

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

In the Matter of )  
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Equal Opportunities Complaint Filed by )  
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Angelides For Governor Campaign )  
 )  
Against 11 California Television Stations )  
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ORDER

Adopted: October 26, 2006

Released: October 26, 2006

By the Assistant Chief, Policy Division, Media Bureau:

1. The Commission has before it a complaint filed on October 12, 2006, by the Angelides for Governor Campaign (“Campaign”) on behalf of Phil Angelides (“Angelides”), a Democratic candidate for Governor of California, against 11 television stations (list attached) in California. The Campaign alleges that Angelides is entitled to equal opportunities from the subject stations pursuant to Section 315 of the Communications Act of 1934, as amended (“Act”), that the stations have not responded to its request, that it considers their lack of response a rejection of its request for equal opportunities, and asks that the Commission “act on [its] complaint as quickly as possible.” The stations filed responses to the complaint on October 16, 2006, and the Campaign filed a reply on October 17, 2006. For the reasons set forth below, we conclude that the news interview segments of “The Tonight Show with Jay Leno” qualify for the *bona fide* news interview exemption under Section 315(a)(2), and that news interviews conducted on that program are exempt from equal opportunities.

2. **Background.** The Campaign asserts that Angelides is entitled to 15 minutes and 41 seconds of air time on the subject stations as a result of the appearance of Governor Arnold Schwarzenegger (“Schwarzenegger”), a Republican candidate for Governor of California, on “The Tonight Show with Jay Leno” (“The Tonight Show”) on October 11, 2006. In its letter to the stations, as support for its request for equal opportunities, the campaign quotes a letter from Rep. Xavier Becerra (D-Calif.) (attached to its complaint) to The Honorable Kevin J. Martin, Chairman, Federal Communications Commission. In his letter, Rep. Becerra states that “any argument that suggests that The Tonight Show would fall under the four exceptions listed in paragraph (a) of §315 would lack merit, especially given the fact that The Tonight Show is controlled and operated by NBC’s entertainment division, not its news division.” The Campaign’s complaint also references an October 11, 2006, article in the *Sacramento Bee* (attached to the complaint) in which an NBC spokesman is quoted as stating in 1984 that the subject program “is an entertainment show . . . It has always been an entertainment show and we have no desire for it become anything else.”

3. NBC Telemundo License Company (“NBC”) filed a response with the Commission on behalf of three of the subject stations for which it is either the licensee or the controlling general partner of the licensee and indicated that the eight remaining subject stations concurred in its response.<sup>1</sup> In its response, NBC contends that the Campaign’s complaint should “be denied because Section 315(a)(2) of the Communications Act, Section 73.1941(a)(2) of the Commission’s Rules and controlling Commission precedent clearly exempt The Tonight Show with Jay Leno, as a *bona fide* news interview program, from political equal opportunities obligations.”<sup>2</sup> It further asserts that the program meets the Commission’s criteria for a *bona fide* news interview program because: it is regularly scheduled—airing every weeknight on the NBC network and in its current format since 1992; NBC Studios and Big Dog Company, the producers of the program, control all aspects of the program; and “the producers ensure that decisions as to format, content and participants are based on the producers’ independent news judgment as to the participant’s newsworthiness and not motivated by partisan purposes.”<sup>3</sup>

4. NBC argues that the Campaign’s characterization of “The Tonight Show” as an entertainment program is not relevant to the legal analysis of this case because “[t]he Commission long ago rejected any limitation on the applicability of the news interview exemption based on a categorization of a program in which the news interview appears.”<sup>4</sup> NBC cites a 1984 Commission decision regarding the “Donahue” program and more recent Commission staff decisions that found that certain programs or portions thereof qualified as *bona fide* news interviews. NBC argues that in the Donahue ruling and subsequent decisions, the Commission has expanded the types of programs eligible for the news interview exemption in recognition of change and innovation in broadcast production, and has expanded the scope of what constitutes news for purposes of the exemption.<sup>5</sup> Given these decisions, NBC argues that the entire program should be considered a *bona fide* news interview program, including brief skits, live performances, and Jay Leno’s opening monologue, which regularly details newsworthy events.

5. In support of its position, NBC states that “The Tonight Show” includes interviews of many newsworthy persons, including public, entertainment, and political figures with a variety of perspectives, about current noteworthy events. Such persons have included California Governor Gray Davis and U.S. Senators Hillary Clinton and John McCain. It also points to a study reported by the Pew Research Center in 2004 that “concluded that late night talk shows, including The Tonight Show with Jay Leno, were increasingly important sources of political news, particularly for younger viewers.”<sup>6</sup> NBC states that the fact that “The Tonight Show” has been characterized as an entertainment program has no bearing on whether it can qualify for a news exemption. In support of this argument, NBC cites the Commission’s decision that portions of the “Donahue” show qualified as exempt news interviews as

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<sup>1</sup> We note that several of the subject stations also filed individual responses to the complaint. With one exception, the individual responses make similar arguments to NBC and will not be referred to separately. The General Manager of Station KMIR-TV, Palm Desert, CA, indicates that the station is making arrangements to provide time to Angelides, although not in direct response to Angelides’ request for time.

<sup>2</sup> NBC Response at 1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.* at 2-3, citing, e.g., *Request by Multimedia Entertainment, Inc. for Declaratory Ruling*, 56 R.R.2d 143 (1984) (“Donahue”); *Request of ABC, Inc.*, 15 FCC Rcd 1355 (MMB 1999) (“Politically Incorrect”); *Request for Declaratory Ruling By Paramount Pictures Corporation, et al.*, 3 FCC Rcd 245 (1988) (“Entertainment Tonight”).

<sup>6</sup> NBC Response at 2, citing Pew Research Center for the People and Press, “Cable and Internet Loom Large in Fragmented Political News Universe at 11 (Jan. 11, 2004).

precedent for the Commission's rejection of "any limitation on the applicability of the news interview exemption based on a categorization of the program in which the news interview appears."<sup>7</sup> The same decision, NBC states, confirms "that the Bureau would defer to a programmer's good faith discretion as to the newsworthiness of guests."<sup>8</sup> While NBC notes a 1960 decision in which the Commission found that the Jack Paar program, also known as "The Tonight Show," was not exempt from the equal opportunities provision,<sup>9</sup> the company argues that this decision has been implicitly overruled by subsequent rulings.<sup>10</sup>

6. In its reply, the Campaign argues that "The Tonight Show" is not a *bona fide* news interview program but is instead "an attempt by an entertainment figure, Jay Leno, to use his access to the public airwaves to promote his good friend's political campaign."<sup>11</sup> It points to various quotes by NBC executives in which they describe the show as entertainment. The Campaign also asserts that although "The Tonight Show" has had a handful of political guests in the past, only once before has a guest been a legally qualified candidate for public office at the time of his appearance. In addition, it claims that most of the political guests have appeared to promote books or movies and, therefore, were booked for "entertainment purposes." It further contends that there was no "newsworthy" purpose to Schwarzenegger's subject appearance. That fact, the Campaign contends, combined with "Leno's promotion and support of Schwarzenegger's political career," raises a serious question as to whether the decision to have Schwarzenegger as a guest on the show was made in good faith and based on newsworthiness.<sup>12</sup> In particular, the Campaign notes that Leno appeared as "Master of Ceremonies" at Schwarzenegger's 2003 party celebrating his victory in his first race for Governor of California.<sup>13</sup>

7. The Campaign argues that, unlike "The Tonight Show," whose host is a comedian and whose guests are primarily entertainers, most of the exempt news programs cited by the subject stations were hosted by former journalists and "were primarily forums to discuss public affairs and provide useful information to viewers." It distinguishes the subject program from "Entertainment Tonight" (found to be a *bona fide* newscast), stating that the latter uses "the same methods and journalistic guidelines typical of traditional newscasting," and from "Politically Incorrect" (found to be a *bona fide* news interview), stating that that program was about politics and current events.<sup>14</sup> The Campaign disagrees with NBC's contention that the Commission's 1960 decision concerning the Jack Paar program, also known as "The Tonight Show," has been implicitly overruled by subsequent rulings.<sup>15</sup> The Campaign notes that the 1960 program, which the Commission ruled was not exempt from the equal opportunities provision, had substantially the same general format as the current "Tonight Show with Jay Leno."

8. **Discussion.** Section 315(a) of the Act provides that, if a licensee allows a legally qualified candidate for public office to use a broadcast station, it must afford equal opportunities to other

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<sup>7</sup> *Donahue, supra*.

<sup>8</sup> *Id.*

<sup>9</sup> *Broadcast Actions, Lar Daly Rulings*, 40 FCC 314 (1960) ("Jack Paar").

<sup>10</sup> NBC Response at 3, n.6.

<sup>11</sup> Campaign Reply at 1.

<sup>12</sup> *Id.* at 3.

<sup>13</sup> *Id.* at 1.

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.* at 5.

such candidates for that office to use its facilities. There are, however, exceptions to the equal opportunities provision. Appearances by legally qualified candidates on certain categories of *bona fide* news programming, including *bona fide* news interviews, are exempt from equal opportunities.<sup>16</sup> When adopting these exemptions in 1959, Congress indicated that, to qualify as a *bona fide* news interview program, a program must be regularly scheduled; the content, format, and participants must be determined by the licensee;<sup>17</sup> and the determination that programming is a *bona fide* news interview must have been made by the station “in the exercise of its *bona fide* news judgment and not for the political advantage of the candidate for political office.”<sup>18</sup> Although Congress did not specifically define the term “news” when adopting these exemptions, the Commission has stated that “it is clear that in enacting the exemptions Congress envisioned increased news coverage of the political process. It would seem elemental that Congress contemplated interviews with elected officials and candidates for elected office as newsworthy subject matter.”<sup>19</sup>

9. During the 25 years following enactment of the news exemptions, the Commission determined that only programs with traditional question and answer formats such as “Meet the Press” and “Face the Nation” qualified as news interview programs; Congress had noted these as examples of the kind of news interview programs in existence when it enacted the news exemptions. In 1984, however, the Commission began taking a significantly broader view of the scope of the news interview exemption. In finding that *bona fide* news interview segments on the “Donahue” show were exempt from Section 315(a), the Commission ruled that exempting less conventional interview formats as *bona fide* news interviews is consistent with Congress’ intent in adopting the exemptions to increase news coverage of the political campaign process. The Commission stated that “it would be unsound to rule that a program involving a unique or innovative approach to interviewing its guests somehow lacks sufficient licensee control evident in traditional news interview programs like ‘Meet the Press’ or ‘Face the Nation.’”<sup>20</sup> To do so, the Commission stated, “would discourage programming innovation by sending a signal to broadcasters that to be exempt an interview program should adhere only to the format of certain programs mentioned by Congress over 25 years ago.”<sup>21</sup> The Commission also stated that “the fact that other ‘Donahue’ segments may not include discussions pertaining directly to the political arena, or even to current news events, would appear immaterial.”<sup>22</sup> Since the *Donahue* decision, the Commission has ruled that other news interview programs or segments thereof with unique and innovative format elements, such

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<sup>16</sup> 47 U.S.C. §315(a)1-4.

<sup>17</sup> In 1981, the Commission determined that independently produced programs may also be considered exempt news programming. However, in doing so, the Commission also indicated that whenever a news exemption is sought for an independently produced program, “licensees must still make a determination to air individual programs in the exercise of their *bona fide* news judgment.” *Request for Declaratory Ruling on Independently Produced News Interviews*, 7 FCC Rcd 4681, 4685 (1981). Accordingly, the licensees of the stations on which the subject program airs “must independently make a determination to air the program, not for the political advantage of any candidate for public office, but in the good faith exercise of their news judgment.” *Id.*

<sup>18</sup> 105 Cong. Rec. 17777 (1959).

<sup>19</sup> *Donahue*, 56 R.R.2d at 147.

<sup>20</sup> *Id.* at 146.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 148.

as the “Sally Jessy Raphael Show,” “Jerry Springer,” “Politically Incorrect,” and “Howard Stern,”<sup>23</sup> qualify for the news interview exemption under Section 315(a).

10. Our decisions stress that the Commission defers to the reasonable, good faith judgment of broadcasters regarding newsworthiness. A Commission staff ruling that “Entertainment Tonight” was a *bona fide* newscast under Section 315(a)(1) quotes from a decision in which the Commission stated: “[t]he term ‘*bona fide*’ (which is used to qualify all of the Section 315 exemptions) was intended to emphasize Congress’ intent that the programs be of genuine news value and not be used to advance the candidacy of a particular individual.”<sup>24</sup> The *Entertainment Tonight* ruling further states that “Congress did not note that *bona fide* news could be coverage of only certain substantive areas.”<sup>25</sup> It stated that the prospect of the Commission making determinations as to whether particular kinds of news are more or less *bona fide* “would involve unwarranted intrusiveness into program content and would be thus, at least suspect under the First Amendment.”<sup>26</sup> The ruling concludes that “[so] long as the program characteristics set out by Congress are met, our role is properly limited to determining whether a broadcaster was reasonable in deciding that a program fits within an exemption. Our role is not to decide, by some qualitative analysis, whether one kind of news story is more *bona fide* than another.”<sup>27</sup>

11. We find that the news interview portions of “The Tonight Show with Jay Leno” meet the criteria for exemption as a *bona fide* news interview. The program is regularly scheduled, its producers control all aspects of the program, and the producers assert that decisions as to format, content and participants are based on the producers’ independent news judgment as to the participant’s newsworthiness and not motivated by partisan purposes. The fact that many interviews on the program concern entertainment is irrelevant. We note that “Entertainment Tonight” reports and airs commentary regarding current events and stories concerning various aspects of the entertainment industry and was nonetheless found to qualify as a *bona fide* newscast. Similarly, “The Tonight Show with Jay Leno” often interviews individuals, including many from the entertainment industry, regarding current events, including entertainment and political news.

12. With respect to the Campaign’s argument that Schwarzenegger is not newsworthy, we again note the Commission’s observation in *Donahue*: “[i]t would seem elemental that Congress [when adopting the news exemptions] contemplated interviews with elected officials and candidates for elected office as newsworthy subject matter.”<sup>28</sup> As the Commission stated in *Donahue*, “Congressional intent is to defer substantially to the good faith news judgments of licensees.”<sup>29</sup> As in *Entertainment Tonight*, if the criteria for a *bona fide* newscast are met, the Commission’s role is not to decide whether one kind of news story is more *bona fide* than another but rather to determine whether a broadcaster’s decision that a

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<sup>23</sup> *Request of Multimedia Entertainment, Inc.*, 6 FCC Rcd 1798 (MMB 1991) (“*Sally Jessy Raphael*”); *Request of Multimedia Entertainment, Inc.*, 9 FCC Rcd 2811 (MMB 1994) (“*Jerry Springer*”); *Politically Incorrect, supra*; *Request of Infinity Broadcasting Operations, Inc.*, 18 FCC Rcd 18603 (MB 2003) (“*Howard Stern*”). See *Request of Infinity Broadcasting Corporation of Illinois*, 12 FCC Rcd 773 (MMB 1997) (Ed Vrdolyak and Ty Wansley).

<sup>24</sup> *Entertainment Tonight*, 3 FCC Rcd at 245, quoting *Henry Geller*, 95 FCC 2d 1236 (1983).

<sup>25</sup> *Id.* at 245.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 245-6.

<sup>28</sup> *Donahue*, 56 RR 2d at 147.

<sup>29</sup> *Id.* at 148.

program fits a particular news exemption is reasonable. Similarly, our role in this case is not to second-guess broadcasters about the relative newsworthiness of interviewees, but to decide if the broadcasters were reasonable in determining that the news interview segments of “The Tonight Show with Jay Leno” fit within the news interview exemption.<sup>30</sup> We note that, in the segment at issue here, the interview addressed topics that included the Governor of California’s views on immigration reform, bipartisan legislative activities in California, and the war in Iraq. Based on the record before us, we cannot say that the producers’ judgment that the news interview segments of “The Tonight Show with Jay Leno” fit within the news interview exemption was unreasonable.

13. Nor do we find that the decision to invite Schwarzenegger on “The Tonight Show with Jay Leno” was motivated by partisan purposes. Here, NBC specifically represents that the producers of “The Tonight Show with Jay Leno” ensure that such decisions are based on the participant’s newsworthiness and are not motivated by partisan purposes, and the Angelides campaign has not provided sufficient evidence to rebut this representation. The campaign’s assertion that Schwarzenegger’s appearance was an attempt by Jay Leno to promote Schwarzenegger’s campaign is based on little more than speculation. Even were we to accept the campaign’s position that Leno and Schwarzenegger are friends, that fact by itself would not establish that the producers’ decision to invite Schwarzenegger on the program was motivated by a desire to help his campaign. Indeed, we note that Schwarzenegger appeared on the “Tonight Show with Jay Leno” twice in both 2004 and 2005, even though he was not a candidate for any office during either year, a fact which rebuts any assertion that the invitation for Schwarzenegger to appear on the show was an out-of-the-ordinary attempt by the show’s producers to aid Schwarzenegger’s candidacy. Moreover, we note that prior to entering politics, Schwarzenegger was a movie star with nationwide appeal. It would thus not be unreasonable for the producers of the “Tonight Show with Jay Leno” to reach the conclusion that an interview with Schwarzenegger, who is a national celebrity outside of California, would be of particular interest to the program’s nationwide audience. Therefore, such a decision raises no inference of partisan motivation.

14. Nor do we find Jay Leno’s lack of journalistic credentials to be controlling here. Although hosts of some *bona fide* news programs in the past have had journalism backgrounds, such credentials in a host are by no means a prerequisite for a program to be considered a *bona fide* news program.<sup>31</sup>

15. The Commission’s decision in *Jack Paar* is not relevant to this case because it was decided using standards that are no longer in force. In *Jack Paar*, the Commission found that an appearance by a candidate on the “Jack Paar” program was not exempt from the equal opportunities provision primarily because station logs listed the show as a “variety program.”<sup>32</sup> *Jack Paar* was decided in 1960, one year after Congress adopted the news exemptions. As previously noted, the Commission at that time considered only programs with traditional question-and-answer formats such as “Meet the Press” and “Face the Nation” to be qualified as news interview programs. As discussed above, the Commission has, since 1984, consistently ruled that exempting less conventional interview formats is consistent with Congress’ intent in adopting the exemptions to increase news coverage of the political campaign process. The Campaign’s reliance on the staff decision involving Pappas Telecasting’s

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<sup>30</sup> We note that broadcast licensees must provide truthful and accurate statements to the Commission or be in violation of Section 1.17 of the Commission’s Rules, 47 C.F.R. §1.17.

<sup>31</sup> See, e.g., *Politically Incorrect*, *supra*; *Howard Stern*, *supra*.

<sup>32</sup> *Jack Parr*, *supra*.

donation of free air time to the Fresno County Republican Central Committee is also misplaced.<sup>33</sup> That ruling did not involve a news interview program, and there is no indication in that ruling that the program was regularly scheduled, that the producers or licensees controlled the program format, content or participants, or that the selection of the participants was based on their newsworthiness. Indeed, free air time was donated in that case to political party committees that distributed the time to the party's candidates.<sup>34</sup>

16. We do not (and need not) find, however, that the entire subject program is exempt from Section 315(a) as a *bona fide* news interview. Although we found all of the program "Politically Incorrect," including the host's monologue, to be a *bona fide* news interview program, we found that the monologue in that case was closely related to the interview portion of the program. NBC has not indicated that the monologue on "The Tonight Show" is in any way connected to its news interview segments. In addition, the types of program segments described by NBC as "brief skits" and "live performances from entertainment talent" were specifically excluded from qualifying as exempt news programming in *Entertainment Tonight*. That decision states that "the presentation of skits, dramatic readings, music, comedy, or other forms of pure entertainment would not meet the congressional intention" behind adopting news programming exemptions to the equal opportunities provision.<sup>35</sup> Based on this precedent, we are unable to conclude on the current state of the record that the entire "Tonight Show with Jay Leno" program is exempt from Section 315(a).

17. Based on the record before us, we conclude that the interview of Governor Schwarzenegger on "The Tonight Show with Jay Leno" qualifies for the *bona fide* news interview exemption under Section 315(a)(2).

18. Accordingly, IT IS ORDERED that the complaint filed by the Angelides for Governor Campaign IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Robert L. Baker  
Assistant Chief  
Policy Division  
Media Bureau

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<sup>33</sup> See Complaint and attached decision.

<sup>34</sup> See *id.*

<sup>35</sup> *Entertainment Tonight*, 3 FCC Rcd at 246.

ATTACHMENT

Stations

KGET-TV  
Bakersfield, CA

KNVN(TV)  
Chico, CA

KIEM-TV  
Eureka, CA

KSEE(TV)  
Fresno, CA

KNBC(TV)  
Los Angeles, CA

KMIR-TV  
Palm Desert, CA

KCRA-TV  
Sacramento, CA

KSBW(TV)  
Salinas, CA

KNSD(TV)  
San Diego, CA

KNTV(TV)  
San Jose, CA

KSBY(TV)  
San Luis Obispo, CA