

Political Broadcast, Censorship
Political Broadcast, Program Content
Political Broadcast, Program Form
Political Broadcast, Reasonable Access Rule
Political Broadcast, Rules, Enforcement Of
Political Candidate, Federal Candidate, Reasonable Access

Report and Order issued detailing Commission policy on enforcing Sec. 312(a)(7) of the Act. Generally, licensee's judgment as to what is reasonable access will be relied upon. Program time, bans on federal candidates' use, censorship, program content and program format specifically discussed.

F.C.C. 78-504

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Commission Policy in Enforcing Section
312(a)(7) of the Communications Act

BC Docket No.
78-102

REPORT AND ORDER

(Adopted: July 12, 1978; Released: July 31, 1978)

BY THE COMMISSION: COMMISSIONER WHITE CONCURRING IN THE
RESULT.

1. On March 22, 1978 the Commission issued a Notice of Inquiry concerning its policy in enforcing Section 312(a)(7) of the Communications Act.* That Section provides that:

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

* * *

(7) For willful or repeated failure to afford reasonable access to or to permit the 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.

Since the passage of Section 312(a)(7) as part of the Federal Election Campaign Act of 1971, the Commission's policy has generally been to defer to the reasonable, good faith judgment of licensees as to what constitutes "reasonable access" under all the circumstances present in a particular case. The Commission desired, through its inquiry into this area, to learn whether that policy was proving manageable and equita-

* 43 Fed. Reg. 12,938. Released March 28, 1978. Comments were due May 1, 1978. An extension was granted to May 15, 1978. Reply comments were due May 15, 1978. An extension was granted to May 30, 1978.

ble for candidates and licensees or whether additional rules or guidelines would be advisable.¹

I. General Comments

2. The majority of parties submitting comments on the Notice of Inquiry recommended that the Commission not promulgate specific rules concerning what constitutes "reasonable access" under Section 312(a)(7). Many believed that such rules would be impractical in light of the diversity of circumstances with which each licensee is faced during an election period including (1) the number of Federal offices in contention; (2) the number of candidates vying for these offices; (3) the number of state and local offices of importance and interest; (4) differing requests from Federal candidates for access; and (5) the amount of broadcast time available. ABC and KAZY suggested that specific rules would eliminate the flexibility now enjoyed by candidates and licensees in "customizing" access to best suit particular Federal races. Other parties commented that a licensee familiar with all of the circumstances in the community would be the one most able to determine what constituted "reasonable access" in a particular case. The RNC objected to the establishment of specific rule under Section 312(a)(7) because "licensees will be encouraged to treat the rules requirements as a maximum as well as a minimum." Many suggested that such rules would be burdensome for licensees to apply and for the Commission to enforce.

3. A few of the parties commenting suggested that the promulgation of rules in this area was either improper or illegal. CBS stated that the Commission "is not required by statute² to adopt implementing rules or guidelines," and to do so would "constitute an unwarranted governmental intrusion upon content and scheduling judgments of broadcasters." Boston Broadcasters contended that the form which any rules in this area would take "would be so specific as to dictate the format, duration, number of exposures, etc. of the political broadcasts which licensee would be required to present." It alleged that such an intrusion into "selection or presentation of specific programming" would be "constitutionally and statutorily prohibited." MDCD disputed whether the Commission possesses the authority to promulgate rules under Section 312(a)(7). It asserted that the Commission "can act in no greater capacity than that of an overseer under authorization and powers given under the Communications Act . . ." In general, the parties

¹The following parties have submitted comments in this proceeding: Southern Tier Educational Television Assn., Inc. (Southern Tier); Eduard B. Berlin, Esq.; Chapman Television of Tuscaloosa, Inc.; Educational Broadcasting Corp. (WNET-TV); The Republican National Committee (RNC); Maryland-District of Columbia-Delaware Broadcasters Assn. (MDCD); Boston Broadcasters, Inc.; Telemundo, Inc.; National Association of Broadcasters (NAB); The National Broadcasting Company, Inc. (NBC); Southern Broadcasting Co. and United Broadcasting Co. (joint comments) (Southern and United); National Radio Broadcasters Association (NRBA); Greater Washington Educational Telecommunications Assn., Inc. (GWETA); Ohio Educational Television Network Commission (OETNC); CBS; Public Broadcasting Service (PBS); D.J. Leary of Campaign Media Consultants, Inc.; Robert G. Gauteaume; Broadcast Licensees including Board of Education of Jefferson Co., Ky. (joint comments) (WKPC-TV); Broadcast Licensees including KAZY, Denver, Colorado (joint comments) (KAZY); American Broadcast Companies, Inc. (ABC); Metromedia, Inc.

Reply comments were submitted by Public Broadcasting Service and Blonder-Tougue Laboratories, Inc. (B-T Labs). Also, see para. 56, below, regarding letter from Media Access Project.

²Section 312(a)(7) contains no specific Congressional directive concerning the promulgation of rules. This is in contrast with Section 315 which provides that the "Commission shall prescribe appropriate rules and regulations to carry out the provisions of [the] section."

urged the Commission to continue to defer to a licensee's reasonable, good faith judgment under the facts and circumstances present in each individual case in determining what constitutes "reasonable access." The NAB, among others, suggested that "the need to accord great latitude to the judgment of the broadcaster as to what constitutes reasonable access is underscored by the severity of the ultimate penalty for violation of Section 312(a)(7)"—revocation of license.

4. Some of the parties' comments on the Notice did request that the Commission give more guidance to candidates and licensees concerning what will be considered "reasonable" under Section 312(a)(7). D.J. Leary of Campaign Media Consultants, Inc. suggested that there is a need for "specific guidelines" from the Commission, and that prior to the drafting of such guidelines public hearings should be held to "delve into what the current practices are of broadcasters in their consideration of 'reasonable access,' and equally important, seek out testimony from those . . . who deal professionally with Section 312(a)(7) on behalf of political candidates and their campaigns."

5. Boston Broadcasters indicated that the Commission should "promptly issue a comprehensive 'primer' on 'reasonable access' to provide some certainty in this area," but to "continue to rule, on a case-by-case basis, on specific complaints involving the 'reasonable access' provision."

6. Eduard Berlin asserted that the present policy of the Commission concerning "reasonable access" is uncertain and contradictory. He recommended that the FCC either:

- (1) request Congress to replace this section of the Communications Act with a separate provision that defines what rights to access [on] broadcast facilities Congress intends to afford federal office seekers, or in the alternative, (2) issue regulations or a "primer" to clarify how the Commission intends to apply current Section 312(a)(7) in particular situations.

7. Southern and United, while urging the Commission to continue to leave it "to the good faith of the politicians and the broadcast licensees to work out individual resolutions on a case-by-case basis," suggested that the Commission draft intelligible and simple general guidelines in this area.

8. In contrast, there were those who suggested that the few guidelines now provided by the Commission are unnecessary and an intrusion into the journalistic prerogatives of the broadcaster. For instance, PBS urged the Commission to "reduce the importance of the amount of time a candidate requests" and "defer to licensee determinations as to how to discharge their obligations under Section 312(a)(7) unless the plan was so unreasonable as to effectively deny federal candidates the opportunity to appear on the station and to express their views on the issues in the campaign." PBS suggested that the standard to be applied under Section 312(a)(7) was whether the broadcaster had grossly abused its discretion in determining what constituted "reasonable access."

9. The Commission has determined that, absent unusual circumstances such as a multiplicity of candidates, broadcast licensees are required under Section 312(a)(7) to afford federal candidates program time in prime time. *Licensee Responsibility Under Amendments to the*

Communications Act Made by the Federal Election Campaign Act of 1971, 47 FCC 2d 516 (1974). Both the NAB and WKPC-TV urged that this requirement not be considered absolute. Rather, stated the NAB, "a licensee should be allowed to make non-prime time periods available if such a course of action would best serve the interests of the public served by the station."

10. A number of the commenting parties questioned whether the "reasonable access" provision was itself constitutional. WNET-TV recommended that the Commission instruct its General Counsel to issue an opinion that the statute is unconstitutional on the following basis: "(1) vagueness to the extent of being a denial of due process; . . . (2) improper governmental interference in broadcast journalism in violation of the First Amendment . . . ; and (3) as applied to public television creates such an unfair and unwarranted burden on those stations, and not others, as to constitute a denial of due process." The NAB stated that a recent court decision, *Gore Newspapers v. Shevin*, 397 F. Supp. 1253 (S.D. Fla. 1975) *affmd per curiam*, 2 Med. L. Rptr. 1818 (1977), "cast doubt on the constitutionality of the 'reasonable access' provision . . . , when considered with the companion 'lowest unit charge' requirement of Section 315(b)(1)."³ In that case, the court held that a Florida campaign financing law which required newspapers and broadcast stations to offer advertising to political candidates at the lowest advertising rate violated the First Amendment.

11. In its Notice of Inquiry the Commission asked various questions concerning the areas in which additional guidance should be given, if such guidance was necessary.⁴ For instance, the Commission asked whether the licensees' obligation to afford "reasonable access" should begin at any particular point in a campaign. NRBA urged that the Commission not make any determination in this area. It stated that "while designation of a particular date would, in effect, eliminate any 'reasonable access' claims raised prior to the designation date, it would also in effect give rise to a presumption that Federal candidates would be absolutely entitled to access following such date." Berlin suggested a plan to obligate licensees to offer a specific amount of time to candidates to be used at whatever point in the campaign that the candidate wishes, thus eliminating the need for the Commission to impose any date when access is to begin.

12. Both ABC and KAZY urged the Commission not to obligate licensees to grant access to a Federal candidate as soon as he or she becomes legally qualified. They noted that such a rule might give an advantage to candidates who qualify early and disadvantage candidates who do not establish their candidacy until a time closer to the "traditional campaign period." KAZY also suggested that such an ex-

³Section 315(b)(1) provides that:

(b) The charges made for the use of any broadcast station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed—

(1) During the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period.

⁴Some parties, including CBS, recommended generally that no specific rules or guidance be given, while other parties, agreeing with CBS on this point, commented specifically on the inadvisability of Commission action in the specific areas addressed in the Notice of Inquiry.

tension of the access period would be less a justifiable intrusion on the audiences' programming preferences than access limited to times closer to an election.

13. A majority of those submitting comments recommended that the Commission establish the same periods for access as those dictated by Congress for the operation of the "lowest unit charge provision"—45 days prior to a primary election and 60 days before a general or special election. Parties expressing that view based their recommendations on various reasons including: (1) such a limit would coincide with traditional campaign periods and concentrate political broadcasting in times when it will be of greatest interest and benefit to the viewers or listeners;⁵ (2) a limit would not prejudice candidates who do not qualify for the ballot at an early date and; (3) a limit would provide licensees with some guidance in planning political broadcast policies.

14. Boston Broadcasters expressed the belief that the 45 and 60 day limits on "reasonable access" are mandated by Congress, as evidenced by the legislative history surrounding the passage of Section 312(a)(7). It pointed out that the Senate Report accompanying the bill which ultimately was enacted as the Federal Election Campaign Act of 1971 stated:

"The Committee is also persuaded that a limitation on the length of time when this most favored rate is available will be an incentive to candidates to shorten the duration of their campaigns, thereby helping to reduce campaign costs. Accordingly, the legislation provides that the lower unit rate will only be available forty-five days before a primary election, and sixty days before a general or special election." *Senate Report No. 92-96*, 92 Cong. 1st Sess. (May 6, 1971).

Boston Broadcasters contended that "the Congressional intent in limiting the time of applicability of the 'lowest unit charge' provision applies with equal force to limiting the time frame within which a licensee is required to afford 'reasonable access' to Federal candidates."

15. The Commission also asked in its Inquiry whether broadcast licensees should be under some obligation to grant a particular amount of time, or to accommodate candidates' requests for particular lengths of program time or for spot time, and whether a candidate is entitled to particular classes of time. In addition to parties opposed generally to any regulation in this area, NAB, ABC, MDCD, WKPC-TV and NRBA objected specifically to any Commission Rules and/or guidelines concerning the lengths and classes of time offered to Federal candidates. They based their objections on the same rationale expressed in paragraphs 2 and 3 *supra*.

16. Of those recommending some Commission guidance in this area, Leary and the RNC suggested that licensees be obliged to afford candidates the same lengths and classes of time which they offer to commercial advertisers. Southern and United also recommended that "a licensee's determination to afford to the politician the same schedule and lengths as is accorded to regular commercial clients should not be held unreasonable," but suggested that the Commission might wish to adopt a guideline which provides that a licensee must allocate a certain portion of its regular public affairs broadcasts, on a non-paid basis, to

⁵ MDCD suggests that an even shorter period, for instance 30 days, would better allow a licensee to strike a balance between "the candidates' ability to advertise, and the listening public's ability to not hear political advertising if they should so choose. . . ."

Federal candidates. Southern and United additionally proposed that the Commission publish guidelines for determining "reasonable access" for renewal applicants. Stations would propose in their renewal applications a plan of access for Federal candidates. The Commission could then regulate the amount of access time on a "promise versus performance" standard. Under this plan, different sets of standards would apply to stations depending upon their formats—an "all news" station being required to provide more access to Federal candidates than "beautiful music" stations.

17. Eduard Berlin agreed that "candidates should be able to purchase or otherwise obtain the same 'type' of broadcast time that commercial advertisers have access to." He also urged the Commission to attempt to quantify the amount of time which must be afforded to Federal candidates "either by setting minimum guidelines for how much time to give candidates, depending on the number of opponents or other federal candidates, or by setting an amount which is a percentage of the commercial time sold during that time period in the previous year." As an alternative to this proposal, Berlin suggested the following: Licensees would establish a policy concerning how much program and spot time was available and notify all Federal candidates of that policy. Candidates would then "register" for time and be given a gross amount to be used in the types and lengths which he or she desired.

18. Chapman Television proposed a similar aggregate amount of time be afforded for candidates. Under its plan, the station would set a dollar limit on the amount of time which a candidate could purchase. Each candidate could buy whatever combination of types, lengths and classes of time he or she desired within that monetary limit.

19. Robert A. Gauteaume suggested that although candidates in primaries should be afforded equal access, the amount of access afforded candidates for election to office should be based upon the amount of support garnered by that candidate as evidenced by votes in the primary or the collection of signatures.

20. Boston Broadcasters stated its belief that "a combination of *free* political time, public affairs programming time, and paid spot announcements provide the most effective 'mix' of airtime to assure a Federal candidate a reasonable opportunity to present his candidacy to the electorate by means of television." It also indicated that it would:

have no objection to adoption by the Commission of a requirement that licensees offer Federal candidates broadcast time during all classes of time during the broadcast day, provided that: (a) the candidate is not given the right to dictate to the station the particular length of program time in question, and (b) the station is not required to provide the candidates' programming or announcements any particular placement, in terms of a specific date and/or specific time.

Finally, Boston Broadcasters suggested that "reasonable access" be held to require stations to provide spot time to candidates in whatever lengths they offer to commercial advertisers.

II. *Noncommercial Educational Licensees*

21. Ten of the parties submitting comments on the Notice of Inquiry addressed the Commission's question of whether a different standard of reasonableness under Section 312(a)(7) should apply to noncommercial educational broadcast stations. Boston Broadcasters suggested

that if a different standard is justified, that standard should be even more rigorous than the one to which commercial licensees are held because of "the special educational and public service obligations of such stations." (PBS disputed this statement in its reply comments.) Leary commented that these licensees appeared to be in the "best position to provide 'no charge' air time to political candidates for a full range of access opportunities. . . ." He suggested, however, that the access afforded "need not include the airing of a candidate's prepared political announcements." Rather, a noncommercial licensee should initiate and produce programming featuring candidates. Berlin proposed that educational stations not be required to make available "spot time or any other type of access unless it is a normal component of their broadcast schedule." Southern Tier urged the Commission to apply the same standard of reasonableness to educational stations as it does to commercial stations and not "discriminate" among its licensees.

22. Many of those commenting in this area suggested that a different standard should apply to noncommercial licensees. PBS and WNET cited the possibility of unmanageable requests for access being directed to such stations because of the lack of "market mechanism" which commercial stations have—the ability to charge for broadcast time and thus limit access to those candidates with financial support. OETNC stated that "the necessity to devote large amounts of time to political broadcasting will have not only a disruptive effect on a non-commercial station's programming, but it may also result in depriving it of the bulk of its budget for local programming." It pointed out that "this undesirable effect can be minimized by commercial broadcasters, but not by noncommercial broadcasters."

23. Some respondents stated that the unique character of public broadcasting dictates that such stations not be judged by the same standard under Section 312(a)(7) as commercial licensees. Specifically, they concluded that noncommercial educational stations should not have to provide spot announcements or accept "commercial type" prepared announcements. Many commented that such broadcasters should be able to consider "non-uses" of the station by a candidate toward that candidate's reasonable access.

24. Concerning the sale of spot announcements, OETNC stated that although noncommercial stations do have "spot" announcement breaks in programming, "it would be consistent with the basic function of noncommercial broadcasting for the Commission to interpret the 'reasonable access' requirement not to *require* the availability of announcements for political candidates over noncommercial facilities." GWETA stated that a typical commercial television station has as many as 100 opportunities a day for the insertion of spot announcements while a noncommercial educational station may have as few as 10 opportunities for such announcements a day during its adult viewing hours. Both OETNC and GWETA suggested that to obligate a noncommercial station to afford spot announcements would result in "commercial-like clutter" which the Commission has deplored in other contexts.⁶

25. In its decision in *Public Broadcasting Council of Central New*

⁶Notice of Inquiry—Commission Policy concerning the Noncommercial Nature of Educational Broadcast Stations, FCC 77-162 (March 2, 1977).

York, 63 FCC 2d 952 (1976), known as the *Buckley* decision, the Commission found certain noncommercial educational broadcast stations in violation of the reasonable access provision, but stated that the licensees were not required to broadcast the prepared five-minute programs requested by the complainant. The licensees apparently took this decision to mean that they could refuse to broadcast any program prepared for commercial stations. However, in a decision in January, 1978, the Broadcast Bureau clarified the earlier opinion. It explained that a candidate may not dictate the exact length of a program, but a noncommercial station may not refuse to broadcast any material (of whatever length) merely on the basis that it was produced for broadcast on a commercial station. All stations are forbidden by Section 315 of the Communications Act from censoring any uses of a broadcast station by a legally qualified candidate for public office and may not dictate the content or format of any non-exempt appearance of such candidate.

26. WKPC-TV and Southern Tier, among others, urged the Commission to overturn this ruling and allow noncommercial broadcasters to refuse to air "commercial type" political announcements. Southern Tier suggested that "such commercial-oriented political advertising is fundamentally at odds with the spirit of noncommercial broadcasting, and is disruptive of the programming approach which noncommercial stations work diligently at achieving." WKPC-TV contended that the broadcast of "commercial-styled" announcements by noncommercial educational broadcast stations was "improper and illegal." It based its conclusion on an interpretation of Section 399 of the Communications Act which prohibits partisanship on the part of such licensees, and Section 501(c)(3) of the Internal Revenue Code, which "prohibits partisan broadcasts."

27. As noted above, many who commented on the applicability of Section 312(a)(7) to noncommercial broadcasters urged that such stations be permitted to include as part of a candidates' "reasonable access" appearances of candidates on programs exempt from Section 315.⁷ Some, including PBS, contended that the language of the statute did not require an interpretation that "access" referred only to non-exempt uses of the station. It argued that:

Read in the most reasonable manner, [Section 312(a)(7)] creates two severable obligations. The first—"to allow reasonable access to . . . a broadcasting station"—applies to situations in which time is provided without charge. The second—"to permit the purchase of reasonable amounts of time for the use of a broadcasting station"—applies to situations in which time is sold to a candidate. It is only in the latter case, however, that the statute requires a "use"; no such obligation is imposed by the language of the Section where time is provided free. Thus, by its terms, the section does not require that time provided without charge be a "use."

PBS also asserted that the Section did not apply exclusively to "uses" because: (1) "Section 312(a)(7) requires that the candidate must use the station 'on behalf of his candidacy'—an obligation which is foreign to a Section 315 'use'"; (2) The Federal Election Campaign Act of 1971 frequently employs the phrase "use on behalf of his candidacy" to include appearances which are not Section 315 "uses"; (3) At one point in the development of the FECA Presidential and Vice-Presidential candidates' campaigns were to be exempt from Section 315 and licens-

⁷ NBC urged that commercial stations also be able to dictate the format for "access" under Section 312(a)(7).

ees were to afford such candidates "flexibility and discretion" in determining the format of their appearances on a broadcast station. PBS argued that such a provision would have been superfluous had Section 312(a)(7) been merely a codification of the preexisting obligation of licensees to cover political campaigns and not the creation of a new obligation to allow "uses" of the station.

28. OETNC and others based their arguments for the inclusion of exempt appearances as "access" on the fact that "news interviews and debates . . . may constitute the most informative beneficial programs from the point of view of enlightening the public." WKPC-TV argued that "the public broadcast licensee [should have] the broad discretion to determine the appropriate manner in which 'reasonable access' will be secured, including the format, the duration, and the scheduling of such presentations."

29. As a corollary to the above, GWETA recommended that the Commission "consider guidelines that specifically encourage noncommercial stations (at least) to provide joint appearances by all of the candidates for a particular office, since such appearances uniquely serve as the best way to inform and indicate the public on the people and issues in a campaign." PBS agreed and urged that a candidate's failure to appear on such a program constitute a waiver of Section 315 equal opportunities.

III. *Miscellaneous*

30. The Commission received comments from several parties concerning areas not specifically addressed in its Notice of Inquiry. NBC, Southern and United, Chapman and Berlin suggested that licensees be able to set a date before an election after which requests for "reasonable access" would not be granted. Metromedia urged the Commission "to emphasize the federal preemption of [state & local] regulations relative to political broadcast." Telemundo, Inc. took no position on the need for rules concerning Section 312(a)(7), but requested that Puerto Rican broadcast stations be excluded from any such rules. B-T Labs requested that "reasonable access" not be applied to "scrambled" subscription programming.

IV. *Discussion*

31. We pointed out in our Notice of Inquiry that the Commission has received little guidance from Congress as to how it is to interpret Section 312(a)(7) of the Communications Act.⁸ However, Congress did indicate that the purpose of the Federal Election Campaign Act (FECA), of which Section 312(a)(7) was a part, 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. (117 Cong. Rec. 512872 (daily ed. August 2, 1971).)

The Commission considers this mandate to be an extremely important and serious one.

32. Prior to the enactment of the FECA, we recognized political broadcasting as one of the fourteen basic elements necessary to meet

⁸The Commission's authority to interpret Section 312(a)(7) derives from Section 303(r) of the Communications Act which provides that the Commission shall

(r) make such rules and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . .

the public interest, needs and desires of the community.⁹ No legally qualified candidate had, at that time, a specific right of access to a broadcasting station. However, stations were required to make reasonable, good faith judgments about the importance and interest of particular races. Based upon those judgments, licensees were to “determine how much time should be made available for candidates in each race on either a paid or unpaid basis.”¹⁰ There was no requirement that such time be made available for specific “uses” of a broadcasting station to which Section 315 “equal opportunities” would be applicable.

33. When Congress enacted Section 312(a)(7), it imposed an additional obligation on the general mandate to operate in the public interest. Licensees were specifically required to afford reasonable access to or to permit the purchase of reasonable amounts of broadcast time for the “use” of Federal candidates.

34. We see no merit to the contention that Section 312(a)(7) was meant merely as a codification of the Commission’s already existing policy concerning political broadcasts. There was no reason to commit that policy to statute since it was already being enforced by the Commission. Moreover, Congress limited the applicability of the “reasonable access” provision to candidates for Federal elective office. The Commission’s policy made no specific distinction between those candidates and candidates for state and local office. Therefore, it seems clear that Congress was creating a different, additional obligation which was to apply only to Federal candidates.

35. PBS argues (see paragraph 27, above) that the phrase “to allow reasonable access to” modifies “a broadcasting station” and not “reasonable amounts of time for the use of the broadcasting station.” Therefore, it asserts, a licensee may satisfy its obligation under Section 312(a)(7) wholly or in part through the broadcast of programming which is exempt from Section 315. It also asserts that such “non-uses” should be considered as fulfillment of a licensee’s obligation when time is given rather than sold. If we accepted PBS’ argument, the entire basis for Section 312(a)(7) would be rendered meaningless since commercial licensees could presumably meet their “reasonable access” obligation by covering candidates in exempt programming and by refusing to sell time for use by political candidates. This certainly was not the intent of Congress. It enacted the “lowest unit charge” provision of Section 315 (47 USC 315 (b)) at the same time it enacted Section 312(a)(7). Since Section 315(b) applies only to “uses” by a candidate, it is only logical that Congress intended Section 312(a)(7) also to apply only to “uses.” There is nothing in the legislative history to indicate that Congress desired that access to free time was to be judged by a different standard than the sale of broadcast time. We believe that the particular phraseology of Section 312(a)(7) reflects Congress’ intention that access may be provided either through the gift *or* the sale of time. This is in contrast to an earlier version of the FECA which limited access to candidates for President and Vice President and required a station to “make available without charge the *use* of its facilities.”¹¹

⁹ *Network Programming Inquiry*, 44 FCC 2303 (1960).

¹⁰ *Hon. Richard M. McCarthy*, 23 FCC 2d 773 (1970). The same standard continues to apply to access to broadcasting stations by legally qualified candidates for state and local office. See *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510 at 535 (1972).

¹¹ S.1, 92nd Cong., 1st Sess. (1971).

36. The fact that Congress wished "reasonable access" to be afforded through the kind of "uses" contemplated under Section 315 is supported by an analysis of Congressional action in amending Section 315 at the time of adoption of Section 312(a)(7). Prior to the enactment of the FECA, Section 315 provided that:

No obligation is hereby imposed upon any licensee to allow the use of its station by any [legally qualified candidate for public office].

Concurrent with the passage of the "reasonable access" provision, Congress amended Section 315 to provide that no obligation to allow "uses" of the station was imposed "under this subsection," clearly implying that such obligation was imposed elsewhere in the Communications Act, specifically by Section 312(a)(7).

37. PBS contends that the fact that the phrase "use on behalf of candidacy" appears elsewhere in the FECA, where it does not refer to Section 315 "uses," indicates that this phrase need not be read consistently with Section 315. However, those other Sections of the FECA were not meant to be incorporated into the Communications Act. We believe it is reasonable to expect that Congress, being aware of the Commission's interpretation of the word "use," intended the same meaning to be applied to amendments to the Communications Act which contained that term.

38. It is clear, therefore, that Congress expressed a desire that licensees afford candidates for Federal office a special right of access to a broadcasting station which no other group enjoyed.¹² This right to access is, of course, not absolute, as we stated in *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*.¹³

Important as an informed electorate is in our society, there are other elements in the public interest standard, and the public is entitled to other kinds of programming than political. It was not intended that all or most time be preempted for political broadcasts.

However, in enforcing Section 312(a)(7) we must keep in mind the basic desire of Congress to allow candidates to use a station's facilities to "better explain their stand on the issues and thereby more fully and completely inform the voters."

39. We continue to believe that the best method for achieving a balance between the desires of candidates for air time and the commitments of licensees to the broadcast of other types of programming is to rely on the reasonable, good faith discretion of individual licensees.¹⁴ We are convinced that there are no formalized rules which would encompass all the various circumstances possible during an election campaign. However, there do appear to be some areas, discussed below, where some guidelines would be appropriate to clear up confusion expressed by candidates and licensees and to ensure that the Congressional intent in enacting Section 312(a)(7) is fully realized.¹⁵

¹² See *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973).

¹³ 34 FCC 2d 510, 536 (1972).

¹⁴ We reject the suggestion, however, that the Commission "reduce the importance of the amount of time a candidate requests" in the determination of whether a station has afforded reasonable access. As discussed above, we believe that Federal candidates are the intended beneficiary of Section 312(a)(7) and therefore a candidate's desires as to the method of conducting his or her media campaign should be considered by licensees in granting reasonable access.

¹⁵ Since we will continue to rely on the good faith, reasonable judgment of licensees under all the circumstances present to determine what constitutes "reasonable access," we see no reason to provide any particular exemptions for Puerto Rican broadcasting stations.

40. Initially, we reaffirm our previous holding that, absent certain unusual circumstances, "reasonable access" requires that a legally qualified candidate be afforded program time in prime time.¹⁶ We continue to believe that a refusal to afford such time "would deny the candidate access to the time periods with the greatest audience potential, and would be inconsistent with the Congressional intent. . . ." ¹⁷ In reiterating this policy, we are aware that there may be situations where the number of Federal candidates in a particular election may make it impossible for a station to make prime-time program-time available. We have never held that the "prime-time, program-time" policy is absolute and inflexible. We will continue to make exceptions to this policy where circumstances dictate. However, notwithstanding that a station has offered prime-time, program-time to Federal candidates, it must make prime-time, spot time available. As Boston Broadcasters noted, many candidates have found the broadcast of spot announcements to be the most effective way of reaching the voters. We believe that under Section 312(a)(7) a candidate not only must be afforded an opportunity to address a prime-time audience, but must be allowed flexibility to do so in the manner best suited to his or her campaign.

41. We believe it to be generally unreasonable for a licensee to follow a policy of flatly banning access by a Federal candidate to any of the classes and lengths of program or spot time in the same periods which the station offers to commercial advertisers.¹⁸ We feel certain that Congress in granting Federal candidates a specific right of access to a station wished such candidates to be at least on par with commercial advertisers who have no such access rights. Except for prime time, this does not necessarily mean that a licensee must always allow a candidate access to every class and length of time. In tailoring access to meet the needs of candidates for a particular office, licensees may consider such factors as the unavailability of particular classes of time; a multiplicity of candidates; the specific desires of candidates; etc. However, an arbitrary "blanket" ban on the use by a candidate of a particular class or length of time in a particular period cannot be considered reasonable. A Federal candidate's decisions as to the best method of pursuing his or her media campaign should be honored as much as possible under the "reasonable" limits imposed by the licensee.

42. We do not believe that this policy will in any way disrupt a station's broadcast schedule. It only requires that the licensee follow its usual commercial practices. Nor do we foresee that this policy will result in an inundation of a station's broadcast day by political announcements. We do not require that certain amounts of time be made available to Federal candidates but rather that they be afforded the opportunity for *varied* access. Indeed, we believe that this statement

¹⁶ See *Licensee Responsibility Under Amendments to the Communications Act Made by the Federal Election Campaign Act of 1971*, 47 FCC 2d 516 (1974). "Prime time" as used in this document means the period of the broadcast day in which there is maximum audience potential. For television that would be the time specified in Section 73.658(k) of the Commission's Rules (47 CFR 73.658(k)). For radio, it would usually be the so-called "drive time." In any case where questions are raised as to what constitutes a particular station's "prime time," we will examine all relevant facts brought to our attention.

¹⁷ *Id.*

¹⁸ Where a commercial station does not sell time but rather donates time to candidates it must make available free spot time, of the various lengths, classes and periods which are available to commercial advertisers.

of policy will result in little practical change in the political broadcast policies of most licensees who already afford Federal candidates their full complement of broadcast times.

43. We must emphasize that although a candidate for Federal office is entitled under Section 312(a)(7) to varied broadcast times, such candidate is not entitled to a particular placement of his or her political announcement on a station's broadcast schedule. We recognize that it would be very difficult for a licensee to afford "equal opportunities" to opposing candidates if one candidate had his or her spot placed adjacent to a highly rated program which was broadcast only once or very rarely. Additionally, there may be circumstances when a licensee might reasonably refuse broadcast time to political candidates during certain parts of the broadcast day.¹⁹ It is best left to the discretion of a licensee when and on what date a candidate's spot announcement or program should be aired.

44. Some of the parties commenting on the Inquiry suggested that a candidate's requests for access not be honored after a certain point before an election. We cannot agree. A Federal candidate may have varied and legitimate reasons for waiting until a short time before election day to make a request for "access," e.g. a late receipt of funds to purchase time. Of course, a candidate who requests time late in the campaign need not be offered the same aggregate amount of time which opposing candidates who have long been exercising their access rights have been afforded.²⁰ Those candidates who make late requests for access, however, cannot be denied time altogether.

45. We turn now to the question of whether there should be a particular point during a campaign at which a licensee's obligation to afford reasonable access begins. The setting of such a limit is difficult because each campaign is unique with respect to the controversiality and importance of the issues involved, the public interest in the race, and the amount of campaigning done by the candidates. For instance, a presidential campaign may be in full swing almost a year before an election; other campaigns may be limited to a short concentrated period. However, we believe that the fact that Section 312(a)(7) and the "lowest unit charge" provision of Section 315 were passed concurrently suggests that Congress desired Section 312(a)(7) to be effective at least during the periods when the latter provision was applicable.²¹ We also agree with many of the parties that these periods—45 days prior to a primary election and 60 days prior to a general election—correspond with the "traditional campaign periods." Thus, we believe that, generally, a licensee would be unreasonable if it refused to afford access to Federal candidates at least during those time periods. Moreover, it may be required to afford reasonable access before these periods; however, the determination of whether "reasonable access" must be afforded before these periods for particular races must be made in each case under all the facts and circumstances present.

¹⁹ See *Anthony R. Martin-Trigona*, appeal dismissed, *Anthony R. Martin-Trigona*, FCC 78-109 (February 16, 1978).

²⁰ Section 73.1940(e) of the Commission's Rules requires that a request for equal opportunities under Section 315 be made within seven days of the first prior "use" by an opposing candidate. Additionally, the Commission has indicated that one candidate may not save all of his or her "equal time" until the last day or two before the election. *Hon. Allen Oakley Hunter*, 40 FCC 246 (1952); *Emerson Stone, Jr.*, 40 FCC 385 (1964); *Summa Corp. KLAS-TV*, 49 FCC 2d 443 (1974).

²¹ However, although Congress may have wished to encourage candidates to concentrate their campaigning to these periods, there is nothing to indicate that it intended to require candidates to so limit their campaigns.

46. The Commission has received no Congressional guidance as to when Section 312(a)(7) should be effective prior to a convention or caucus since the "lowest unit charge" provision applies only before elections. Additionally, none of the parties commenting on the Inquiry addressed this question. In light of this fact, and in view of the large variation in procedures utilized for obtaining nomination through such methods, we will not suggest any time limits on access in those situations. However, we expect licensees to afford access at a reasonable time prior to a convention or caucus. We will review a licensee's decisions in this area on a case-by-case basis.

47. Regarding noncommercial educational broadcast stations, we find nothing in either the language of Section 312(a)(7) or the legislative history of that statute to indicate that Congress intended to exempt noncommercial educational stations. Although such stations may perhaps feel a stronger commitment to political broadcasting because of their mandate to educate and their direct public funding, we do not believe the commitment can or should be translated into a more rigid standard of reasonableness under Section 312(a)(7). In applying Section 312(a)(7) we take into consideration the nature of noncommercial educational broadcasting. Just as commercial licensees are generally not required to disrupt their programming schedules by offering candidates lengths of program time which are not a normal component of their broadcast day, noncommercial broadcasters should not be required to change the basic nature of their broadcast schedules to accommodate candidates unless absolutely necessary. Thus, noncommercial stations need only offer lengths of programming to candidates which are consistent with the lengths of programming ordinarily broadcast. For example, such stations need not interrupt their regular programming in order to make available spot announcements if they do not ordinarily do so.²² We recognize that there are substantial differences in the services offered by noncommercial educational stations and those offered by commercial stations. We will consider these differences in resolving complaints in this area.

48. We must once again emphasize, however, that all licensees are required to provide Federal candidates with non-exempt "uses" of the station under Section 312(a)(7). Such "uses" are subject to Section 315 which provides, in part, that:

... licensees shall have no power of censorship over the material broadcast under the provisions of this section.

Thus, while a noncommercial educational licensee may limit candidates to specific lengths of broadcast time, it may not dictate the content of that broadcast. Therefore, a station may not refuse material of the length it has agreed to broadcast merely because it was originally prepared for airing on a commercial station.²³

49. We see no inherent conflict between the obligations of noncommercial educational licensees under Section 312(a)(7) and the require-

²² Although a noncommercial educational station might normally broadcast spot promotional or public service announcements, it generally need not make those spot times available to political candidates.

²³ As then Chairman Wiley and Commissioner Fogarty noted in the *Buckley* decision, *supra*, any change in this requirement would have to be accomplished through Congressional action.

ments of Section 399 of the Communications Act or Section 501 of the Internal Revenue Code. Section 399 provides that:

No noncommercial educational broadcasting station may engage in editorializing or may support or oppose any candidate for public office.

We fail to see how the broadcast of a candidate's announcement as required by Section 312(a)(7) can be considered either editorializing or support for that candidate, especially when the station must afford "equal opportunities" to opposing candidates under Section 315.

50. The same rationale applies to the application of Section 501 of the Internal Revenue Code which provides that tax-exempt organizations, such as noncommercial educational broadcasting stations, may "not participate in, or intervene in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office." Again, we do not believe that a required grant of access may be considered an intervention in a political campaign, or support for any candidate. Indeed, because of the licensee's inability to affect the content of a political announcement, the licensee is isolated from any appearance of intervention in a campaign.

51. Licensees are, of course, free to make suggestions to candidates concerning the format of their appearances. Thus, they may invite candidates to appear on a debate or other joint program. But a candidate may not be penalized for his failure to agree to a format suggested by a licensee and does not waive his "equal opportunities" rights because he declines to appear.

52. The amount of time which must be devoted by public broadcasters to Federal candidates will depend on many factors including the time available and the number of candidates. If a noncommercial educational station must make access available to a greater number of candidates because of the lack of "market mechanism" inherent in the sale of time, it may have to afford each candidate less time than offered by commercial licensees. We do not believe that any special Commission policy is necessary to apply to those situations. Rather, we will continue to rely on the reasonable, good faith judgment of licensees in the particular circumstances of each case.

53. B-T Labs in its reply pleading, states that the Commission policy that Federal candidates' rights of reasonable access embody a right to prime time spots and programming should not apply to STV stations. B-T Labs claims that if STV stations were obligated to honor requests for political broadcast time during the prime time hours that they are broadcasting on a scrambled basis the noncommercial nature of over-the-air STV service would be destroyed and one of the major incentives for subscription for such a service, uninterrupted entertainment programming, would be lost. The purpose of giving to Federal candidates the right to prime time spots and programming is based upon the fact that prime time generally is the period of maximum audience potential. Since subscription television programming is generally geared to selective audiences it would appear that those stations engaged in STV would have their periods of maximum audience potential outside of normal prime time viewing periods. Therefore, we do not believe that reasonable access requires STV stations to make available to Federal candidates those periods of time in which they are engaged in STV programming. Of course, since STV is a relatively new service,

our holding here is subject to any future determinations we may make in this area.

54. Finally, we take no position on the constitutionality of Section 312(a)(7) or the Federal preemption of the area of political broadcasting. We believe that such issues are for the courts and Congress to resolve. The Commission's authority extends to the interpretation of statutes which Congress has enacted.

55. To summarize, the Commission will continue to rely generally on the reasonable, good faith judgments of licensees as to what constitutes reasonable access under all the circumstances present in particular cases. However, we will apply the following general principles in determining whether a licensee's judgments in this area can be considered reasonable:

- (a) Reasonable access must be provided through the gift or sale of "uses" of a station by legally qualified candidates for Federal elective office.
- (b) Licensees must provide prime-time program time absent unusual circumstances and prime-time spot announcements as part of the fulfillment of their "reasonable access" obligations.
- (c) Licensees may not have a policy of flatly banning Federal candidates from access to the types, lengths and classes of times which they sell to commercial advertisers.
- (d) Reasonable access must be provided at least during the 45 days before a primary and 60 days before a general or special election. The question of whether access should be afforded *before* these periods and when access should apply before a convention or caucus will be determined on a case-by-case basis.
- (e) Noncommercial educational stations generally need not provide Federal candidates with lengths of program time which are not a normal component of the station's broadcast day.
- (f) In view of the no-censorship provision of Section 315(a) non-commercial broadcasters may not censor the content of a "use" by a candidate and, therefore, may not reject broadcast matter submitted by candidates merely on the basis that it was originally prepared for broadcast on a commercial station.
- (g) Although educational and commercial licensees may suggest the format for appearances of candidates under Section 312(a)(7), a candidate need not accept these suggestions and may not be penalized by loss of "equal opportunities" if he or she declines to appear on a program designed by the broadcasters.

56. On May 31, 1978 a letter was received in the Chairman's office from Media Access Project (MAP) expressing concern with the lack of input from citizens' groups in this Inquiry and requesting that the time for reply be extended for at least one month. The Commission is also aware of the failure of various citizens' groups, candidates and candidate representatives to submit comments. We had hoped to have a larger representation of comments from these parties, and we made a special effort to inform them of the Inquiry. However, the limit on reply time was necessitated by the need to have this Report and Order issued in time to be useful in the November 1978 elections. The two

months provided for comments were not unduly short as indicated by the fact that 22 parties did submit comments. MAP also requested, in the alternative, that if we do not extend the time for reply, we should make it "explicit" in our Report and Order "that any rules adopted are *only* interim, and that they do not reflect *any* effort to pre-judge these issues, which will be opened for further inquiry after the November 1978 elections." Since we have adopted no specific rules to implement Section 312(a)(7), MAP's request to that extent is moot. We intend to review these policies in light of our experience in the present campaign and the months thereafter; and of course, we are prepared to reevaluate these policies if and as appropriate.

57. Accordingly, IT IS ORDERED, That the proceeding in BC Docket No. 78-102 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary*.