertisements, MAP/WACCI-VCR will not address the larger issue. If the Commission does intend to rule on this matter, MAP/WACCI-VCR request a clarification on the larger issue, along with an opportunity to comment thereupon.

³One broadcaster lumps "obscene" political advertisements with those that are arguably "indecent." See generally, ITBC Comments. Unlike obscenity, however, "indecent" speech is protected speech, and cannot be judged under the same standards. FCC v. Pacifica Foundation, 438 U.S. 726 (1978). In any event, the Request does not seek comment on obscene political advertisements.

controversial. Any suggestion that broadcasters' "editorial discretion" should be stretched to permit either channeling or outright banning of political advertisements which are not indecent must be rejected out of hand.

I. Section 312(a)(7) and Section 315 Do Not Permit "Channeling" or Rejection of Either Indecent or Non-Indecent Political Advertisements.

Gillette pays lip service to the principle that "political speech is entitled to the highest Constitutional protection," Gillette Comments at 8, and that the "right of listeners and viewers is paramount." Id. at 5, 21 [citations omitted]. As a whole, however, the broadcasters' comments manifest an intention to undermine these very protections.

The broadcasters' arguments share several basic flaws. First, they wholly misinterpret Section 312(a)(7). Second, they almost completely ignore the "no-censorship" provision of Section 315. Third, they erroneously believe that 18 U.S.C. §1464 subjects them to criminal liability for airing these ads. Finally, they believe that "editorial discretion" that permits censorship of political speech that might merely offend is consistent with the First Amendment.

A. "Reasonable Access" Provision of Section 312(a)(7).

The broadcasters read the "reasonable access" requirements of Section 312(a)(7) to permit unfettered editorial discretion on behalf of broadcasters as to whether and when to air a political advertisement. Kaye Scholer Comments at 11-15, LTBC Comments at 4-6, Gillette Comments at 17-19. They argue that as long as "the broadcaster has taken the appropriate factors into account, and...the broadcaster has acted reasonably," the Commission must defer to its decision vis a vis arguably indecent political advertisements. Kaye Scholer Comments at 12 citing, inter alia, CBS, Inc. v. FCC, 453 U.S. 367 (1981); Codification of the Commission's Political Programming Policies, 7 FCC Rcd 678, 682 (1991), reconsideration granted in part and denied in part, 7 FCC Rcd 4611

(1992) ("Political Broadcasting Order").

While these decisions may permit a broadcaster broad latitude on when to air political advertisements generally, they have never been, and cannot be, interpreted to permit a broadcaster to channel or refuse to air an advertisement based upon its content. Indeed, the portion of the Political Broadcasting Order relied upon by Kaye, Scholer refers to the Commission's decision to permit broadcasters to refuse to air any and all political advertisements during newscasts. To read Section 312 (a) (7) to permit content-based distinctions would nullify Section 315, which prohibits any censorship of political advertisements. See, discussion infra.

The "reasonable access" requirement of Section 312(a)(7) is directed to the status of the speaker, not the content of the speech. Because candidate speech "makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process," CBS, Inc. v. FCC, supra at 378, Section 312(a)(7) was designed to confer "a special right of access on an individual basis" to political candidates. Id. at 379. Thus, all federal candidates are granted access, no matter what their message, on the theory that "expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values," NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982). The ruling the broadcasters seek cannot be reconciled with the candidate-centered view of Section 312(a)(7), as it has been interpreted by the FCC and the Courts.⁴

⁴Gillette notes that the purpose of Section 312(a)(7) is to "inform voters." Gillette Comments at 17. It then deduces that, because children are not of voting age, it is not improper to channel indecent political advertisements to hours when children are not watching. Id. This presumption takes away the candidates' right to reach audiences of their choice. CBS, Inc. v. FCC, supra. It ignores the fact that there are adults who, for work or other reasons, cannot watch television during the "safe harbor" period. It also ignores the fact that children

B. No Censorship Provision of Section 315.

The broadcasters, save one, ignore plain language mandate of Section 315 that "licensee[s] shall have no power of censorship over the material broadcast under the provision of this section." On its face, the statutory "no censorship" provision has no exceptions. It has never been interpreted to be anything other than an absolute prohibition on the exercise of editorial discretion with respect to the content of political advertisements. Farmers Educational & Cooperative Union of America v. WDAY, Inc., 360 U.S. 525 (1959). See, MAP/WACCI-VCR Letter to Donna Searcy dated January 22, 1993 in MM Docket 92-254.⁵

LTBC argues that the no censorship requirement is not an absolute, because there are conditions on access to equal access opportunities under Section 315, including, inter alia, a requirement to pay, time restrictions, and sponsorship identification requirements. LTBC Comments at 7-8. But this attempt to analogize these conditions to the restrictions proposed by the broadcasters fails for the same reason their Section 312(a)(7) argument fails. Unlike channeling or refusing certain political ads, the conditions on Section 315 access are imposed on all political ads from all candidates on a content-neutral basis.

In addition, LTBC argues that the four bona fide news exemptions of Section 315(a) further show that candidate speech can be limited. Id. This moves from the disingenuous to the outrageous. The exemptions to Section 315 do not in any way relate to candidate advertising. Moreover, by excluding such programming from the definition of what constitutes a "use" under the statute, is not to censor, but to define

talk to their parents, and can quite possibly influence the way they vote.

⁵LTBC argues that the holding of Farmers Union cannot be reconciled with Section 312(a)(6) and 18 U.S.C. §1464. LTBC Comments at 12-14. As discussed below, these statutory provisions are no bar to airing political advertisements which are indecent or not indecent.

the kind of appearances that qualify. This is something that Congress surely has the power to do incident to establishing a right of access. This is not something that a broadcaster can abrogate based on its desire to censor.

C. 18 U.S.C. §1464.

The broadcasters argue that the dictates of Sections 312(a)(7) and 315 must be reconciled with 18 U.S.C. §1464, which proposes criminal penalties for "[w]hoever utters any obscene, indecent or profane language by means of radio communication." Without the ability to channel arguably indecent political advertisements, these broadcasters fear that they might subject themselves to criminal liability under Section 1464. Kaye, Scholer Comments at 9, LTBC Comments at 12-14.

That fear is unfounded. Section 312(a)(7) on its face, provides a right of reasonable access to candidates. Section 315, on its face, prohibits censorship of candidate advertisements. While 18 U.S.C. §1464 purports to place a flat ban on indecency, that reading of the statute has been held to be unconstitutional. Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991), cert. denied, 112 S.Ct. 1282 (1992). See, Sable Communications of California, Inc. v. FCC, 109 S.Ct. 2829, 2836 (1989); Action for Children's Television v. FCC, 852 F.2d 1332, 1344 (D.C. Cir. 1988) ([b]roadcast material that is indecent but not obscene is protected by the first amendment;...). Since 18 U.S.C. §1464 must be given a limited construction to preserve its constitutionality, the apparent conflict with Sections 315 and 312(a)(7) does not in fact exist.⁶

The only "authority" on the relationship between these three stat-

⁶LTBC argues that 47 U.S.C. §312(a)(6) requires the channeling or rejection of indecent political advertisements. LTBC Comments at 8, 12-14. Section 312(a)(6) permits the Commission to suspend or revoke a license for violations of 18 U.S.C. §1464. Therefore, for the reasons discussed above, Section 312(a)(6) does not jeopardize a licensee for airing indecent political advertisements.

utory provisions that the broadcasters purport to rely upon is an unpublished letter from then-Chairman Mark Fowler to Congressman Thomas A. Luken dated January 19, 1984. ("Letter") The Letter was never presented to the Commission, much less adopted by it. In fact, Chairman Fowler does not even expressly endorse the legal memorandum which accompanies the letter. The memorandum, written by Commission staff, concludes that "the no-censorship provision of Section 315 was not intended to override the statutory prohibition against the broadcast of obscene or indecent materials that is etched in Section 1464 of the Criminal Code."

The letter and the staff memorandum attached to it are of no precedential value. Moreover, they based on a specious legal analysis. As discussed above, that part of Section 1464 which prohibits the broadcast of indecent material has been definitively construed as being unconstitutional. The assumption that indecency is not protected speech is also the fatal flaw in the staff's analysis. The memorandum states

We believe that our analysis herein, which limits the reach of the no-censorship provision to matters which are protected by the First Amendment, is faithful to Section 315's purpose, which was to foster political debate and discourse.

Staff Memorandum at 5 [Emphasis added]. The staff's conclusion that 18 U.S.C. §1464 places a limitation on indecent political advertisements cannot be reconciled with the overwhelming judicial precedent which protects such speech.⁷

⁷In a footnote to this statement, the staff states, "[o]ur analysis covers obscene material, which has been held to be unprotected speech...[i]nsofar as the Supreme Court has not held that indecent or profane language is protected by the First Amendment when uttered over the airwaves, our analysis would apply equally to such expressions. See, e.g., FCC v. Pacifica Foundation, supra." Memorandum at 5 n.12. As this footnote demonstrates, the discussion of the relationship between Section 315 and indecency in the Memorandum is mere dictum. In any event, the staff's analysis of Pacifica is wrong. The Court in Pacifica held that indecent language is protected speech, but did not reach the issue of whether a flat ban on broadcast indecency would offend the First Amendment. Pacifica, supra, at 750 n.28.

D. First Amendment Considerations.

Several of the broadcasters make arguments that channeling, or even completely refusing to air, candidate speech is fully consistent with First Amendment theory and jurisprudence. But stripped of their attempts to clothe censorship in the guise of "editorial discretion" and the "public interest," these arguments stand embarrassingly bare.

"If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society find the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 413 (1989) [citations omitted]. It is also axiomatic that the First Amendment does not permit "reduc[ing] the adult population" to seeing and hearing "only what is fit for children." Butler v. Michigan, 352 U.S. 380, 383 (1957)⁶ Finally, with respect to broadcasting, it is the right of the viewers and listeners...which is paramount." Red Lion Broadcasting Co. V. FCC, 395 U.S. 367, 390 (1969).

Several of the broadcasters appear, however, to have a new First Amendment standard: that speech that is either indecent or non-indecent may be restricted so as not to ignore the "sensitivities of adults," Gillette Comments at 7 or the "unusually sensitive parent." LTBC 11. They argue further that the "public interest" so demands. Gillette Comments at 21-22, LTBC Comments at 22-23. For at least one broadcaster, channeling arguably indecent material is not enough:

[M]oving speech into the "safe harbor" does not resolve the entire issue. What about speech that is not indecent? What about speech that is...racist? Or bigoted? Or shocking to the sensitivities of persons in the audience?

Gillette Comments at 18. In effect, Gillette is asking the Commission

⁶LTBC argues that channeling and labelling indecent and non-indecent political ads is insufficient because "children may be found in the viewing audience at any time of the day or night." LTBC Comments at 22. This argument was flatly rejected in Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991), cert. denied, 112 S.Ct. 1282 (1992).

to overturn numerous prior decisions protecting candidate speech that another would find "abhorrent." E.g., Atlanta NAACP, 36 FCC2d 635, 637 (1972); Western Connecticut Broadcasting Co., 43 FCC 2d 730 (1973); Anti-Defamation League, 4 FCC2d 190 (1966) affirmed, Anti-Defamation League v. FCC, 403 F.2d 169 (1968) cert. denied, 394 U.S. 930 (1969).⁹

It would be hard to find a more slippery slope. Today, these broadcasters want to reject political advertisements with pictures of bloodied fetuses. Tomorrow, they will want to reject those political advertisements of candidates with whom they do not agree, if those views are, in their view, "radical" or "shocking." Under this shaky standard, candidates with unpopular messages (at various stages of their careers) such as George Wallace, Lester Maddox, David Duke, Pat Buchanan and Al Sharpton might have found their campaign messages censored.¹⁰

The great irony here is that these very same broadcasters who ask the Commission for the ability to censor offensive political speech, use this docket to argue that the political broadcasting laws and the theories that underlay broadcast regulation are contrary to the First Amendment. Gillette Comments at 15 n.9, LTBC Comments at 24-27. The latter issue, of course, is far beyond the scope of this docket. However, that the issue is even raised here highlights the fact that certain broadcasters continue to view the First Amendment as a shelter under which

⁹Gillette also recommends that broadcasters be permitted to engage in "judicious editing" of political advertisements that they find offensive, to make them more suitable for viewing. Id. If the no censorship requirement of Section 315 means anything, it certainly prohibits a broadcaster from editing a political ad in any manner.

¹⁰Several broadcasters argue that channeling or banning indecent, and even non-indecent but offensive material, is a content-neutral time, place and manner restriction, much like restrictions on the decibel level of a sound truck. Louisiana Television at 9, Gillette Comments at 8. One broadcaster even goes so far as to say that such restrictions are content-neutral "in that it would apply to all speech the licensee deemed indecent." Louisiana Television at 9. These arguments defy logic. The mere determination that matter is indecent or offensive is a decision based solely on its content; therefore any decision to channel or reject it is a content-based restriction.

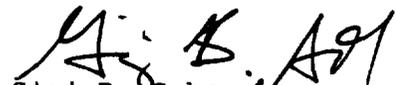
only they may protect themselves; there appears to be no such room for the public's right to hear unfettered candidate speech.

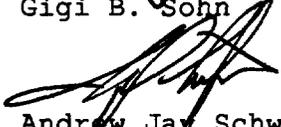
CONCLUSION

The Commission should reject all entreaties to permit broadcasters to become the arbiter of what political speech the public should or should not see or hear. A number of the political advertisements that gave rise to this docket may be shocking or offensive to some, or maybe even the vast majority of the American public. But the proper way to show one's distaste for these advertisements is "more speech, not enforced silence." Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

The Commission should also note that the speech it is being asked to circumscribe here is not only the highest on the First Amendment hierarchy, it is also very limited: federal elections take place once every two years, and the number of such candidates who present ads which may even remotely be described as indecent are minuscule. The Commission should be very reluctant to tinker with the First Amendment when the actual "problem" it seeks to address is minute.

Respectfully submitted,


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February 23, 1993