

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

In re Request of)
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Greater Washington Educational)
Telecommunications Association, Inc.)
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For Declaratory Ruling)
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DECLARATORY RULNG

Adopted: December 8, 2011

Released: December 8, 2011

By the Chief, Media Bureau:

1. In this Order, we grant a request for declaratory ruling filed by Greater Washington Educational Telecommunications Association, Inc. (“GWETA”), licensee of public television station WETA-TV, Washington, D.C., and producer of the series “In Performance at the White House,” (“Series”). In its Request, GWETA asks the Commission to declare that “the programs which comprise the series “In Performance at the White House” are exempt from the “equal opportunities” requirements of Section 315(a) of the Communications Act of 1934, as amended, under the bona fide news event exception.”¹ For the reasons set forth below, we conclude that broadcasts of the programs in the subject series within twelve weeks of the event covered in the program qualify as on-the-spot coverage of a *bona fide* news events under Section 315(a)(4) of the Communications Act of 1934, as amended (“Act”).

2. **Background.** GWETA describes “In Performance at the White House” as a series composed of programs that cover musical performances at the White House. GWETA states that the President of the United States typically attends these performances and frequently provides remarks at the opening and/or closing of the program.² It adds that the President can also appear throughout the broadcast, including shots of the President having “impromptu verbal or other interactions [with] the performers” and making “further remarks...relating to the performance.”³ GWETA states that “the programs are taped live at the White House, edited for time, and then distributed by PBS for local broadcast by nearly 360 public television stations nationwide.”⁴ According to GWETA, the Series has aired on public

¹ Request for Declaratory Ruling at 1 (filed by GWETA April 27, 2011) (“GWETA Request”). In response to a request by Commission staff, GWETA also submitted Supplements to its request, which included additional information regarding the Series.

² GWETA Request at 1.

³ GWETA Supplement to Request for Declaratory Ruling at 1 (submitted by Margaret L. Miller, Counsel for WETA, via e-mail Nov. 16, 2011, to Robert Baker and Hope Cooper, FCC Staff) at 1 (“GWETA Supplement III”).

⁴ GWETA Request at 1.

television stations since 1976, and plans for future programs in late 2011 and 2012 are underway, including those that may feature gospel music, the Blues, a celebration of young artists, as well as the award of the Library of Congress' Gershwin Prize.⁵

3. GWETA argues that broadcasts of the programs in the Series are on-the-spot coverage of *bona fide* news events under Section 315(a)(4), and are, therefore, exempt from the equal opportunities requirements of Section 315(a). It maintains that the subject performances are news events because they are "held at the White House, attended by the President and the First Family, and frequently featur[e] music in the context of an historical or national event, or the presentation of a national award."⁶ GWETA argues that the Commission "has recognized that programming which offers viewers a glimpse into the White House, and the events that take place there, are subject to greater media attention and, because of public interest, are inherently newsworthy."⁷ GWETA contends that any coverage of a "sitting President in...the White House,...when the President is hosting our nation's culture in performance" is newsworthy.⁸ It also contends "that there is no partisan purpose underlying or driving this programming" as demonstrated by the production of the Series "in every administration since that of President Carter, Republican and Democrat."⁹

4. GWETA acknowledges that the Series is not broadcast live but may be broadcast days, weeks or sometimes even longer after the event occurs. It states that the delay is due to "the time required for editing to time, the demands of scheduling for a national distribution to nearly 360 public television stations that then make 'local' broadcast decisions, as well as other factors."¹⁰ GWETA notes that it is sometimes difficult for stations to quickly broadcast a program in the Series. According to GWETA, while the performances that are the subject of programs in the Series are often planned with only a few weeks notice, the stations "typically establish their broadcast schedules three months in advance," and may have to wait several months before they can find "time in their schedule for the initial broadcast of the program in their communities." GWETA further contends that "[w]hile the audience for that station may have been aware from other news that the event occurred several weeks earlier, the performance of the event in its entirety remains new and newsworthy for that audience."¹¹ In addition to potential delay in initial broadcasts, GWETA also indicates that stations may decide to repeat the broadcasts. GWETA argues that "[s]uch delay and rebroadcasts do not defeat the on-the-spot component of the coverage of the

⁵ GWETA states that it taped the 2011 Library of Congress' Gershwin Award on November 21, 2011. GWETA Supplement to Request for Declaratory Ruling at 1 (submitted by Lisa Lindstrom Delaney, Vice President and General Counsel, WETA, via e-mail Oct. 20, 2011, to Robert Baker and Hope Cooper, FCC Staff) ("GWETA Supplement II").

⁶ GWETA Request at 4.

⁷ GWETA Request at 4 citing as an example *Democratic National Commission v. CBS and NBC*, 34 FCC 2d 572, 576 (1972) ("DNC") (involving two one hour programs--one involving President Nixon being interviewed by Dan Rather and the other involving John Chancellor narrating a day in the life of President Nixon).

⁸ GWETA Supplement III at 1.

⁹ GWETA Request at 5. GWETA also notes that "the initial broadcast of a program in the Series twice fell during the re-election campaign of an incumbent President – in July, 1996 during President Clinton's administration, and in June, 2004 during the administration of George W. Bush." GWETA adds that it "is unaware of any requests for equal time as a result of these broadcasts." GWETA Supplement I at 2.

¹⁰ GWETA Request at 5.

¹¹ GWETA Supplement II at 1.

news event exemption because the Commission has stated that “[w]e believe that a broadcaster’s good faith determination to delay or rebroadcast a newsworthy debate later than the day after the event to maximize audience potential may come within the exemption.”¹²

5. However, GWETA acknowledges that the Commission has previously “limited the ‘on-the-spot coverage of bona fide news event’ exception . . . to a finite period of time that is reasonably related to the date of the news event.”¹³ It cites to a case in which Commission staff determined that the broadcast of an event five weeks after it occurred could still reasonably qualify as on-the-spot coverage of a news event under the circumstances set forth in that case, including that the event received contemporaneous news coverage and that the issues discussed had “continuing topicality.”¹⁴ GWETA maintains that the events at the White House that are taped and eventually appear in programs in the Series “receive contemporaneous news coverage” and, for the reasons already discussed, “submits that the [subject] events will have continuing topicality through . . . twelve weeks from the date of the events.”¹⁵ It therefore requests that broadcast of a program in the subject Series be considered on-the-spot coverage of a news event up to twelve weeks from the date of the event.¹⁶

6. **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 such candidates for that office.¹⁷ Section 315(a) also states, however, that appearances by legally qualified candidates on four categories of *bona fide* news programming, including on-the-spot coverage of *bona fide* news events (Section 315(a)(4)), are exempt from equal opportunities requirements.

7. Congress qualified all four categories of exempt news programming with the term “*bona fide*,” which “was intended to emphasize Congress’ intent that the program be of genuine news value and not be designed to serve the political advantage of any particular candidacy.”¹⁸ In *Aspen Institute*, the Commission stated 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.”¹⁹ In deciding that “Entertainment Tonight” qualified as a *bona fide* newscast, the Mass Media Bureau stated that its “role is not to decide, by some

¹² GWETA Request at 5 citing *In re Petitions of Henry Geller*, 95 FCC 2d 1236, 1246 (1983) (“*Henry Geller*”), *aff’d sub nom., League of Women Voters Educ. Fund v. FCC*, 731 F.2d 995 (D.C. Cir. 1984).

¹³ GWETA Supplement to Request for Declaratory Ruling at 1 (filed Sept. 30, 2011) (“GWETA Supplement I”).

¹⁴ GWETA Supplement II at 1, citing *In re Request of The Southern Center for International Studies and WGBH Educational Foundation, Licensee of Noncommercial Station WGBX-TV, Boston, Massachusetts for Declaratory Ruling*, 3 FCC Rcd 492, 493 (MMB 1988) (“*Southern Center*”).

¹⁵ GWETA Supplement II at 1-2.

¹⁶ GWETA Supplement II at 2.

¹⁷ A “use” is defined as any identifiable, positive appearance (including by voice or picture) of a candidate lasting four seconds or more that is not exempt pursuant to Sections 73.1941 (a)(1) through (a)(4) of the Commission’s Rules, 47 C.F.R. § 73.1941(a)(1)-4. See 47 C.F.R. § 73.1941(b).

¹⁸ *In re Request of Oliver Productions, Inc. For Declaratory Ruling*, 4 FCC Rcd 5953, 5953 (1989), citing *Henry Geller*.

¹⁹ *Aspen Institute*, 55 FCC 2d 697, 708 (1975), *aff’d sub nom., Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 890 (1976) (“*Aspen Institute*”).

qualitative analysis, whether one kind of news story is more *bona fide* than another.”²⁰ It further stated that, “[s]o long as the program characteristics set out by Congress are met, [its] role is properly limited to determining whether a broadcaster was reasonable in deciding that a program fits within an exemption.”²¹

8. We consider two factors to determine whether a program qualifies as on-the-spot coverage of a *bona fide* news event under the statute: is it reasonable for a broadcaster to conclude that the subject event is newsworthy, and was the decision to carry the program based on good faith news judgment and not partisan purposes?²² As to whether the Series depicts a newsworthy event, the Commission has stated that the broadcast of remarks by a U.S. President fits within this category because presidential speech has “inherent newsworthiness,”²³ and that “[a]s the leader of the American people, [the President’s] life and that of the members of his family is a topic of great interest to a large segment of the population.”²⁴ Based on the foregoing, we find that it is reasonable for a broadcaster to conclude that any Presidential appearance, particularly in the White House, is a newsworthy event. Therefore, as long as the event is a reasonably recent event and the broadcast is intended in good faith by the broadcaster to inform the public and not to favor or disfavor any candidate, the program qualifies as on-the-spot coverage of a *bona fide* news event.

9. Contrary to earlier decisions which found that news events broadcast later than one day after the event did not qualify for the news exemption, the Commission stated in *Henry Geller* that “[w]e now believe instead that the only reasonable rule of thumb on the meaning of the Section 315(a)(4) exemption is that it encompasses news reports of any reasonably recent event intended in good faith by the broadcaster to inform the public and not intended to favor or disfavor any candidate.”²⁵ The Commission did not specifically quantify the time frame for a “reasonably recent event,” *i.e.*, a time period beyond which an event would no longer qualify as exempt news programming, other than to indicate that a one day limitation was unduly restrictive.²⁶ In making this decision, the Commission stated that “[t]he legislative history is silent as to a ‘contemporaneous’ restriction; it merely addresses the relative

²⁰ *Paramount Pictures Corp.*, 3 FCC Rcd 245, 245-46 (MMB 1988).

²¹ *Id.* See *Rev. Donald L. Lanier*, 37 FCC 2d 952 (B/c Bur. 1972) (granting newscast exemption to a program dealing entirely with current religious news).

²² See *In re Requests of Fox Broadcasting Company, Public Broadcasting Service, and Capital Cities/ABC, Inc. for Declaratory Rulings*, 11 FCC Rcd 11101, 11109 (1996), citing *Aspen Institute*. Although in *Fox Broadcasting* the Commission described the first prong of this test, as set out in *Aspen Institute*, as asking whether the “format” of the program reasonably fit within a news event exemption category, application of the first prong by the Commission has focused on newsworthiness. For example, in *Aspen Institute* itself, the Commission stated that newsworthiness was one of two criteria to be used “in determining whether Section 314(a)(4) had been properly invoked” by a broadcaster. *Aspen Institute*, 55 FCC 2d at 708; see also *King Broadcasting Company v. FCC*, 860 F.2d 465 (D.C. Cir. 1988) (describing the first prong of the *Aspen Institute* test as whether “the program was genuinely ‘newsworthy.’”).

²³ *In re Complaint of Democratic National Committee et al. Against Columbia Broadcasting System, Inc.*, 91 FCC 2d 1170, 1174 (1982).

²⁴ *DNC*, 34 FCC 2d at 576 citing *Democratic National Commission v. CBS and NBC*, 34 FCC 2d 891, 906 (D.C. Cir. 1972).

²⁵ *Henry Geller*, 95 FCC 2d at 1246-7.

²⁶ *Id.* at 1246.

newsworthiness of the event as the touchstone for exemption.”²⁷ As mentioned by GWETA, Commission staff has found that a time period as long as five weeks between an event and its broadcast was reasonable under the circumstances set forth in that case and that the broadcast qualified for a news exemption.²⁸ We acknowledge that 12 weeks is significantly longer than 5 weeks. Nevertheless, under all of the circumstances presented in the instant case, including GWETA’s representation that the subject events “receive contemporaneous news coverage” and its judgment as to the continuing topicality of the subject events, we find it reasonable to consider a broadcast of the subject event up to twelve weeks after the event to meet the first prong of the test for on-the-spot news coverage.

10. With respect to the second prong of our analysis, our decisions in this area stress that the Commission defers to the reasonable good faith judgment of broadcasters regarding newsworthiness of a program absent evidence that the program was broadcast for partisan purposes.²⁹ We believe that the airing of the subject programming beginning in 1976 to the present, a time period spanning the administrations of Presidents of both major parties, strongly supports GWETA’s contention that there is no partisan purpose connected to the production of the Series. In addition, we have no evidence before us of bad faith or unreasonableness on the part of GWETA.

11. Based on the record before us, we conclude that broadcasts of programs in the Series aired within twelve weeks of the events covered in the programs qualify for the on-the-spot coverage of a *bona fide* news event exemption under Section 315(a)(4) because it is reasonable for broadcasters to conclude that the event is newsworthy, and the decision to carry the programs is based on good faith news judgment and not partisan purposes. Therefore, appearances by the President in programs in the Series aired within twelve weeks of the event covered in the programs are exempt from the equal opportunities requirements of Section 315(a).

12. Accordingly, GWETA’s request for declaratory ruling IS GRANTED because we find that broadcasts of programs in the series “In Performance at the White House” aired within twelve weeks of the event covered in the programs qualify for the on-the-spot coverage of *bona fide* news events exemption under Section 315(a).

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief
Media Bureau

²⁷ *Id.* at 1253, citing Conference Rep. No. 1069, 86th Cong., 1st Sess. at 4 (1959); 105 Cong. Rec. 14442 (Pastore); *id.* at 16224 (Brown); *id.* at 17828 (Pastore); *id.* at 17777 (Scott).

²⁸ *Southern Center, supra.*

²⁹ *See Chisholm v. FCC*, 538 F.2d 349, 359 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 890 (1976).