Before the
Federal Communications Commission
Washington, D.C. 20554

In re Petition for Reconsideration by	)
PEOPLE FOR THE AMERICAN WAY AND MEDIA ACCESS PROJECT	)
of	)
DECLARATORY RULING	)
Regarding Section 312(a)(7)of the Communications Act	)

MEMORANDUM OPINION AND ORDER

Adopted: August 27, 1999 **Released: September 7, 1999**

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement:

1. The Commission has before it a petition for reconsideration of our October 3, 1994, *Declaratory Ruling*, timely filed by Media Access Project and People for the American Way ("Petitioners"). The *Declaratory Ruling* granted a request by the National Association of Broadcasters ("NAB") with respect to a broadcaster's sale of non-standard lengths of time, such as five minutes, to legally qualified candidates for federal elective office.[1] Specifically, the Commission ruled that broadcast stations need not sell or furnish legally qualified candidates for federal office time for political advertising in increments other than those which the station either sold commercial advertisers or programmed during the one-year period preceding an election.

2. For the reasons set forth below, we believe that the petition for reconsideration should be granted and that a broadcast station should not be allowed to refuse a request for political advertising time *solely* on the ground that the station does not sell or program such lengths of time. As will be

[1] *Memorandum Opinion and Order*, 9 FCC Rcd 5778 (1994). The NAB has opposed the petition for reconsideration and the petitioners have replied thereto. Although NAB did not discuss five-minute program lengths exclusively, it focused primarily on five-minute lengths and the majority of Commission rulings in this area involve requests concerning five-minute lengths.

discussed in greater detail, a station must take into account a number of factors in evaluating a federal candidate's request for access, only one of which involves the potential disruption to normal programming. Our reconsideration finds that the *Declaratory Ruling* did not accord sufficient consideration to the needs of federal candidates.

3. Petitioners argue that the Commission's *Declaratory Ruling* erred both as a matter of policy and law. As to policy, they suggest that allowing broadcasters to refuse in advance the sale of certain lengths of program time based entirely on a station's or network's commercial sales or programming practices wrongly reduces political speech to the level of the commercial marketplace. Petitioners also question the Commission's stated goal of drawing a clear line as to what lengths of time are subject to legitimate access requests in order to avoid potential disputes. According to Petitioners, the record neither demonstrated any need to protect broadcasters from such potential disputes nor evidenced any need to preserve administrative resources. Further, Petitioners contend that only a few cases involving this issue had been brought to the Commission prior to the *Declaratory Ruling*.

4. With regard to the law, Petitioners argue that the *Declaratory Ruling* misconstrued the Commission's longstanding and consistently applied interpretation of Section 312(a)(7), which requires that federal candidates' requests for access must be considered individually, on a case-by-case basis. Petitioners contend that until the *Declaratory Ruling*, Commission decisions had consistently held that a broadcaster cannot arbitrarily refuse, in advance, to sell a program slot of any particular length.[2] Rather, according to Petitioners, the Commission had required broadcasters to consider each request for time on an individualized, *ad hoc* basis. Petitioners maintain that this approach of requiring *ad hoc* responses to access requests properly accorded broadcasters sufficient flexibility without foreclosing the possibility that a candidate may successfully demonstrate the need for a certain non-standard program length. In this way, the candidate has the opportunity to explain individualized campaign needs for a length of program time and the broadcaster retains the ability to counter offer or refuse a request, if warranted by the facts. Petitioners conclude that permitting broadcasters to choose not to sell particular lengths of time based on their own commercial sales and programming practices conflicts with the Commission's and the courts' longstanding interpretation of Section 312(a)(7), which prohibits a broadcaster from establishing blanket bans on sales of any particular length of spot or program time.

5. NAB's Opposition challenges Petitioners' argument that the Commission, by its action, relegated federal candidate speech to that of a commercial advertiser. NAB contends that Petitioners ignored the *Declaratory Ruling* to the extent that it requires a broadcast station to provide access to

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[2] *1978 Policy Statement*, 68 FCC 2d 1079, 1090 (1978). And as noted by Petitioners, the Commission's prohibition against such flat bans was favorably cited by the U.S. Supreme Court in its landmark reasonable access decision. *Carter/Mondale Presidential Committee*, Inc., 74 FCC 2d 631, *recon. denied*, 74 FCC 2d 657 (1979), *aff'd sub nom. CBS Inc. v. FCC*, 629 F.2d 1 (D.C. Cir. 1980), *aff'd*, 453 U.S. 367, 392 (1981) ("*Carter/Mondale*"). In addition, our *Report and Order* in *Codification of the Commission's Political Programming Policies*, reaffirmed the ongoing viability of the prohibition against flat bans. 7 FCC Rcd 678, 681-82 (1991) ("*Political Programming Policies*").

program lengths either sold *or programmed* in the year preceding an election. Thus, according to NAB, federal candidates are still entitled access to program lengths greater than commercial spot time. NAB argues that the *Declaratory Ruling* struck an appropriate balance between the need of candidates to convey their message and the practical need of broadcasters to minimize the disruption to their schedules. NAB also argues that the *Declaratory Ruling* is entirely consistent with Commission and court precedent, which has avoided forcing broadcasters "to carve up their schedules in order to accommodate a candidate who desires to air an odd-length spot or program."

Discussion

6. Section 312(a)(7) of the Communications Act provides:

> The Commission may revoke any station license or construction permit...for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.[3]

Since Congress enacted this provision in 1972, the Commission has attempted to interpret it in a manner consistent with Congress' clear intent to promote wider, less fettered dissemination of political speech. Indeed, the legislative history of the access provision emphasizes that the fundamental policy underlying its adoption was "to give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters."[4]

7. While it is clear that candidates have an undeniable right to purchase "reasonable" amounts of time, it is also clear that this right is not without limitation. Thus, the Commission has steadfastly charted a course which attempts to strike an appropriate balance between political speech and undue burdens on broadcasters in accommodating the needs of federal candidates. In doing so, the Commission has determined that it is not appropriate or practical to adopt formal rules outlining in an objective, quantifiable manner how much time is reasonable because of the variety of circumstances and number of federal candidates any particular station might encounter during a specific election period. Instead, the Commission has relied on the reasonable, good faith judgment of licensees to provide reasonable amounts of time to federal candidates.[5] In determining whether a particular licensee reasonably afforded access to advertising time, the Commission confines itself

[3] 47 U.S.C. Section 312(a)(7).

[4] 117 Cong. Rec. S12872 (daily ed. Aug. 2, 1971); *see also* S. Rep. No. 96, 92d Cong., 1st Sess. 20 (1971). The Commission in *Summa Corp*. indicated its understanding that Section 312(a)(7) was not intended to require stations to accept all requests for political time during election campaigns to the exclusion of all or most other types of programming or advertising. 43 FCC 2d 602, 604 (1973).

[5] *Political Programming Policies*, 7 FCC Rcd at 681.

to two questions:
(1) whether the broadcaster followed the proper standards in deciding whether to grant a candidate's request for access; and (2) whether the broadcaster's explanation of its decision is reasonable in terms of these standards.[6]

8. As articulated by the U.S. Supreme Court in its landmark *Carter/Mondale* decision, the Commission's guidelines a broadcaster must follow in evaluating access requests are well-established:

> [A]ccess requests from "legally qualified" candidates for federal elective office . . . must be considered 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. In responding to access requests, however, broadcasters may also give weight to such factors as the amount of time previously sold to the candidate, the disruptive impact on regular programming, and the likelihood of requests for time by rival candidates under the equal opportunities provision of Section 315(a). These considerations may not be invoked as pretexts for denying access; to justify a negative response, broadcasters must cite a realistic danger of substantial program disruption -- perhaps caused by insufficient notice to allow adjustments in the schedule -- or of an excessive number of equal time requests.[7]

The Commission has consistently followed these guidelines in evaluating complaints under Section 312(a)(7).[8]

9. While determinations regarding access are entitled to deference if the licensee takes into account the appropriate factors and acts reasonably and in good faith, it is well-settled Commission policy that "across-the-board" policies adopted by a broadcaster generally cannot be sustained.[9] This is precisely because "across-the-board" policies do not allow for appropriate consideration of the individualized needs of candidates.[10] The Supreme Court in *Carter/Mondale* considered this issue and stated:

> While the adoption of uniform policies might well prove more convenient for broadcasters, such an approach would allow personal campaign strategies and the exigencies of the political

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[6] *Carter/Mondale*, 453 U.S. at 375-76.

[7] *Carter/Mondale*, 453 U.S. at 387.

[8] *See, e.g., Ed Clark for President Committee*, 87 FCC 2d 417 (B/C Bur. 1980) ("*Ed Clark*"); *Ed Noble*, 79 FCC 2d 903 (B/C Bur. 1980); *Kennedy for President Committee*, 80 FCC 2d 93 (1980). *See also, Arthur R. Block, Esq.*, 7 FCC Rcd 1784 (MMB 1992); *Mitchell Rogovin, Esq.*, DA 92-198 (released February 18, 1992)*; Michael Steven Levinson*, 7 FCC Rcd 1457 (MMB 1992).

[9] *Carter/Mondale*, 453 U.S. at 387-88. *See also Ed Clark*, 87 FCC 2d at 421; *Ed Noble*, 79 FCC 2d at 907.

[10] *Carter/Mondale*, 453 U.S. at 387-88.

process to be ignored. A broadcaster's "evenhanded" response of granting only time spots of a fixed duration to candidates may be "unreasonable" where a particular candidate desires less time for an advertisement or a longer format to discuss substantive issues.[11]

10. On the other hand, in balancing the needs of candidates and broadcasters, the Commission has ruled that candidates do not have a right to a particular placement of their political announcements on a station's schedule;[12] nor do candidates have any right to program time "of any particular or minimum duration."[13] These two policies, taken together, require a candidate and a station to negotiate and compromise, in the absence of pre-established ceilings or minimums.

11. The Commission's *Declaratory Ruling* was a departure from the above framework and, on further reflection, we believe the it does not afford appropriate consideration to the needs of federal candidates. In effect, the *Declaratory Ruling* permitted what amounts to an "across-the-board" policy, or flat ban, on the sale of program time in non-standard increments. Thus, upon reconsideration, we now believe that broadcasters should not be allowed to refuse, as the result of such a ban, requests from candidates for non-standard lengths of time. Rather, in considering such requests, broadcasters must take into account the *Carter/Mondale* factors outlined above.

12. We believe that requiring good faith negotiation between an individual federal candidate and a broadcaster concerning access to non-standard lengths of political advertising time better fulfills Congress' intent in enacting Section 312(a)(7). As a practical matter, there may be a variety of circumstances where a federal candidate decides that the best campaign strategy involves the use of non-standard length advertising formats and, applying the *Carter/Mondale* factors, the broadcaster can reasonably make the necessary accommodations. With respect to requests for five-minute increments in particular, we note that, from a candidate's perspective, a five-minute program may be a desirable option because of the expense of purchasing and producing a thirty-minute or longer program, and the brevity of a thirty- or sixty-second spot announcement. As petitioners point out, such non-standard lengths of time may facilitate more substantive political discourse during political campaigns. This, in turn, furthers the purposes of Section 312(a)(7) by giving candidates the opportunity to "better explain their stand on the issues, and thereby more fully and completely inform the voters."[14]

13. The disruption to regular programming that would be caused by granting a request for a non-standard length of time, while clearly relevant, must be considered in light of whether the broadcaster could make adjustments in its schedule that would accommodate the candidate's needs.

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[11] *Id.* at 390.

[12] *1978 Policy Statement*, 68 FCC 2d at 1091.

[13] *Donald Riegle*, 59 FCC 2d at 1315; *Pete Flaherty*, 48 FCC 2d at 848.

[14] 117 Cong. Rec. S12872 (daily ed. Aug. 2, 1971).

In this regard, in several of the reasonable access cases decided by the Commission prior to the *Declaratory Ruling*, broadcasters were able to provide five-minute programs to candidates, which suggests that broadcasters may not be extraordinarily burdened by such requests.[15] To allow a broadcaster categorically to decide in advance that it will not sell non-standard time, like five-minute increments, absolves the broadcaster of even considering the possibility that it could make such an accommodation in a particular circumstance.

14. Our finding herein does not mean that broadcasters will be required to provide five minutes or other non-standard lengths of program time to candidates in every particular instance. Indeed, in several previous decisions involving candidate requests for non-standard length program time, the Commission determined that the broadcaster acted reasonably in denying the request given the circumstances presented in those cases.[16] Thus, the Commission will, as previously, defer to a licensee's discretion, and overturn a decision only if the licensee has acted unreasonably pursuant to the established guidelines.[17]

15. For all of the above reasons, we grant Petitioners' request for reconsideration, and find that stations must evaluate each request for time by a federal candidate on an individualized basis, using the factors set forth in *Carter/Mondale.* These factors include:
(1) how much time was previously sold to the candidate; (2) the potentially disruptive impact on the station's regular programming; (3) the likelihood of equal opportunities requests by opposing candidates; and (4) the timing of the request.[18] And we note that, as the Court in *Carter/Mondale*

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[15] See *Carter/Mondale*, 453 U.S. at 394; *Ed Noble*, 79 FCC 2d at 903-4; *Donald Riegle*, 49 FCC 2d at 1314; *Senator Frank Church*, 37 R.R.2d 337 (1976); *Campaign '76 Media Communications, Inc.*, 58 FCC 2d 1142 (1976) ("*Campaign '76"), reversed on other grounds, Anthony Martin-Trigona*, 64 FCC 2d 1087 (1977); *Don C. Smith*, 49 FCC 2d 678 (B/C Bur. 1974).

[16] *See, e.g., Ed Clark*, 87 FCC 2d at 428; *Ed Noble*, 79 FCC 2d at 910-11; *Donald Riegle*, 59 FCC 2d at 1314; *Don C. Smith*, 49 FCC 2d at 680; *Pete Flaherty*, 48 FCC 2d at 848; *Humphrey for President Campaign*, 34 FCC 2d 471, 472 (1972).

[17] As to our discussion of the case law in the *Declaratory Ruling* regarding the provision of non-standard program time, we note that in the cases cited, the staff undertook the very balancing of factors that NAB would have us ignore. In *Donald Riegle*, the Commission balanced the needs of the candidate with those of the broadcaster in determining that the broadcaster had acted reasonably in refusing to sell a candidate five-minute programs in prime time and early fringe hours. However, the Commission explained by pointing out that the broadcaster made available to the candidate five-minute programs on Saturday and Sunday, and thirty-minute programs during prime time and early fringe. 59 FCC 2d at 1315-16. A similar balancing analysis and result was reached in *Ed Noble* pursuant to a careful balancing of the relevant factors. 79 FCC 2d at 909.

[18] In its initial request for a declaratory ruling, NAB asked that we consider a narrower alternative approach if we decided that Section 312(a)(7) would not permit allowing broadcasters to reject non-standard length of time requests if they had neither sold nor programmed a requested increment. The alternative would allow broadcasters to reject non-standard length requests during any network or syndicated programming. Since the *Declaratory Ruling* reached the broader approach, the alternative was rendered moot. We believe that NAB's alternative request raises concerns

emphasized, these factors may not be used as a pretext for denying access: "...to justify a negative response, broadcasters must cite a realistic danger of substantial program disruption -- perhaps caused by insufficient notice to allow adjustments in the schedule -- or of an excessive number of equal time requests."[19]

16. In view of the foregoing, Media Access Project and People for the American Way's petition for reconsideration, to the extent indicated, is hereby GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Secretary

similar to those addressed herein. As a practical matter, for example, if a station could deny a request for non-standard lengths of time during all network and syndicated programming, federal candidates would be virtually shut out of televised prime time programming hours on the major network affiliates and from a significant portion of drive time radio, where syndicated programming is especially dominant. Although a station may consider the potentially disruptive impact such requests may have on its regular programming, it must weigh this factor along with the other *Carter/Mondale* factors in making an individualized decision on whether to grant the request.

[19] 453 U.S. at 387.

Dissenting Statement of Commissioner Harold W. Furchtgott-Roth

In re Petition for Reconsideration by People for the American Way and Media Access Project of Declaratory Ruling Regarding Section 312(a)(7) of the Communications Act.

For the reasons that follow, I would have adhered to the interpretation of section 312(a)(7) set forth in the *Declaratory Ruling*, 9 FCC Rcd 5778 (1994). That decision does not suffer from legal error and, in my view, policy considerations cut in favor of establishing a clearer rule regarding the duties of broadcasters to sell time.

Legal Considerations

Section 312(a)(7) is not a particularly specific statute. It obliges stations to allow legally qualified federal candidates to "purchase reasonable amounts of time" for the use of broadcast facilities. The definition of "reasonableness" is left to this agency.

The *Declaratory Ruling* found that "broadcasters should be required to make available to federal candidates only the lengths of time offered to commercial advertisers during the year preceding a particular election period." 9 FCC Rcd at para 10. This decision was based on the Commission's 1978 Policy Statement on enforcement of section 312(a)(7). *See* 68 FCC 2d 1079.

A careful reading of that Policy Statement indicates that the 1994 Commission correctly understood it to establish regulatory parity as between candidates and advertisers with respect to time. That Statement specifically concludes:

> We believe it to be generally unreasonable for a licensee to follow a policy of flatly banning access by a federal candidate *to any of the classes and lengths of program or spot time in the same periods which the station offers to commercial advertisers. . . .*
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> [Thus,] [l]icensees may not adopt a policy that flatly bans federal candidates *from access to the types, lengths, and classes of time which they sell to commercial advertisers.*

68 FCC 2d 1079 at paras. 41, 55. In other words, broadcasters must treat candidates as well as they treat regular advertisers.

As the 1994 Commission noted, this parity principle runs throughout our section 312, and related section 315, interpretations. With respect to the question whether stations must provide candidates with access on weekends, the Commission has concluded that "stations are required to provide *only the same policies* with respect to weekend access that they apply to commercial advertisers. . . . [I]t is reasonable for federal candidates to expect to be treated *in the same manner* as commercial advertisers." 9 FCC Rcd at para. 8 (citing Codification of the Commission's Political Programming Policies, 7 FCC Rcd 678, 683 (1991)) (emphasis added). The Commission has also followed the parity principle in the context of "make goods," explaining that broadcasters must only

offer make goods to candidates if such a privilege has been offered to commercial advertisers in the last year. *See* 9 FCC Rcd at para. 9 (citing 7 FCC Rcd at 697).

For a broadcaster to adhere to this principle of parity with respect to the issue of time units (even in a general, or "across the board," fashion) is simply not inconsistent with our precedent. To the contrary, it comports fully with the above-discussed rulings and codifications. In my view, today's decision represents a break from the well-established "parity principle" of "reasonableness."

Conversely -- *and contrary to the linchpin of petitioners' argument* -- the *Declaratory Ruling* does not, by establishing that stations need only sell candidates the time amounts they sell commercial advertisers, violate any Commission precedent. *See supra* at para. 11. Although the Order asserts "it is well-settled Commission policy that 'across-the-board' policies adopted by a broadcaster generally cannot be sustained," *supra* at para. 9, this is not at all clear.

The purported ban on "flat bans" that underlies petitioners' theory, as well as today's Order, is traced back to the 1978 Policy Statement. *See supra* at para. 4 & n.2 (summarizing petitioners' argument and citing, in support thereof, the 1978 Policy Statement). *That decision did not, however, generally prohibit across-the board policies.* Rather, it prohibited across-the-board policies that deny candidates the chance to buy time under the same terms as commercial advertisers. To repeat:

> Licensees may not adopt a policy that flatly bans federal candidates *from access to the types, lengths, and classes of time which they sell to commercial advertisers.*

68 FCC 2d 1079 at para. 55. This is simply not a rule against "flat bans" in general, or even against "flat bans" relating to time issues , as petitioners and the Order characterize it; it is a rule against "flat bans" that deny candidates treatment equal to that given advertisers on matters of time.[20]

Moreover, *CBS v. FCC*, 453 U.S. 367 (1981), did not hold, as this Order suggests, that across-the-board policies are unsustainable or somehow impermissible. The *dicta* from that case recounts the criteria for evaluating access claims that the Commission established in the 1978 Report and in the Order and memorandum opinions and orders underlying that litigation. In the cited passages, the Supreme Court only recounted those criteria for purposes of deciding the other legal claims before the Court. Specifically, the Court held that the Commission's case-by-case approach was "consistent with," 365 U.S. at 389, the access requirement of section 312(a)(7), and it explained why that was so, speaking of the various interests at stake. In no way, however, did the Court

[20]Given that the Commission has generally declined to issue guidelines as to what constitutes "reasonable" time, and that it now rejects even the parity principle, one wonders whether this application of the statute could survive a non-delegation doctrine challenge. *See generally American Trucking v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999) (requiring agency to adopt "intelligible principles" in implementing broad statutory provision in order to save provision from constituting an unconstitutional delegation of authority).

require such an approach with respect to all issues. Other approaches -- including placing some outer limits on the meaning of reasonableness, as the Commission has attempted with its parity theory -- could be equally consistent with the statute.

As discussed above, "across-the-board" policies, even with respect to time, were never prohibited by the 1978 Policy Statement. In any event, the Commission cannot really mean what it says about the requirement of individualized consideration and negotiation in every case. Surely, broadcasters may have "flat" policies that track the requirements of section 312(a)(7). For instance, broadcasters may refuse -- "across the board" -- to sell time prior to the commencement of a campaign, to an unqualified candidate, or to a candidate for state office.

To be sure, the Commission has also stated that spot requests should be considered on an individualized basis. But when it can be ascertained that the request is somehow legally deficient -- either because the campaign has not commenced, the person is not qualified, or the request seeks treatment that exceeds that given to advertisers with respect to weekend access, make goods, or time increments -- I do not believe that the broadcaster has any duty to consider and negotiate such requests. The best way to reconcile the parity principle with the Commission's emphasis on individualized consideration is to conclude that stations must negotiate individual requests when those requests fall within the outer bounds of section 312(a)(7).

Policy Considerations

Given that the Commission possesses some discretion to define the meaning of "reasonableness," I turn to the policy considerations involved in the sale of non-standard increments of time to political candidates. I believe that the interests of the broadcasters in having at least some regulatory clarity, as well as their interest in reducing the transaction costs of complying section 312(a)(7), are being overlooked.

I grant that determinations of reasonableness turn, at bottom, on the facts and circumstances of individual cases. That does not mean, however, that we cannot establish any general principles to help broadcasters better understand, *ex ante*, their obligations in this area -- such as simple equal treatment standards.

Moreover, by requiring broadcasters to engage in full-scale negotiation and compromise *every single time* that a federal candidate makes a request to purchase time (today's Order admits of no exceptions), this decision imposes great transaction costs on the stations. The cost for stations of mandated, individualized negotiation in every case should not be underestimated.

Finally, I am troubled by the fact that the Commission's reading of section 312(a)(7) elevates federal candidates to a status that is not just on a par with, but superior to, commercial advertisers. I think it equally reasonable to read "reasonable time" to mean as much time as the station gives commercial advertisers -- in other words, to require parity of treatment between candidates and

advertisers. As explained above, this is precisely how Commission precedent has interpreted the term. In my opinion, reasonable treatment is equal treatment; I do not think that the policy concerns that animate 312(a)(7) require special or more favorable treatment for candidates than for everybody else.