

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., SW
Washington, DC 20554



July 17, 2003

Re: MM Docket No. 93-25

Dear Ms. Dortch:

On July 11, I met with Johanna Mikes of Commissioner Adelstein's office and Catherine Bohigian of Commissioner Martin's office. On July 15, I met with Paul Gallant of Chairman Powell's office, Jennifer Manner of Commissioner Adelstein's office, and Jordan Goldstein of Commissioner Copps' office. I met with each of these staff to discuss the political programming obligations imposed on DBS operators pursuant to Section 25(a) of the 1992 Cable Act, 47 U.S.C. § 335(a). As detailed below and in the attached bullets, which were supplied to Commission staff, the Commission's prior decision to leave DBS compliance up to case-by-case decision making without formal rules will not facilitate candidate access to citizens.

Generally, the FCC's political programming rules work extremely well, and few complaints occur. Media Bureau Chief Ken Ferree just spoke about the high quality of the political programming procedures in place at the Media Bureau. Chief Ferree said, "it's one of the best operations in the FCC." *BNA Daily Report*, July 16, 2003. "The folks that handle political complaints in the bureau are probably the most efficient group in the FCC. They handle 99 percent of the complaints literally within minutes, informally, on the telephone, with the stations and the candidate's representatives." *Id.* He decried the use of formal proceedings, "I think if we had to do every one of them formally--and we do lots of them--it would be incredibly cumbersome." *Id.* Media Access Project, on behalf of its clients, seek the same treatment of DBS that it applied to broadcast and cable services.

In addition, during the meetings, I made the following points:

- Candidates have been given the right of access under the law. Clear, explicit Commission rules will facilitate the access that Congress gave candidates. Failure to facilitate candidate access undermines the law and court precedent granting candidates great deference when they seek to reach citizens over the airwaves.
- Candidates will have little incentive to spend time and resources in an FCC proceeding. First, candidates have little time or extra resources during a campaign. Second, because the likely outcome of a formal FCC proceeding will not occur until after the campaign is over, the only beneficiary of a candidate who initiates a proceeding would be the next candidate.

Therefore, the Commission will not obtain additional insight and information about candidate's needs vis-à-vis DBS using a case-by-case approach. Lack of clear rules will only discourage candidate access.

- The Commission based its original decision in large part on the fact that DBS operators did not sell advertising. This is no longer true. As demonstrated in DAETC, UCC, *et al.*'s reconsideration petition, DBS operators sell advertising at advertised rates.
- Applying the Commission's policies for cable, candidates do not have the unfettered right to demand placement on any channel, at any time, at any price. In the multi-channel environment of cable, candidates gain access to advertising only during "origination" programming which is programming subject to the exclusive control of the cable operator. *See* 47 C.F.R. §§ 76.5(p); 76.205. DBS operators have determined already the times of day and the rates at which they wish to offer advertising, applying the Commission's rules will not be difficult.

The Commission's failure to adopt clear rules will deprive candidates and DBS operators with the efficient, flexible and successful mechanism the Media Bureau uses to mediate disputes. Without clear rules for the Bureau to interpret, the staff will be forced to await full Commission orders on this subject. If further information is needed to tailor the Commission's rules for DBS operators, the Commission should seek that information as part of this docket. The failure of the DBS industry to come forward with detailed objections or proposals should not result in a Commission decision that means no candidates will reach citizens over DBS services, in violation of the statutory mandate.

Pursuant to Section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b), a copy of this letter is being filed electronically. If you have any questions, do not hesitate to contact me at 202-454-5683.

Sincerely,

Cheryl A. Leanza
Deputy Director

Attachments

cc: Paul Gallant
Jennifer Manner
Johanna Mikes
Catherine Bohigian
Jordan Goldstein

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News

Communications
FCC Not Inclined to Change
Political Advertising Complaint Process

The Federal Communications Commission has a highly effective, if informal, way of dealing with complaints about political advertising, and the commission will not change the way it handles those complaints unless and until a new mandate is signed into law, Kenneth Ferree, chief of the FCC's Media Bureau, told reporters July 15.

"The short answer is, we are not looking at changing our political team in any way absent congressional direction that we do so," Ferree said.

Senate Commerce, Science, and Transportation Committee Chairman John McCain (R-Ariz.) added an amendment to the FCC's authorization bill (S. 1264) that would require the FCC to develop new rules for broadcasters with regard to political advertising.

Specifically, McCain is seeking new rules by Aug. 1, 2004, that would require broadcasters to better identify the purchasers of political advertising, and establish a formal complaint procedure at the commission to handle violations of the rules on political advertising.

Ferree, however, said it would be a huge mistake for the commission to change its current process. "The folks that handle political complaints in the bureau are probably the most efficient group in the FCC. They handle 99 percent of the complaints literally within minutes, informally, on the telephone, with the stations and the candidate's representatives," he said.

Ferree made his comments at a wide-ranging press briefing at the commission July 15. The bureau chief's remarks on political advertising came in response to questions from reporters.

Formal Process Time Consuming

Right now, only the odd case is handled through a formal process, and like every other FCC process, it takes time to resolve, Ferree said. "I think if we had to do every one of them formally--and we do lots of them--it would be incredibly cumbersome, very slow, and I'm not sure ... the results would be

any better," he said.

Currently, both the stations and the candidates are usually pleased with the results from the more informal process, Ferree said. "From what I hear, it's one of the best operations in the FCC," he said.

Later, Ferree told BNA that FCC rules already require broadcasters to keep a public file with the name and a point of contact of all organizations purchasing political advertising. If someone provides credible evidence that the organization is a front or a fraud, then the broadcast station has an affirmative duty to investigate that claim, he said.

However, if the station fails to adequately investigate the claim, an individual may call the FCC to complain about the station, Ferree said. "The question is, do you need a formal process then to go through?" he said.

Currently, when the FCC receives this type of complaint, a staffer calls the broadcast station for answers, Ferree said. "And typically this is all kind of worked out, very informally, usually the same day," he said.

During the campaign season, the commission receives hundreds of these types of complaints, Ferree said. "And in an election cycle, a matter of days or weeks can make the difference," he said.

"So it's not clear to me that a formal process to resolve these things would actually do anybody any good; in fact, it might do a great deal of harm," Ferree said.

Additionally, asking broadcasters to investigate too closely the identity of political organizations could run into constitutional problems, Ferree added. "You'd have to draft the rules in a way to be very cautious about treading into the political speech arena," he said.

By Cheryl Bolen

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**Implementation of Section 25 of the Cable Television Consumer Protection
and Competition Act of 1992, and Direct Broadcast Satellite Public Service Obligations
MM 93-25**

Media Access Project on behalf of DAETC, *et al.* asks the Commission to revisit its decision.

- This decision has unfortunately not benefitted from the helpful reorganization of the Commission that was designed to bring the expertise of the Media Bureau to Commission policy-making with respect to DBS political programming laws.
- The FCC is obligated under Section 25(a) of the 1992 Cable Act, which requires the Commission to “apply the access to broadcast time requirement of section 312(a)(7) . . . and the use of facilities requirements of section 315” to DBS operators. 47 U.S.C. § 335(a).
- In direct conflict with the Commission’s present practice with respect to broadcast political advertising questions, the FCC placed unjustified reliance upon case-by-case decision-making to resolve questions which will now arise in the intense heat surrounding the end of any political campaign season. By issuing vague rules that will force candidates to litigate to receive confirmation of their rights, many voters will be deprived of access to candidate speech. As the Commission and the courts have previously recognized, access delayed is access denied in the fast-paced world of political campaigns. “[I]t is of small solace to a losing candidate that an appellate court might eventually find that the Commission’s approval of a licensee’s...decision was an abuse of discretion or contrary to law.” *Becker v. FCC*, 95 F.3d 75, 81 (D.C. Cir. 1996); *see also CBS, Inc. v. FCC*, 453 U.S. 367 (1981).
 - o In the DBS Order, the Commission states “DBS providers, like broadcasters and cable operators, must disclose to candidates information about rates and discount privileges and give any discount privileges to candidates.” Direct Broadcast Satellite Public Interest Obligations, 13 FCC Rcd 23254, ¶ 48 (1998) (hereinafter *DBS Order*). But the Commission is embarrassingly unclear as to whether the specific details of the Commission’s rule, Section 73.1942, applies to DBS operators. Specifically, the Commission should apply 47 C.F.R. § 73.1942(a); (a)(1)(I), (iii), (iv), (vi), (viii), (ix), (x), (xi), (xii), (xiii); (a)(2); and (b) to DBS operators.
 - o It appears that the Commission did not explicitly adopt its lowest unit rate rules because it believed that DBS operators do not sell advertising. (“DBS providers do not currently have commercial rates on which to base a LUC determination. . . .” *DBS Order* at ¶ 48.) DBS operators have begun to sell advertising, and therefore, adopting rules is no longer premature.
 - o Many helpful and practical policies that have long been used by the Mass Media Bureau to implement Sections 312(a)(7) and 315 were ignored by the Commission in its DBS Order. For example, the Commission failed to adopt the procedural policies found in its 1984 Political Primer providing for expeditious resolution of political advertising disputes during a campaign. The Mass Media Bureau routinely provides telephone numbers to the public so that candidates may obtain informal staff advice rapidly during the heat of a

political campaign.

- o In some instances the Commission made a wise choice and adopted its previous interpretations of Sections 312(a)(7) and 315's terms, *DBS Order* at ¶ 45, the Commission did not reflect these decisions in its rules. Thus, although the Commission concludes at paragraph 45 of the *DBS Order* that it will adopt the definitions of “use” and “legally qualified candidate” in the DBS context, it did not reflect that decision in the rules applicable to DBS operators. The FCC should incorporate it into 47 C.F.R. § 25.701 (formerly 47 CFR § 100.5(b), relocated by Direct Broadcast Satellite Service, 17 FCC Rcd 11331, ¶ 16 (2002)).
- o The Commission ignored years of judicial and its own precedent, which clearly articulate the appropriate standard for broadcaster consideration of political advertising requests. *See DBS Order* at ¶¶ 38, 41. Contrary to the FCC’s holding for DBS, candidates' needs have been considered central in implementing Section 312(a)(7). In *Carter-Mondale Presidential Committee, Inc.*, 74 F.C.C.2d 631, 642 (1979), a decision subsequently upheld by the Supreme Court in *CBS, Inc. v. FCC*, 453 U.S. 367, 379 (1981), the Supreme Court stated that broadcasters must consider candidate requests “on an individualized basis, and broadcasters are required to tailor their responses to accommodate, as much as reasonably possible, a candidate's stated purposes in seeking air time.” 453 U.S. at 387.
- o The Commission improperly concludes that can and should defer consideration of whether a non-national Federal candidate may obtain access to DBS systems. *DBS Order* at ¶ 38. To the extent the Commission appears to permit a blanket policy under which Congressional candidates may be denied access to DBS, this determination must be reversed. The plain language of Section 312(a)(7) gives rights to “federal candidates” without limitation and makes no distinction between Congressional and presidential candidates. The Commission has specifically held that the term reaches Congressional candidates. *See Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510 (1972).
- The Commission’s decision about placement of political advertisements was based on a facts no longer true, and in light of those changed facts, the Commission decision conflicts with specific and controlling Supreme Court precedent.
 - o The Commission has placed reliance on representations of DBS operators that they “do not originate programming, [or] sell advertising time. . . .” *DBS Order* at ¶ 34, and that DBS licensees do not sell advertising because of technical, economic, and legal reasons. *Id.* at n. 71. However, on February 16, 1999, DirecTV announced that it is selling spot time on retransmitted cable channels as well as on channels for which it originates programming.
 - o The Commission failed to apply binding Supreme Court precedent stating that broadcasters may not adopt blanket policies relegating candidates to certain portions of the broadcast day because such policies would violate broadcasters' obligations under Section 312(a)(7) to consider each candidate's requests individually. *DBS Order* at ¶¶ 40, 41. The Supreme Court, in *CBS, Inc.*, 452 U.S. at 390, upheld the Commission's rules prohibiting blanket rules concerning access.

- The FCC adopted, as Commission DBS policy, unpublished and unexplained “informal advice” purportedly rendered to cable operators despite the fact that it violates D.C. Circuit precedent.
 - o The Commission stated that staff had informally advised cable operators that they only need ensure Section 315 equal opportunities obligations to have comparable audience size, but in fact candidates have the right to audiences in the same time slot and the same demographics, if they so choose.
 - o In *Becker*, the D.C. Circuit held “the equal opportunity requirements ‘forbid any kind of discrimination by a station between competing candidates’ . . .” *Becker*, 95 F.3d at 84 (quoting Political Primer 1984, 100 F.C.C.2d 1476, 1505 (1984)).

- The FCC should reverse its decision and require DBS operators to comply with the Children’s Television Act rules. The FCC’s reasoning, that the DBS industry is nascent, is no longer accurate. *DBS Order* at ¶59, 62-64. Moreover, DBS operators sell advertising, so they are a logical subject of regulation. Children that receive programming over satellite should not be penalized, particularly since many DBS subscribers lack cable as an alternative and most households are unaware that DBS services lack the same protections cable offers.

- The Commission should adopt rules that will promote access to DBS operator public files by obligating DBS operators to mail via U.S. mail its public file to any party in the U.S. requesting a copy, subject to reasonable limitations with respect to copying expenses. DBS is a national service and its public files should be available nationally. An acceptable alternative would be to require the information to appear on a DBS operator’s web site if they so chose.