Virginia Association of Broadcasters Legal Review

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SPECIAL REPORT **SPECIAL REPORT**

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THE RANDALL TERRY DECISION AND WHAT IT MEANS FOR BROADCASTERS

On the Friday before the Super Bowl, the FCC's Media Bureau issued an order allowing Chicago television station WMAQ to deny purported Presidential candidate Randall Terry the right to purchase political advertisements during the Super Bowl. Terry is a proclaimed Democratic candidate for President whose advertisements include graphic anti-abortion images.

The Media Bureau ruled that Terry was not a "legally qualified candidate" for the Democratic nomination for President, and therefore, he was not entitled to "reasonable access" to purchase political advertisements on WMAQ. The Media Bureau also ruled that even if Terry was entitled to reasonable access, he is not guaranteed the right to place his spots during a specific, one-time program such as the Super Bowl.

The reasoning of the Media Bureau has important ramifications for broadcasters during the political season. First, the Media Bureau's analysis of Terry's candidacy suggests that he may have trouble proving that he is a legally qualified candidate in *any* state. Second, the Media Bureau's decision appears to reinforce broadcasters' flexibility to prevent federal candidates from demanding that a particular spot run during a particular program or time period—but stations should still assure that any decision not to sell time to a legally qualified federal candidate be well-reasoned after considering various factors, including the needs of all federal candidates and potential equal opportunities requests. At the end of the day, the Media Bureau's decision provides a

helpful roadmap to examine certain reasonable access requests, but it does not provide any clear cut answers to all situations.

Some of the key issues arising from the decision are discussed briefly below.

A. What It Means to Be a "Legally Qualified Candidate"

The Media Bureau ruled that Terry was not a "legally qualified candidate" because he did not make a "substantial showing that he was a bona fide candidate" for the Democratic presidential nomination as required by the Commission's rules. The decision cited the fact that Terry had not "engaged in campaign activities throughout a substantial part of the state," and it also cited the Democratic National Committee's letter stating that Terry was not a *bona fide* Presidential candidate of the party.

The Media Bureau's ruling will make it more difficult for Terry to successfully demand reasonable access to stations in other states where Terry has not qualified for a place on the ballot. By ruling that Terry's campaign stops in several different counties did not constitute campaigning throughout a "substantial part of the state," Terry likely will have to increase his *statewide* campaign activities in other states where he is not on the ballot. The decision did not determine exactly how much—or what type of—campaigning a candidate must do to demonstrate that he or she has campaigned in a "substantial part of the state," but, consistent with Commission rules, the Media Bureau plainly put the burden on the candidate to provide sufficient evidence of such activity.

But what if Terry has already qualified for a place on the ballot in another state? In that case, he normally would not need to make a separate, "substantial showing" that he is a bona fide candidate. The tough question, though, is whether the Democratic Party's decision that Terry is not a bona fide Democratic Presidential primary candidate prevents Terry from being a "legally qualified candidate" under the Commission's rules. In other words, can a Presidential candidate be "legally qualified" for an office even if he or she is not qualified under the party's rules to receive the nomination?

The Media Bureau did not answer that question. It cited the DNC's letter as evidence that Terry had not made a substantial showing of a bona fide candidacy, but the Media Bureau did not confront the question whether the party's rejection of Terry as a candidate for the party's nomination means that he is not a "legally qualified" candidate if he is on the ballot. Stations in other states in which Terry *is* on the ballot may well face this question down the road—and the Commission may be called upon to answer it. (Indeed, some stations have already faced it.) Case precedent involving Lyndon LaRoche suggests that a party's decision to "disown" a candidate may be dispositive of the "legally qualified," question, even where a candidate is on the ballot.

B. Whether Federal Candidates May Purchase Spots During Specific Programming

In ruling that Terry did not have the right to purchase spots in the Super Bowl, the Media Bureau cited Commission precedent stating that federal candidates may not be entitled to demand the right to purchase spots "on a particular program" or "during certain parts of the broadcast day." With respect to the Super Bowl, the Media Bureau explained that if a candidate buys time during highly-rated programs that are broadcast "only once or rarely," it may not be possible for stations to provide access to *all* federal candidates during that same programming, and to provide competing candidates with equal opportunities to reach a similar audience "given the lack of equivalent broadcasts."

But what about programs that are not as highly-rated or as rare as the Super Bowl? The Media Bureau suggests that stations have flexibility to deny federal candidates access to specific programs or dayparts, but that flexibility is not without important longstanding limitations set by the Commission. For example, the Commission has long held that federal candidates are entitled to purchase prime time spots absent exceptional circumstances, and any denials of reasonable access to any legally qualified federal candidate—during any time period or program—must be well-reasoned. As the Commission has previously stated:

> 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. 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.

There may be some programs, like the Super Bowl, that may be impractical for

stations to sell to *all* federal candidates and to honor equal opportunity requests. But such decisions will still require a case-by-case determination, and stations are well-advised to avoid sales policies that prohibit legally qualified federal candidates from purchasing spots during periods available to commercial advertisers—such a policy could subject the station to *legal exposure.*

One "takeaway" from the Media Bureau's decision on reasonable access is that the more specific the "reasonable access" request, the more flexibility a station may have to consider the reasonableness of the request. For example, if a federal candidate makes a demand to purchase a :90 spot during the last commercial break within a top-rated network program, the station could possibly deny the request if it could show, among other things, that the station did not have sufficient inventory or notice to provide other federal candidates (and competing candidates) with an equivalent audience share. But it would be far more difficult to deny the candidate from purchasing *any* length spot to air at any time during the program. And it would be next to impossible to deny the candidate from purchasing *any* spots during prime time.

In short, the Media Bureau's decision reinforces that stations have discretion to consider the impact of specific reasonable access requests with respect to specific programming. At the same time, it does not change the underlying principle that any denial of the sale of any particular spots to a legally-qualified candidate must be well-reasoned, and it should be the rare exception rather than the rule.

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If you should have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

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