

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

LETTER

October 4, 1996

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**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

WMUR-TV, Inc.  
Licensee of Station WMUR-TV  
P.O. Box 9  
50 Phillippe Cote Street  
Manchester, New Hampshire 03105

Dear Licensee:

This is in response to a complaint filed on April 22, 1996, against WMUR-TV by the Steve Michael Presidential Campaign Committee ("SMPCC"). SMPCC purchased time on WMUR-TV on behalf of Steve Michael, a candidate in the New Hampshire Democratic Presidential Primary held on February 20, 1996. SMPCC alleges that WMUR-TV failed to comply with the reasonable access and equal opportunities provisions of the Communications Act<sup>1</sup> in connection with advertising SMPCC purchased prior to this election. WMUR-TV responded to SMPCC's complaint on May 17, 1996, denying that it had failed to comply with these provisions. SMPCC filed a Reply to WMUR-TV's response on June 26, 1996.

On February 6, 1996, SMPCC placed its first order for time on WMUR-TV. This order consisted of nine sixty-second spots to air between February 8-9, 1996. On February 14, 1996, SMPCC placed a second order consisting of eight sixty-second spots to air between February 17-18, 1996. The following day, SMPCC placed an order for an additional nine spots to run between February 17-19, 1996, totalling seventeen spots requested to air during this three day period. SMPCC submitted three different sixty-second commercials to WMUR-TV. The first referred to as "Dodger," criticized President Clinton's AIDS policy. The second, "Needle," visually instructed viewers on how to clean a hypodermic needle. This advertisement also urged viewers not to "shoot drugs if [they] can help it," but states that if they must, then at least to do

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<sup>1</sup> 47 U.S.C Section 312(a)(7) and 47 U.S.C. Section 315, respectively.

so with "clean equipment." The third, "Kiss," showed two men kissing each other and urged viewers to protect themselves with condoms every time they engaged in "anal or vaginal sex." Although SMPCC had purchased the time during which all of the above-mentioned spots were to air by February 17, 1996, the only ad submitted to the station until that point had been "Dodger."

WMUR-TV concedes that it declined to air "Needle" and "Kiss" in certain time slots requested by SMPCC and substituted "Dodger" in their place. WMUR-TV states that it "did not censor the advertisements, but rather channeled them to what it believed was the appropriate time range under the circumstances." WMUR-TV contends that "Kiss" is indecent "in light of its express reference to anal sex." WMUR-TV asserts that "Needle" was inappropriate for the requested time because it "clearly advocates criminal activity."<sup>2</sup> The substitutions occurred during the following programs and time periods: once during "Day of Discovery" from 8:00 - 8:30 a.m. in which "Kiss" was replaced; once during "Jerry Springer" from 9:00 - 10:00 a.m. in which "Needle" was replaced; once during "Rush Limbaugh" from 12:05 - 12:35 a.m. in which "Kiss" was replaced; and twice during "Hard Copy" from 12:00 - 12:30 a.m. in which both were replaced. On ten occasions, however, WMUR-TV did air "Kiss" and "Needle" as scheduled.

In its June 26, 1996, reply, SMPCC denies that "Kiss" is indecent. SMPCC states that while the advertisement refers to anal sex, it also refers to vaginal sex and that references to both are frequently made during prime-time television. SMPCC also denies that "Needle" "advocates criminal activity." On the contrary, SMPCC argues, the advertisement specifically advises against "using drugs." To the extent that it portrays criminal activity, SMPCC contends that such portrayals are routinely shown on prime-time television programs in the form of murders and other crimes. Furthermore, SMPCC asserts, WMUR-TV's reluctance to air political advertisements advocating illegal activity would impede any politician who advocates a change from current public policy to a policy inconsistent with current law. Responding to WMUR's claim that it did not censor, but merely channelled some spots, SMPCC argues that channelling is not appropriate in this case because it had asked to air the spots during programs containing material similar to that in the advertisements. In fact, SMPCC states, it specifically requested that its advertisements air during the programs as designated because of the advertisements' relevance to those programs. Finally, SMPCC points out that three of the spots for the ads that were not broadcast were scheduled to air after midnight.

Section 312(a)(7) of the Communications Act requires broadcast stations to provide or make available for sale reasonable amounts of time to candidates for federal elective office. 47 U.S.C. Section 312(a)(7). WMUR-TV states, and SMPCC does not deny, that the station sold SMPCC nine sixty-second spots that were aired on February 8-9, 1996, and seventeen additional spots aired between February 17-19, 1996, accommodating the total amount of airtime requested

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<sup>2</sup> New Hampshire State law prohibits the possession of hypodermic syringes or needles, except in limited medical and manufacturing circumstances not applicable here. N.H.R.S.A. 318:52-e.

by SMPCC.<sup>3</sup> In addition, WMUR-TV made time available to SMPCC in various time periods, as required by the Commission's interpretation of Section 312(a)(7).<sup>4</sup> Thus, we do not find that the station acted unreasonably with respect to its Section 312(a)(7) obligation. However, as discussed below, we find that the station violated the no-censorship prohibition of Section 315(a).

Section 315(a) provides that licensees shall have no power of censorship over the material broadcast in a candidate's "use." 47 U.S.C. Section 315(a). The Commission has long enforced this requirement stating, for example almost forty years ago, that once a station agrees to provide time to a candidate, it "may not censor." Port Huron Broadcasting Corp., 12 FCC 1069, 1071 (1948). Although the no censorship provision is incorporated in the equal opportunities statute of Section 315, we have held that this provision bars licensees from exercising censorship over the content of political advertisements whether they are initial uses or responses to prior uses. Hammond for Governor Committee, 69 FCC 2d 946 (B/cast Bur. 1978). As the Commission stated in Liability of WANV, Inc., 58 FCC 2d 854, 857 (1976), "once a station has committed itself to make time available to particular candidates, it cannot withdraw its commitment because of the substance of a candidate's use."

It is undisputed that WMUR-TV failed to air "Kiss" on three occasions because of its content, and failed to air "Needle" twice for the same reason. WMUR-TV relies on the Commission's decision in Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communications Act ("Declaratory Ruling"), 9 FCC Rcd 7638 (1994), to support its contention that the station "channelled" the spots into more appropriate time periods, as opposed to having censored them. Therein the Commission held that licensees could channel candidates' advertisements containing graphic abortion imagery into time periods in which they in good faith believe children are less likely to be in the audience. However, WMUR-TV's reliance on Declaratory Ruling is misplaced. First, we note that the Court of Appeals has since vacated our Declaratory Ruling. See Daniel Becker v. FCC, No. 95-1048, D.C Cir., released Sept. 13, 1996. In any event, the Declaratory Ruling did not allow licensees to refuse to air advertisements containing graphic abortion imagery, it merely held that airing such advertisements during time periods when children were less likely to be in the audience violated neither Section 312(a)(7) nor the prohibition on censorship in Section 315(a). WMUR-TV did not reschedule "Kiss" and "Needle" to air at different times than those requested. Rather, the station refused to air them on five occasions and substituted a commercial more to its liking. Accordingly, it can not reasonably be said that WMUR-TV "channeled" the advertisements.

For similar reasons, we need not address WMUR-TV's assertion that channelling was

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<sup>3</sup> It does appear that SMPCC attempted to negotiate one prime-time slot on February 19, 1996. WMUR-TV refused SMPCC's request citing an inability to honor equal opportunities obligations, and the limited availability of inventory during prime time programming. We note that this request was for the purpose of rescheduling spots already bought rather than for the purchase of additional time.

<sup>4</sup> Codification of the Commission's Political Programming Policies ("Report and Order"), 7 FCC Rcd 678, 681 (1991), recon. denied, 7 FCC Rcd 4611 (1992).

permissible because "Kiss" is indecent. As indicated above, the ads were not channelled but were not aired at all. Nor do we find persuasive WMUR-TV's argument that it could refuse to air "Needle" because, according to the station, it advocates "criminal activity." WMUR-TV points to no Commission precedent or policy that would permit it to refuse to air a political advertisement in such circumstances, and, in any event, the ad apparently does not advocate criminal activity. As SMPCC points out, and WMUR-TV does not dispute, the ad expressly advises against drug use.<sup>5</sup>

In light of the above, WMUR-TV, Manchester, New Hampshire IS ADMONISHED for censoring SMPCC's advertisements in violation of 47 U.S.C Section 315(a). Based upon the information currently available to the Enforcement Division, no further action by the Commission is contemplated regarding this matter. However, it is expected that care will be exercised to assure that such violations do not recur. This matter is being made a part of WMUR-TV's file.<sup>6</sup>

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within thirty days of the release date of this letter. [47 C.F.R. Section 1.4(b)] by writing to the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. 47 C.F.R. Section 1.115

## FEDERAL COMMUNICATIONS COMMISSION

Norman Goldstein  
Chief, Complaints and  
Political Programming Branch  
Enforcement Division  
Mass Media Bureau

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<sup>5</sup> WMUR-TV also contends that SMPCC's advertisements were of "inferior broadcast quality and [did] not meet technical standards." However, despite this contention, WMUR-TV did air the spots and we do not see how, even if true, this assertion could be a justification for refusing to air two of the advertisements on five occasions and substituting the third one for them.

<sup>6</sup> SMPCC requests that the Commission award it damages including attorney's fees. However, neither the Communications Act nor the Commission's rules provide for such relief.