

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
National Association of Broadcasters, et al.)	MB Docket No. 19-363
Petition for Reconsideration of Political File)	
Orders)	
)	

**COMMENTS OF
NCTA – THE INTERNET & TELEVISION ASSOCIATION**

NCTA – The Internet & Television Association (NCTA)¹ files these comments in support of the Petition for Reconsideration filed by the National Association of Broadcasters (NAB)² in the above-captioned proceedings.³ The cable industry takes seriously its obligations under the Communications Act to disclose information about political advertising in its political files and is working to comply with the Commission’s Orders addressing the political file rules. NCTA agrees with NAB, however, that in adopting its recent significant expansion of those obligations, the Commission imposed an overly strict standard that fails to account for the frenetic pace of

¹ NCTA is the principal trade association of the cable television industry in the United States, which is a leading provider of residential broadband service to U.S. households. Its members include owners and operators of cable television systems serving nearly 80% of the nation’s cable television customers, as well as more than 200 cable program networks. Cable service providers have invested more than \$290 billion over the last two decades to deploy and continually upgrade networks and other infrastructure—including building some of the nation’s largest Wi-Fi networks.

² Petition for Reconsideration and Clarification of the National Association of Broadcasters, et al., MB Docket No. 19-363 (Nov. 15, 2019) (“Reconsideration Petition”).

³ *In re Complaints Involving the Political Files of WCNC-TV, Inc., Licensee of Station WCNC-TV, Charlotte, NC, et al.*, Memorandum Opinion and Order, MB Docket No. 19-363, FCC 19-100 (rel. Oct. 16, 2019) (“Order”); *In re Complaints Involving the Political Files of Scripps Broadcasting Holding, LLC, Licensee of Station WCPO-TV, Cincinnati, OH*, Order, MB Docket No. 19-363, FCC 19-101 (rel. Oct. 16, 2019) (“Acronym Order”) (collectively, “Orders”).

political advertising sales during the heat of an election. Indeed, the Commission failed to account at all for how these new standards would apply to cable operators, which face additional compliance challenges. NCTA therefore urges the Commission to reconsider its Orders and, pending that reconsideration, to issue an order clarifying that the Commission will defer to the good faith compliance efforts by cable operators and others subject to these requirements.

DISCUSSION

NCTA agrees with NAB that the Commission should not have adopted new political file requirements without public input, interpreting for the first time the “issue advertising” provisions added to the Communications Act by the Bipartisan Campaign Reform Act of 2002 (BCRA)⁴ in an adjudication involving a dozen broadcast stations.⁵ In this circumstance, a notice-and-comment rulemaking would have been more appropriate to obtain broader input from stakeholders and to consider implementation issues such as a safe harbor for compliance with the revised rules.

⁴ Pub. L. No. 107-155, 116 Stat. 81 (codified 47 U.S.C. § 315(e)(1)(B), (e)(2)(E), and (e)(2)(G)). As an initial matter, NCTA reads the Commission’s Order as only applying to non-candidate political advertising under Section 315(e)(1)(B), not to candidate advertisements under Section 315(e)(1)(A). Section 315(e)(2)(E), which the Order focuses on, relates to advertising communicating a political matter of national importance (*i.e.*, Section 315(e)(1)(B) ads), as shown by the fact that it parallels the three subparts of Section 315(e)(1)(B). *Compare* 47 U.S.C. § 315(e)(1)(B) (requirements apply to a request for broadcast time that “communicates a message relating to any political matter of national importance, including – (i) a legally qualified candidate; (ii) any election to Federal office; or (iii) a national legislative issue of public importance”), *with* 47 U.S.C. § 315(e)(2)(E) (political record shall include “the name of the candidate to which the communications refers and the office to which the candidate is seeking election, the election to which the communication refers, or the issue to which the communication refers (as applicable)”). *See* Order ¶ 13. The Commission acknowledges that Section 315 relates to both requests to purchase advertising time made by candidates and those by other persons relating to political matters of national importance, and states that “[t]he complaints that are the subject of this Order relate to the second type of request.” *Id.* ¶ 11 n.24; *see also id.* ¶ 2 (stating that “[t]he principal focus of these complaints involves the obligations Congress added via the Bipartisan Campaign Reform Act of 2002 (BCRA), which are codified in sections 315(e)(1)(B), (e)(2)(E), and (e)(2)(G) of the Act,” and not referencing Section 315(e)(1)(A) or Section 315(e)(2)(F), which relate to candidate advertisements).

⁵ *See* Reconsideration Petition at 5-6.

Moreover, as the Commission acknowledges, the provisions at issue apply not only to broadcast licensees but also to cable operators engaged in origination cablecasting, as well as satellite television and radio operators, none of which were a party in the adjudicatory proceeding.⁶ As a result, the Commission did not consider the burdens of its interpretations and exacting standard on these other services.

For instance, like the personnel running a broadcast station, cable system “personnel are in no position to review and make accurate, consistent determinations about the issues that may be included in a large volume of ad[vertisement]s under severe time constraints . . . under the watchful ‘Monday morning quarterbacking eye’ of groups like the Complainants who can cherry-pick instances where an issue or two may be overlooked, and more importantly, *see* Order at ¶ 3, the threat of FCC sanctions for any errors.”⁷

In addition to mandating analysis of requests for advertising time by advocacy groups seeking to target particular demographics on *federal* elections and issues, the Orders will require cable system personnel to screen requests by any political party or local advocacy group for advertising time to support or oppose any *local* candidates or issues to determine whether they

⁶ Order ¶ 4 n.7 (“Although the instant complaints involve only broadcast licensees, the obligation to maintain political files for public inspection also applies to cable television system operators engaged in origination cablecasting (*see* 47 CFR § 76.1701); Direct Broadcast Satellite providers (*see* 47 CFR § 25.701(d)); and satellite radio licensees (*see* 47 CFR § 25.702(b)). The clarification provided in this Order is intended to assist all such entities in complying with their political file record-keeping obligations.”).

⁷ Reconsideration Petition at 17-18. The Commission misses the point when it states that the licensees in the underling adjudication “failed to provide any record evidence regarding the incremental burden associated with providing more information about what is typically a 30-60 second ad that requires review under either scenario, i.e., reviewing such an advertisement and reporting on multiple categories of information compared to reviewing it to selectively identify any one of the categories of information.” Order ¶ 19 n.52. The burden – both in terms of time and potential enforcement action – lies not only in reviewing the advertisement, but also in making judgments about whether the advertisement communicates a message relating to any “political matter of national importance.”

raise any federal issues that must be disclosed in compliance with the Commission's interpretation of Section 315(e).⁸ This especially will be a challenge for advertising sales staff, who are not experts in political issues, and will be magnified by the fast pace and high stakes of advertising sales leading up to an election.

Cable operators face additional burdens because they sell advertising on multiple channels of programming on systems that are viewed simultaneously in individual communities across wide metropolitan areas. Thus, while television broadcast stations sell time on a single channel of programming with limited inventory, a cable operator may be airing an array of local and regional advertisements inserted into dozens of channels. Some advertisements will be inserted on the whole system, while others will only be placed on specific targeted parts of the system.

Additionally, cable operators' ability to target advertising to select geographical areas means they are likely to get more requests to purchase time from local candidates and issue advertisers who cannot afford to advertise on broadcast television and do not need the geographic reach of a broadcast station. Similarly, cable systems carry a range of niche channels that candidates and issue advertisers use to target particular demographics, including, for example, news channels, religious channels, outdoor channels, and channels popular with an older demographic. As a result, cable system personnel will have to monitor a multiplicity of advertising.

⁸ NCTA agrees with NAB that Congress did not intend to sweep into Section 315(e)(1)(B) state and local political advertisements that mention issues that happen to be debated on the national stage as well. Reconsideration Petition at 8-10. The Commission should therefore reconsider that conclusion, and instead find that state and local political advertisements (*e.g.*, advertisements for state and local candidates, elections, and ballot measures) are wholly outside the scope of Section 315. This conclusion would be more consistent with its ruling that the phrase "legally qualified candidate" in Section 315(e)(1)(B)(i) means legally qualified candidates for *federal* office. Order ¶ 31.

Likewise, although cable operators are already complying with the requirements adopted in the BCRA as they understood them, complying with the more onerous interpretations adopted by the Commission will require significantly more resources. As one operator explains, given the requirement to upload documents to the political file “as soon as possible,” which is defined as “immediately absent unusual circumstances,”⁹ its goal is to upload information about an advertisement – for each market where it will be placed – within 24 hours of receiving an order. The operator may also be selling advertising time for other multichannel video programming distributors (MVPDs), and therefore must complete paperwork for those MVPDs in the same timeframe. Moreover, at the time the operator receives the order, it does not typically have details about the advertising copy. Additionally, when issue advertisers place advertisements across multiple markets, the content often varies by market. Given this, the new stringent requirements adopted by the Commission add a level of complexity and subjectivity that will require hiring additional staff and providing extensive new training, with no guarantee that the Commission – in the event of a complaint – will agree with whatever nuanced judgments the staff makes in this fast-paced environment.

NCTA also agrees with NAB that the Commission’s conclusion that regulatees must disclose *all* issues raised in an issue advertisement creates incentives to err on the side of over-disclosure, with the risk that key issues addressed by political advertising will be lost among laundry lists of issues merely touched upon. NAB’s proffered standard of requiring entities to

⁹ 47 C.F.R. § 76.1701(c). This rule, notably, applies to “[a]ll records required by this paragraph,” *id.* which does not include the “issue advertising” additions to the political file added by the BCRA, as the Commission never codified those requirements. Had the Commission done a rulemaking to implement these provisions, the Commission would have considered the additional time needed to comply with them.

“make reasonable, good faith efforts to disclose the topics that are the focus of political ads”¹⁰ is a sensible approach that would address the difficulty of staff identifying and listing every possible issue raised, while at the same time ensuring that the public is accurately informed of the issues the advertisements are primarily addressing.¹¹

For these reasons and others laid out in NAB’s Reconsideration Petition, the Commission should reconsider its Orders, adopting more reasonable interpretations consistent with congressional intent. Pending full reconsideration though, NCTA urges the Commission to issue a ruling promptly clarifying that it will defer to the good faith compliance efforts of cable operators and others subject to the requirements.¹² Given that cable operators are entering into a

¹⁰ Reconsideration Petition at 3, 18-20. Specifically, NAB argues that (1) the station should only have to disclose “those topics that are the focus of a federal political advertisement,” and (2) the Commission should “presume that a station has used their reasonable best efforts to discern the issue or issues that were the focus of an advertisement.” *Id.* at 20.

¹¹ NCTA objects not only to the specific interpretations that the Commission made, but to the unreasonably strict standard it has begun applying to entities’ attempts at compliance. To appreciate how unforgiving the Commission’s enforcement standard is one need only look at the Acronym Order adopted simultaneously with the Order interpreting the statute. There, the Commission admonished a licensee for identifying a sponsor as the DSCC-IE instead of spelling out the name of the Democratic Senatorial Campaign Committee. Even if the Commission could reasonably find that the acronym was insufficiently descriptive, taking enforcement action against a station for such a minor lapse is draconian. And although the Commission merely “admonished” the licensee for this failing, it made clear that it did “not rule out more severe sanctions for a violation of this nature in the future.” Acronym Order ¶ 7. *See also In re Online Political Files of Meredith Corp., Licensee of Station WPCH-TV, Atlanta, GA and Georgia Television, LLC, Licensee of Station WSB-TV, Atlanta, GA*, Order, File Nos. 082117a & 082117b, Facility ID Nos. 64033 & 23960, FCC 19-1232 (MB rel. Dec. 3, 2019) (admonishing licensees for such slights as referring to the election at issue in shorthand form).

¹² Adopting a reasonable approach to enforcement would be fully consistent with the Commission’s obligation to enforce the provisions of Section 315 and how it has handled enforcement in other contexts. *See, e.g., In re Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, Report and Order, 26 FCC Rcd 17222, 17238 ¶ 22 (2011) (adopting a safe harbor to prove compliance with a statutory mandate with regard to embedded commercials through certifications and periodic testing, with the Commission investigating only when it receives “a pattern or trend of consumer complaints indicating possible noncompliance”). Now that the Commission has sought input from all affected parties, NCTA is hopeful that it will be able to work with the Commission and advocates to develop a potential safe harbor for compliance with the rules. Such a safe harbor could ensure that regulatees have a clear roadmap for compliance while increasing the usefulness of the information

presidential election year with hotly contested races around the country, it would be overly burdensome to demand perfect adherence to such strict standards, particularly with little time to train the staff who are on the front lines of political advertising.¹³

The Commission has historically deferred to the good faith efforts of regulatees when they have been required to make judgments in the political programming context,¹⁴ yet it fails to extend such deference here despite the difficult, subjective judgments involved in determining whether an advertisement communicates a “political matter of national importance.” Issuing a clear statement that the Commission will defer to regulatees’ good faith efforts is particularly vital here, where sensitive First Amendment values are at stake.¹⁵ The risk that the Commission will second-guess a regulatee’s judgment and penalize the regulatee’s good faith efforts is likely

provided to the public. In the meantime, however, cable operators will need time to train their staff to avoid errors that are highly likely given the fast pace of political advertising sales.

¹³ Indeed, had the Commission adopted its new interpretations in a rulemaking proceeding, as it should have, it would have been required to give affected entities time to come into compliance with the new rules pursuant to the Administrative Procedure Act. *See* 5 U.S.C. § 553(d).

¹⁴ For example, in the context of the news exemption from equal opportunity requirements in Section 315, for more than 40 years the Commission has emphasized that it “allows reasonable latitude for exercise of good faith news judgments by broadcasters and networks by leaving the initial determination as to the eligibility for Section 315 exemption to their reasonable good faith judgment.” *In re Greater Washington Educational Telecommunications Association, Inc.*, Declaratory Ruling, 26 FCC Rcd 16509, 16511 ¶ 7 (MB 2011) (quoting *In re Petitions of the Aspen Institute Program on Communications and Society and CBS, Inc. for Revision or Clarification of Commission Rulings Under Section 315(a)(2) and 315(a)(4)*, Declaratory Order, 55 F.C.C.2d 697, 708 (1975), *aff’d sub nom. Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir. 1976)). The Commission similarly defers to broadcasters’ good faith judgment in granting reasonable access for federal candidates under Section 312(a)(7). *See, e.g., Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, Public Notice, 34 F.C.C.2d 510, 536 (1972) (“The Commission will not substitute its judgment for that of the licensee but, rather, it will determine in any case that may arise whether the licensee can be said to have acted reasonably and in good faith in fulfilling his obligations under this section.”).

¹⁵ *See* Reconsideration Petition at 10-12 & n.22 (stating that the Commission’s action is vulnerable to an as-applied First Amendment challenge, and noting that the U.S. Supreme Court left open such a challenge when it upheld the BCRA disclosure provisions against a facial challenge, depending upon how the Commission interprets and applies the statutory provisions (citing *McConnell v. FEC*, 540 U.S. 93, 242 (2003))).

to discourage regulatees from running issue advertisements, in effect imposing a prior restraint that raises serious First Amendment concerns.¹⁶

CONCLUSION

The Commission should reconsider its Orders and adopt more reasonable interpretations of Section 315(e), consistent with Congressional intent and accounting for how cable operators and others sell advertisements, especially during the height of an election. Pending full reconsideration, NCTA urges the Commission to issue an order clarifying that it will defer to the good faith compliance efforts of cable operators and other entities subject to the requirements.

Respectfully submitted,

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¹⁶ See, e.g., *Wash. Post v. McManus*, 944 F.3d 506, 2019 WL 6647336, at *8 (4th Cir. 2019) (noting that “the specter of a broad inspection authority, coupled with an expanded disclosure obligation, can chill speech and is a form of state power the Supreme Court would not countenance”).