



Federal Communications Commission  
Washington, D.C. 20554

DA 96-1999

New Jersey Broadcasters Association  
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Players International, Inc.  
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Greater New Orleans Broadcasters Association, Inc.  
c/o Ashton R. Hardy, Esquire  
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Re: 18 U.S.C. § 1304  
47 C.F.R. § 73.1211

Dear Sirs:

This addresses three petitions requesting the Commission to suspend or cease enforcement of 18 U.S.C. § 1304 and 47 C.F.R. § 73.1211 (Section 73.1211 of the Commission's Rules) as applied by the Commission to prohibit the broadcast advertising of casino gambling. 18 U.S.C. § 1304 provides that whoever "knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance . . . shall be fined . . . or imprisoned." The Commission's regulation implementing this provision parallels the statutory language. See 47 C.F.R. § 73.1211(a). While the U. S. Department of Justice ("DOJ") has authority to enforce Section 1304, the Commission historically has taken responsibility to enforce the statute through civil forfeitures. In enforcing Section 1304, the Commission has held that casinos may advertise their non-gambling activities, such as

entertainment, food, drink, and decor. See *WTMJ, Inc.*, 8 FCC Rcd 4354 (MMB 1993).<sup>1</sup>

Three petitioners have urged the Commission to reexamine 18 U.S.C. § 1304 and 47 C.F.R. § 73.1211. The New Jersey Broadcasters Association ("NJB") has pending a petition to be treated similarly to broadcasters in Nevada, who are operating under the Commission's temporary suspension of the advertising ban.<sup>2</sup> Players International Inc. ("Players"), a developer and operator of casinos, filed a petition requesting a declaratory ruling that the federal regulatory prohibition against the broadcast advertising of lotteries does not apply to lawful casino gaming activities. In short, Players requests that *any* broadcaster be allowed to broadcast advertisements for casino gambling so long as the casino gambling is legal in the state in which the casino is located.<sup>3</sup> The Greater New Orleans Broadcasters Association, Inc. ("GNOBA") filed a petition requesting that the Commission temporarily suspend enforcement of Section 73.1211 to the extent that the regulations prohibit broadcast advertisements pertaining to legal privately-operated gaming activities by broadcasters licensed to communities in the State of Louisiana.<sup>4</sup>

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<sup>1</sup> By statute, Section 1304's advertising prohibition does not apply to the following categories of advertising: (1) advertisement of state-run lotteries by stations licensed in states that conduct such lotteries, see 18 U.S.C. § 1307(a), 47 C.F.R. § 73.1211(c)(1); (2) advertisement of gaming conducted by Indian Tribes pursuant to the Indian Gaming Regulatory Act, see 25 U.S.C. § 2701, 47 C.F.R. § 73.1211(c)(3); (3) advertisement of lotteries conducted by not-for-profit or government organizations, see 18 U.S.C. § 1307(a), 47 C.F.R. § 73.1211(c)(4)(i); and (4) advertisement of lotteries conducted by a commercial enterprise that are clearly occasional and ancillary to the primary business of that organization, see 18 U.S.C. § 1307(a), 47 C.F.R. § 73.1211(c)(4)(ii).

<sup>2</sup> See *Valley Broadcasting Co. v. United States*, 820 F. Supp. 519 (D. Nev. 1993), *appeal docketed*, No. 93-16191 (9th Cir. June 28, 1993). In *Valley*, two Nevada broadcasters sought injunctive relief and a declaratory judgment that the advertising ban as applied to the broadcasters violated the First Amendment. The District Court entered summary judgment in the broadcasters' favor. During the pendency of judicial review, the Commission issued a public notice in which it announced that it would not enforce the advertising ban for stations licensed in Nevada. Public Notice, DA 93-626 (rel. June 2, 1993). The Commission took this action for equitable reasons, to "reduce uncertainty for broadcasters within the District Court's jurisdiction [all of Nevada] and to preserve the Commission's resources during the appellate process." *Id.*

<sup>3</sup> Players bases its request for declaratory relief on two independent grounds. It claims that Section 1304 should not be read to apply to casino gambling and that the casino gambling advertising ban does not pass constitutional muster given the number of exceptions to the ban and the lack of evidence to support a connection between casino gambling and social ills. Players also argues that the ban violates equal protection in that the ban does not apply to state-run lotteries or to casinos operated by Native Americans.

<sup>4</sup> See *Greater New Orleans Broadcasting Ass'n v. United States*, 69 F.3d 1296 (5th Cir. 1995), *vacated and remanded*, 1996 WL 207218, 65 U.S.L.W. 3220, 66 U.S.L.W. 3255 (1996). GNOBA originally sought injunctive and declaratory relief that broadcasters in Louisiana may advertise casino gambling activities that are legal in Louisiana and Mississippi. In November 1994, a federal district court entered summary judgment in favor of the government, and the Fifth Circuit affirmed that judgment in November 1995. On April 22, 1996, GNOBA filed a petition for a writ of certiorari to the Supreme Court, and on October 7, 1996, the Supreme Court vacated the opinion of the Fifth Circuit and remanded the matter.

All three petitioners argue, among other things, that the relief requested is warranted in light of the United States Supreme Court's recent opinion in *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996). In *44 Liquormart*, the Supreme Court invalidated a Rhode Island statute that prohibited the broadcast of advertisements providing information about the retail prices of alcoholic beverages. These petitioners suggest that *44 Liquormart* calls into question the constitutionality of statutes such as 18 U.S.C. § 1304.

For the reasons set forth in more detail below, we will deny the present petitions for suspension of the advertising ban. The constitutionality of 18 U.S.C. § 1304 insofar as it prohibits radio broadcast of lottery advertising by licensees in nonlottery states was upheld by the Supreme Court in *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993). At present, there is no new judicial opinion holding the casino advertising ban unconstitutional. Thus, there is no basis at this time for the extraordinary relief requested by these petitioners.<sup>5</sup>

This course of action is appropriate in light of the various judicial challenges to Section 1304 that will more precisely determine the impact of *44 Liquormart* on the constitutionality of that statute and the Commission's implementing regulation. DOJ is continuing to defend the constitutionality of Section 1304.<sup>6</sup> DOJ has also taken that position with respect to GNOBA's writ of certiorari seeking Supreme Court review and the remand of a Fifth Circuit decision upholding the casino advertising ban.<sup>7</sup> In addition, the Ninth Circuit's review of *Valley Broadcasting*, which found that the casino advertising ban only "remotely advances" a government interest in protecting the policies of states that have not legalized

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<sup>5</sup> With respect to the NJB petition, we are not persuaded that these New Jersey broadcasters are in the same position as those in Nevada for whom the Commission suspended the advertising ban. In *Valley Broadcasting*, we were faced with a federal district court order applicable to only two Nevada broadcasters. For equitable reasons and to avoid disparate treatment of broadcasters within the same state, the Commission suspended enforcement of the ban pending further judicial review. As a practical matter, we are not faced with that situation *vis-a-vis* broadcasters in New Jersey, obviating the need for a similar approach. Rather, because Section 1304 remains valid and DOJ continues to defend that statute, we will continue to enforce it.

<sup>6</sup> In a similar commercial speech case recently remanded by the Supreme Court to the Fourth Circuit, DOJ filed an *amicus curiae* brief arguing that a cigarette advertising ban is constitutional notwithstanding *44 Liquormart*. See Brief of the Department of Justice on Remand, *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, No. 94-2141 (4th Cir.).

<sup>7</sup> On June 24, 1996, DOJ filed a brief in *Greater New Orleans Broadcasting Ass'n v. United States* requesting that the Court grant the GNOBA petition, vacate the judgment of the Fifth Circuit, and remand the matter to the Fifth Circuit because *44 Liquormart* casts new light on the First Amendment issues. However, DOJ did not concede the unconstitutionality of the advertising ban. Rather, DOJ expressly noted that it did not "mean to imply that the decision of the court of appeals is erroneous, or that *44 Liquormart* necessarily renders Section 1304 unconstitutional in any respect," but only that "it is appropriate for the court of appeals in the first instance to reconsider [the First Amendment] issues in light of the guidance that may be drawn from *44 Liquormart*." On October 7, 1996, the Supreme Court did indeed vacate the Fifth Circuit's decision and remanded the matter for further consideration in light of *44 Liquormart*. See note 4, *supra*. On October 16, 1996, DOJ requested a supplemental briefing on these matters in the Fifth Circuit.

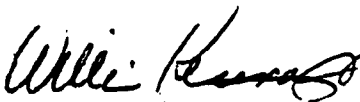
gambling,<sup>3</sup> also remains undecided.

Because of these pending judicial activities, we deem it necessary to preserve the status quo pending the resolution of the various court challenges. In light of the present litigation being handled by DOJ, it is both necessary and appropriate for this Commission to act in concert with DOJ, with which we share authority to enforce Section 1304. In this regard, it is well established that it is inappropriate for the Commission to adjudicate the constitutionality of congressional enactments. See *Johnson v. Robison*, 415 U.S. 361, 368 (1974) ("[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies"). This is particularly so where DOJ shares enforcement authority under Section 1304 and is continuing to defend it. These petitioners would of course be free to request relief at a later date, as courts begin to address the constitutionality of the advertising ban in light of *44 Liquormart*.<sup>9</sup>

Accordingly, pursuant to delegated authority, the petitions filed on behalf of the New Jersey Broadcasters Association, Players International, Inc., and the Greater New Orleans Broadcasters Association, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

  
Roy Stewart  
Chief, Mass Media Bureau

  
William E. Kennard  
General Counsel

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<sup>9</sup> *Valley Broadcasting*, 820 F. 2d at 525-27.

We also note that the relief requested in the pending petitions is appropriately distinguished from the limited relief the Commission granted to Nevada broadcasters, who obtained a court order holding the ban unconstitutional as applied to them.