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

In re Petition for Reconsideration by	)
	)
NATIONAL ASSOCIATION OF BROADCASTERS	)
	)
of	)
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MEMORANDUM OPINION AND ORDER	)
	)
Regarding Section 312(a)(7) of the Communications Act	)

MEMORANDUM OPINION AND ORDER

Adopted: November 5, 2003 **Released: November 12, 2003**

By the Commission:

1. Pending before the Commission is a Petition for Reconsideration filed by the National Association of Broadcasters ("NAB") regarding the Commission's decision in *Petition for Reconsideration by People for the* American *Way and Media Access Project*, FCC 99-231, released September 7, 1999 ("*Reconsideration*"). In *Reconsideration*, the Commission stated that, as part of its obligation to provide reasonable access to a legally qualified federal candidate on behalf of his or her candidacy pursuant to Section 312(a)(7) of the Communications Act of 1934, as amended, a broadcast station could not refuse a request for advertising time made by federal candidates solely on the ground that the station does not sell or program such lengths of time.[1] This ruling reversed an earlier decision by the Commission.[2]

2. In *Reconsideration*, the Commission stated that requiring good faith negotiations between a federal candidate and a broadcaster regarding access to non-standard lengths of political advertising time better fulfills Congress' intent in enacting Section 312(a)(7), which 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."[3] Rather than allowing a flat ban on the sale of program time in non-standard increments, the Commission concluded that stations should evaluate each request for time made by a candidate on an individualized basis, taking into consideration the following factors: "(1) how much time was previously sold to the candidate; (2) the potentially disruptive impact on

[1] 47 C.F.R. § 312(a)(7) (the Commission may revoke any station license for "willful or repeated failure to allow reasonable access to a broadcasting station by a legally qualified Federal candidate on behalf of his candidacy").

[2] *Memorandum Opinion and Order*, 9 FCC Rcd 5778 (1994) (*Declaratory Ruling*).

[3] 117 Cong. Rec. 512872 (daily ed. Aug. 2, 1971); *see also* S. Rep. No. 96, 92d Cong., 1st Sess. 20 (1971).

the station's regular programming; (3) the likelihood of equal opportunities requests by opposing candidates; and (4) the timing of the request."[4]

3. In its Petition, NAB argues that the Commission's decision in *Reconsideration* is at odds with Commission precedent and policy, as well as a misinterpretation of the Supreme Court's decision in *Carter/Mondale*;[5] that forcing broadcasters to grant odd-length spots to candidates would greatly disrupt broadcast programming during prime time hours; and that, during the five years between the 1994 *Declaratory Ruling* and the 1999 *Reconsideration,* there were no candidate requests for odd-length spots to support a change in Commission precedent.

4. Reconsideration is appropriate only when the petitioner either shows a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.[6] NAB has failed to demonstrate that our decision in *Reconsideration* contained a material error or omission. Nor does NAB raise any additional facts not known to it or not existing until after NAB's last opportunity to present such matters.

5. Nonetheless, we address NAB's principal arguments. First, the Commission's decision in *Reconsideration* was not contrary to Commission precedent and policy nor did it misinterpret the Court's decision in *Carter/Mondale.* As the Commission stated in *Reconsideration*, "[w]hile 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" because such "policies do not allow for appropriate consideration of the individualized needs of candidates."[7] The Commission concluded that its decision in the 1994 *Declaratory Ruling* departed from the above policy by allowing what, in effect, was a "an 'across the board' policy, or flat ban, on the sale of program time in non-standard lengths."[8] The Court in *Carter/Mondale* indicated that broadcasters cannot ban certain lengths of time from being considered in candidates' requests for airtime:

> 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 process to be ignored. A broadcaster's "evenhanded" response of granting only time spots of 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.[9]

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[4] *Declaratory Ruling* at 7.

[5] *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 (1981).

[6] *See* 47 C.F.R. § 1.106(c); *WWIZ, Inc.*, 37 F.C.C. 685, 686 (1964), *aff'd sub nom., Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

[7] *Declaratory Ruling* at 4-5, citing *Carter/Mondale*, 453 U.S. at 387-88; *Ed Clark for President Committee*, 87 FCC 2d 417 (B/C Bur. 1980); *Ed Noble*, 79 FCC 2d 903 (B/C Bur. 1980).

[8] *Declaratory Ruling* at 5.

[9] *Carter/Mondale*, 453 U.S. at 389.

6. Second, as to the alleged disruption to broadcast programming, the Commission's case-by-case approach adopted in its *Reconsideration* decision permits broadcasters to consider disruption of their regular programming as one of four factors in evaluating each request from a Federal candidate for non-standard lengths of political advertising time. Therefore, broadcasters need not impose a flat ban on the sale of program time in non-standard increments in order to avoid disruption of broadcast programming.

7. Third, as to the demand for such ads, even if it is true, as NAB asserts, that there were no candidate requests for odd-length spots during the five years that the *Declaratory Ruling* was in effect, that may well have been a function of the candidates' knowledge that stations were not then required to grant such requests. Moreover, if the NAB is correct that Federal candidates are not interested in obtaining such odd-length advertising spots, then the Commission's prohibition of a flat ban on such ads should, in fact, cause broadcasters little or no disruption of their regular programming.

8. Based on the foregoing, we deny NAB's Petition for Reconsideration.

9. Accordingly, **IT IS ORDERED**, that the Petition for Reconsideration filed by NAB **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary