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

In re Complaint of	)
	)
Dole-Kemp '96 Campaign	)
	)
against	)
	)
AFLAC Broadcast Partners, licensee of	)
	)
Station KWWL(TV), Waterloo, Iowa	)
and	)
Station WAFB (TV), Baton Rouge, Louisiana	)

MEMORANDUM OPINION AND ORDER

Adopted: September 25, 1996; **Released:** September 25, 1996;

By the Commission:

1. On August 29, 1996, the Commission received a complaint filed on behalf of the Dole-Kemp '96 Campaign ("Dole-Kemp") against AFLAC Broadcast Partners ("AFLAC"), licensee of KWWL(TV), Waterloo, Iowa, and WAFB(TV), Baton Rouge, Louisiana. Dole-Kemp alleges that these stations have denied it access to their facilities because of a refusal to sign an "Agreement Form for Political Broadcasts" ("Agreement Form").[1] The Agreement Form includes three sections pertaining to: (1) the policies and rules governing rates for candidate broadcasts; (2) the requirement that the Commission be the sole forum for complaints alleging overcharges for candidate broadcasts, including a provision requiring that any such complaints be brought within ninety (90) days after the date of the pertinent election; and (3) the scope of,

[1] We subsequently received a further complaint from Dole-Kemp alleging that AFLAC owned stations in the markets of Columbus, Georgia; Cedar Rapids, Illinois; Savannah, Georgia; Baton Rouge Louisiana; and Paducah, Kentucky, are similarly refusing to sell Dole-Kemp advertising time because of its refusal to sign the Agreement Form.

and procedure for amending, the Agreement Form.[2] AFLAC responded to the Dole-Kemp complaint on September 5, 1996. Incorporated into its response are two pending requests for declaratory ruling by the Commission filed by AFLAC in response to prior complaints[3] against station KFVS-TV,[4] Cape Girardeau, Missouri, for requiring candidates to sign a similar agreement form.[5] At issue is whether broadcast licensees may properly insist that federal candidates sign such Agreement Forms as a condition precedent to the airing of advertisements purchased by those candidates.[6]

2. AFLAC maintains that broadcasters have the right to require political candidates to execute agreements containing reasonable contract terms, prior to accepting requests for advertising time. AFLAC argues that the Agreement Form's forum provision requiring that all allegations of candidate overcharges be entertained solely before the Commission is permissible because it is consistent with a Commission ruling declaring that we have exclusive jurisdiction to resolve candidate rate disputes. See Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, as amended, 6 FCC Rcd 7511 (1991), recon. denied, 7 FCC Rcd 4123 (1992) ("Declaratory Ruling"), pet. for rev. dismissed, Miller v. FCC, 66 F.3d 1140 (11th Cir. 1995), cert. denied, 116 S. Ct. 1543 (1996). AFLAC also states that the forum provision is necessary to protect stations from irreparable harm in the event that the Declaratory Ruling is overturned and it is subsequently determined that state courts may entertain and adjudicate such disputes. Moreover, AFLAC asserts that even if it were held that the Commission's jurisdiction is not exclusive, there is no question that we have the authority to consider complaints alleging violations of the lowest unit charge and comparable rate provisions. It is "well-settled as a matter of contract law," according to AFLAC, that the parties can specify the governing law to be applied in the event of a dispute under the contract.

3. In addition, AFLAC argues that the jurisdictional provision furthers Congress' purposes in enacting Section 315(b) of the Communications Act of 1934, as amended, (47 U.S.C

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[2] The Agreement Form also includes an indemnification clause that is not applicable if the candidate "personally uses the time." Because uses by federal candidates pursuant to the reasonable access provision discussed herein necessarily involve appearances by the candidate, this clause is not relevant to this proceeding.

[3] One of the complaints was withdrawn, and the remaining two will be resolved in a separate proceeding.

[4] KFVS-TV is also owned by AFLAC.

[5] Because the arguments which AFLAC sets forth in its response to the Dole-Kemp and Alexander complaints are substantially the same as those in its requests for declaratory ruling, we shall refer to them collectively hereinafter as those of "AFLAC."

[6] On October 20, 1995, we received a complaint on behalf of Lamar Alexander, a candidate for the 1996 Republican Presidential nomination against Station KWWL, raising the same allegations as those in the Dole-Kemp complaint. AFLAC responded to the Alexander complaint on January 22, 1996. Because the Alexander and Dole-Kemp complaints involve the same issues, we need not consider them separately.

Section 315(b)) by encouraging speedy resolution of claims by the expert agency, and by helping guard against the inconsistent results that would obtain were state courts allowed to interpret Section 315(b). AFLAC contends that there is "no question" that a broadcast station may condition the sale of advertising time to a candidate on reasonable terms and conditions, and cites a Commission policy allowing stations to require advance payment from candidates[7] as well as the names of the members of the boards of directors or officers of their respective campaign committees[8] in support of its contention.[9] AFLAC also argues that the "equal opportunities" right conferred by Section 315(a) of the Act[10] has certain limitations,[11] and if AFLAC sells time to one candidate who has signed the Agreement Form and is required to sell time to another candidate who refused to sign it, the licensee would be impermissibly discriminating between candidates.[12] Additionally, AFLAC argues that Section 312(a)(7)[13] "effectively mandates that stations enter into contracts" with federal candidates and maintains that "the Commission has noted, with apparent approval, broadcaster use of contracts for the sale of advertising time to political candidates" in The Law of Political Broadcasting and Cablecasting: A Political Primer, 100 FCC 2d 1476, 1517 (1984)

DISCUSSION

4. Section 312(a)(7) of the Communications Act provides that:

(a) The Commission may revoke any station license or construction permit ...

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[7] See Beth Daly, 7 Fcc Rcd 1442 (MMB 1992), recon. denied, 7 FCC Rcd 5959 (1992).

[8] See 47 C.F.R. Section 73.1212(e).

[9] AFLAC maintains that these provisions are more burdensome than those specified in the Agreement Form.

[10] Section 315(a) provides, in pertinent part, that:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station....

47 U.S.C. Section 315(a).

[11] For example, AFLAC argues, a station does not have to provide free time to an opposing candidate if the first candidate purchased time.

[12] Section 73.1941(e) of the Commission's rules prohibits licensee discrimination between candidates. 47 C.F.R. Section 73.1941(e).

[13] 47 U.S.C. Section 312(a)(7). Text of provision discussed infra.

> (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy

47 U.S.C. Section 312(a)(7).[14] On its face, the statutory language is mandatory and imposes on licensees an unconditional obligation to provide or make available for sale reasonable amounts of time.[15] Similarly, the legislative history reinforces that Section 312(a)(7) imposes a "[r]equirement that broadcasters may not refuse to sell 'reasonable' amounts of time" to federal candidates,[16] and contains no indication that the licensees can in any manner avoid this obligation. From the statutory language itself, it is of course evident that Congress intended to ensure that a federal candidate's right to purchase political advertising would be governed by a "rule of reason" concerning the amount of time that must be sold to candidates.[17] Candidates thus have a right to purchase only "reasonable amounts" of time. We have concluded, moreover, that, because Section 312(a)(7) does not entitle candidates to free advertising time, candidates' access rights may be circumscribed by reasonable licensee requirements intended to ensure that licensees receive payment for the time purchased.[18] Similarly, we believe the statute contemplates that access rights may be tempered by reasonable requirements intended to ensure that the time purchased qualifies as a candidate "use" and that licensees can fulfill other statutory requirements, such as the sponsorship identification requirements, imposed by the Act.

5. There is no evidence, however, that Congress intended to permit licensees to refuse access unless federal candidates would agree to fulfill licensee imposed conditions at issue here. Nor does the fact that the 1984 Primer makes reference to the signing of a contract mean that licensees can require candidates to sign agreements containing such conditions. We conclude herein that licensees may not refuse to permit the purchase of time by federal candidates unless they sign contracts containing such provisions.

6. In reaching this conclusion, we emphasize that the issue before us is not whether

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[14] AFLAC also asserts that Sections 312 and 315 are "facially violative of the First and Fifth Amendments." However, we have no basis on the record of this proceeding to consider the constitutionality of these statutory provisions. Cf. CBS v. FCC, 453 U.S. 367 (1981).

[15] The portion of the statutory text that refers to an obligation "to allow reasonable access to" a broadcast station was intended only to make clear that, rather than permitting candidates to purchase broadcast time, licensees could also satisfy Section 312(a)(7)'s requirements by making reasonable amounts of time available to candidates without charge. See Kennedy for President Committee v. FCC, 636 F.2d 432, 444-448 (D.C. Cir. 1980).

[16] 117 Cong. Rec. 3893 (1971), quoted in Kennedy for President Committee v. FCC, 636 F.2d at 445.

[17] See CBS Inc. v. FCC, 101 S. Ct. 2813, 2825 (1981).

[18] See Beth Daly, supra, n. 7.

forum selection clauses may, as a general matter, sometimes be permissible or "reasonable" when negotiated between contracting parties who do not possess a statutory right of access. We simply conclude that based on the statutory language and its legislative history, a federal candidate cannot be forced to surrender another legal right in order to exercise his or her statutory right of access.

7. We recognize that the forum selection clause at issue here is consistent with Commission policy preempting state causes of action and declaring that the Commission is the exclusive forum for resolution of lowest unit charge complaints. See Declaratory Ruling, supra. It is also consistent with a recent decision of the U.S. Court of Appeals for the 9th Circuit which, correctly in our view, affirmed a federal court's dismissal of an attempt by candidates who disagree with the Commission's jurisdiction to litigate their lowest unit charge complaints in a trial court. Wilson v. A.H. Belo Corp., 87 F.3d 393 (9th Cir. 1996). Nevertheless, we believe it would be inconsistent with a federal candidate's right under Section 312(a)(7) for a station to require a federal candidate to agree to the forum selection clause as a condition of access.[19]

8. As noted, the Agreement Form also impermissibly requires candidates to file their political broadcasting rate complaints within ninety (90) days of the election. We note that there is no statutory requirement that candidates must bring rate complaints under Section 315(b) within ninety days of the election. Nor has the Commission established any precise statute of limitations for the filing of lowest unit charge complaints. Rather, we look to the specifics of each complaint before us in determining the timeliness of an overcharge complaint. See Harvey Sloane, 9 FCC Rcd 1592 (MMB 1994), application for review pending.[20]

9. The Agreement Form also includes the following statement:

> I understand and agree that, pursuant to the provisions of the Act and the rules and policies of the FCC, any purchase of advertising time from the station will reflect these different characteristics depending on the class of time purchased.

Since AFLAC has agreed to delete, for federal candidates, contractual language that reflects characteristics referred to in the above-quoted provision, we consider it unenforceable and need not reach its permissibility in this ruling.

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[19] We emphasize that this decision does not address the permissibility of such clauses in circumstances involving state and local candidates.

[20] See also, John Van De Kamp, Dianne Feinstein et al.(KCOP-TV), 10 FCC Rcd 7153 (MMB 1995).

10. In light of the above, AFLAC Broadcast Partners IS DIRECTED to conform its practices consistent with our holding herein.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary