

OGC 5230

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON D C 20554

IN REPLY REFER TO

July 17, 1992

Lawrence M. Noble, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: AOR 1992-26

Dear Mr. Noble:

**Comments On
AOR 1992-26**

This is in response to your request that I comment on the validity of various representations with respect to the "reasonable access" and "lowest unit charge" requirements of the Communications Act that are made in Advisory Opinion Request 1992-26 by EZ Communications, Inc. ("EZ"). This letter presents my own legal assessment of EZ's representations under applicable FCC precedents, but does not necessarily reflect the views of the Commission. EZ proposes to offer free or substantially reduced rate announcement time to federal candidates in fulfillment of its reasonable access obligation and believes that such free or reduced rates should not be viewed as illegal campaign contributions under the Federal Election Campaign Act ("FECA").

With limited exceptions noted below, the representations made by EZ concerning the reasonable access and lowest unit rate requirements are generally accurate. I take no position as to whether EZ's proposed plan would afford reasonable access or satisfy the lowest unit charge rules, given the necessarily fact-specific nature of these assessments.

Reasonable Access Requirements. In 1972, Congress amended the Communications Act through FECA, adding the requirement in Section 312(a)(7) that stations provide "reasonable access" to federal candidates, and Section 315(b), which provides that stations cannot charge more than the "lowest unit charge" for the same class and amount of time in the same time period to any candidate for public office making a "use" of a broadcast

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facility.¹ Congress added these provisions to the Communications Act for the express purpose of giving "candidates for public office greater access to the media and... to halt the spiraling cost of campaigning for public office."²

While the FCC determines whether the obligations imposed by Section 312(a)(7) have been met by licensees on a case by case basis, the Commission has articulated formal guidelines for stations to use to determine what is required to comply with the reasonable access requirement. Report and Order in the Matter of Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 FCC 2d 1079 (1978). These guidelines have recently been reaffirmed. Report and Order in the Matter of Codification of the Commission's Political Programming Policies, 7 FCC Rcd 678 (1992).

In describing these requirements, EZ states that reasonable access "can be provided by selling candidates commercial announcements or program time and by giving them access to free coverage during certain news and public affairs programming." Stations do have considerable discretion in deciding how to implement the reasonable access requirement. The FCC has recognized that the reasonable access obligation cannot be defined with detailed specificity, because what may be reasonable in one situation may not be reasonable in another.³ I would note,

1 The FCC has recently revised its definition of what specific candidate appearances constitute a "use" of a broadcast station that triggers the obligations imposed by Section 315. See Report and Order, 7 FCC Rcd 678 (1992); Memorandum Opinion and Order, 57 Fed. Reg. 27705 (June 22, 1992). In addition, Section 315(a) prohibits stations from censoring candidate "uses." The Supreme has held that, because of this prohibition against censorship of candidate "uses," a licensee is immune from liability for damages in civil actions based on allegations of libel or defamation. Farmers Educational and Cooperative Union of America v. WDAY, Inc., 360 U.S. 525, 535 (1959).

2 S. Rep. No. 96, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S. Cong. 7 Ad. News 1773, 1774.

3 In this regard, EZ states that the number of announcements offered for each race would vary with EZ's good faith judgment about the amount of access time that would be required to meet existing criteria of reasonableness, including, for example, the number of candidates in each race and the proximity of the district or election area to the station's community of license or

however, that contrary to EZ's suggestion, coverage of a federal candidate or race through news and public affairs programming alone would not be viewed as sufficient to meet a broadcaster's reasonable access obligation.⁴ Thus, a station could not refuse to sell (or give) spot or program time to a federal candidate by arguing that it had provided sufficient coverage of the candidate through news and public affairs programming.

EZ further states that it wishes to offer free and/or substantially reduced rate announcement time to federal candidates,⁵ and that equal amounts of time would be offered to candidates in specific races, as required by the equal opportunities provision of Section 315(a). FCC regulations implementing Section 312(a)(7) do not require the donation of broadcast time to federal candidates. The Commission has stated that "reasonable access must be provided to legally qualified federal candidates through the gift or sale of time for their 'uses' of the station." (emphasis added). 7 FCC Rcd at 681.⁶ FCC policy does require that "if a commercial station chooses to

core coverage area. Such factors have been articulated by the FCC, and affirmed by the Supreme Court, as relevant to the determination of what constitutes reasonable access. See CBS v. FCC, 453 U.S. 367 (1981).

4 Indeed, the Commission has specifically found that Section 312(a)(7) created additional access rights for federal candidates beyond the political coverage already required by the FCC prior to the enactment of FECA. See Report and Order, Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 FCC 2d 1079, 1088-92 (1978). This interpretation was specifically affirmed by the Supreme Court in CBS v. FCC, supra., 453 U.S. at 377.

5 EZ is correct in its assertion that Section 312(a)(7) of the Communications Act does not require stations to sell time to state or local candidates. Under Section 315(a) of the Act, however, stations that decide to sell time to such candidates are required to afford the candidates' opponents equal opportunities to purchase time.

6 In reaffirming this requirement in the Report and Order, the Commission noted the comments filed by the FEC that concluded that the FEC was unable to offer specific guidance apart from the advisory opinion process as to whether a gift of broadcast time was an illegal "contribution" under FECA. 7 FCC Rcd at 681, n.16.

donate rather than sell time to candidates, it must make available to federal candidates free time of the various lengths, classes and periods that it makes available to commercial advertisers."⁷

As noted by EZ, the FCC also requires that commercial stations must make prime-time spot announcements (typically 30 to 60 seconds) available (either through sale or donation) to federal candidates. 7 FCC Rcd at 681. Furthermore, both commercial and noncommercial stations must make program time (more than five minutes in length) available to legally qualified federal candidates during prime time and other time periods unless unusual circumstances exist that render it reasonable to deny such access. Id.

Lowest Unit Charge. EZ states that "although stations have a forceful incentive to comply with the [lowest unit charge] requirements of the Communications Act, such compliance may require computations and assumptions which are both complex and highly debatable." The FCC has often recognized the complexity involved in determining what constitutes the "lowest unit charge" described in Section 315(b).⁸ The difficulty of these calculations is a function of the increasing complexity of broadcast sales practices and the need for constant regulatory adaptation to enforce this obligation.⁹

7 7 FCC Rcd at 681. In addition, because the right of access is an individualized right of each candidate, stations may not have flat bans or policies strictly limiting what time they will make available to federal candidates. See CBS v. FCC, 453 U.S. at 387. FCC policy requires that stations individually negotiate with each federal candidate seeking access to its facilities. Should a federal candidate challenge whether EZ's described practices provide reasonable access, the FCC would then evaluate EZ's actions in light of these requirements.

8 See Report and Order in the Matter of Codification of the Commission's Political Programming Policies, 7 FCC Rcd 678 (1992); see also Memorandum Opinion and Order, 57 Fed. Reg. 27705 (June 22, 1992).

9 We would obviously dispute EZ's statement that compliance with lowest unit charge rules involves "highly debatable" assumptions and calculations. To the contrary, the principles underlying these rules reasonably reflect industry sales practices. Furthermore, EZ's specific description of the necessary calculations is not entirely accurate. For example, EZ describes the difficulty of calculating the lowest unit charge when

In addition, FCC policy does not prohibit stations from selling time to candidates at a discount. Given Congress' clear intent to reduce campaign costs in enacting the lowest unit charge provision, the FCC has determined that it would not be reasonable to conclude that Congress intended to prohibit such a practice.¹⁰ Thus, stations are permitted under FCC regulations to establish a special discounted class of time to sell to candidates.

Moreover, EZ points out that current lowest unit rate requirements already provide substantial monetary benefits to candidates because they allow candidates to purchase time at rates that are only available to commercial advertisers who buy in bulk. This is correct, and in fact describes the original intent of the lowest "unit" charge provision of Section 315(b).

Finally, EZ's representations concerning the penalties for violating these rules is accurate. While the Commission has never revoked a license for lowest unit charge violations, that is an enforcement sanction available to the FCC. In addition, the FCC can (and has) impose fines, issue admonitions, and require stations to repay overcharges to candidates.

In conclusion, I would also like to point to some legislative history that may shed some light on congressional intent in this area. In 1980, in approving certain FEC regulations pertaining to candidate debates, Congress directed that a letter be sent to then FEC Chairman Tiernan which stated:

We understand that in approving these regulations, that the regulations will have no effect on present communications policy as expressed in sections 312 and 315 of the Communications Act. Under no circumstances would a

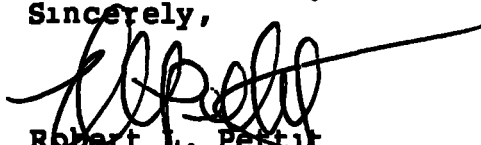
providing promotional items such as billboards, bumper stickers or other hard-to-calculate items. The Commission has recently ruled that non-cash promotional items of "hard-to-calculate" value need not be included in the calculation of the lowest unit charge, but must be offered to candidates on the same basis as they are made available to commercial advertisers, unless they are de minimis in value or imply a relationship between the advertiser and the station or product. Report and Order, supra., 7 FCC Rcd at 695; Memorandum Opinion and Order, supra., 57 Fed. Reg. at 27707.

¹⁰ Report and Order, supra., 7 FCC Rcd at 692, n.144; Memorandum Opinion and Order, supra., 57 Fed. Reg. at 27706.

broadcaster in fulfilling his obligation to provide reasonable access to candidates for public office be considered to have made an illegal contribution. Similarly, a broadcaster's coverage of a candidate which is not a "use" under Section 315 of the Communications Act would under no circumstances be considered a contribution by the broadcaster.¹¹

If you would like anything further, please let me know.

Sincerely,



Robert L. Pettit
General Counsel

¹¹ 126 Cong. Rec. 5408 (1980).