Broadcast LAW BLOG

PUBLISHED BY Davis Wright Tremaine LLP

FCC Decides That Randall Terry Not Entitled to Run Graphic Anti-Abortion TV Ads in the Super Bowl For His "Presidential Campaign" - But Questions Remain

February 3, 2012 by David Oxenford

In an 11th hour decision released at about 5 PM on the Friday before the Super Bowl,the FCC decided that TV station WMAQ-TV in Chicago was **justified in denying Randall Terry's request to buy advertising time in the Super Bowl**. As we've written before, Mr. Terry is claiming that he is a candidate for the **Democratic nomination for President**, and as such has a right of **reasonable access to broadcast stations**, meaning that they must sell him advertising time. If he had such rights, the stations could not censor the content of the ads that the candidate decided to run (see our article here about the Communications Act's no censorship rule). As Mr. Terry has promised to run some very **graphic antiabortion ads** featuring images of aborted fetuses, many stations were reluctant to run the ads, especially in the Super Bowl when families will be watching the big game. The FCC decided that WMAQ-TV acted reasonably in denying Mr. Terry time in the Super Bowl for two reasons: (1) he had failed to make a substantial showing of his candidacy for the Democratic presidential nomination in Illinois, and (2) even if he had, he had no right to demand that his ads be placed in the Super Bowl. Each of these prongs of the decision clarifies some issues in the law of political broadcasting that had been long-debated, but the first part of the decision leaves questions - important questions to which many stations want answers.

The first prong of the decision concluded that WMAQ-TV was justified in determining that Mr. Terry was not a bona fide candidate for the Democratic nomination for President in Illinois as he was not on the ballot there, and had not made a "substantial showing" that he was otherwise a candidate in the state (see our discussion of the requirements to be a legally qualified candidate, here). The FCC found that the station did not need to be a private investigator and ferret out every instance of campaign activity that Mr. Terry had engaged in within the state to determine if his activity was substantial. Instead, the station could rely on the information that Terry presented to it when he made his request. That information essentially amounted to the fact that he had made appearances in two small towns in the state, and had some campaign literature (though there was no evidence that it was ever distributed in Illinois). Based on those facts, the Commission denied the request - concluding that he had not engaged in campaign activities throughout a substantial portion of the state, as required by prior FCC precedent. While this may answer the question in this case (and helped to

clarify the law as to the showing that **write-in candidates need to make before they can demand reasonable access to broadcast stations**), it leaves several questions unanswered for stations that have or may receive Mr. Terry's request for airtime in other states where Mr. Terry is on the ballot.

The decision did not reach the question of whether Mr. Terry could be a qualified candidate in other states, including states where his name does appear on the ballot for the Democratic nomination (including Missouri and Oklahoma). The FCC's decision cites **a letter from the Democratic National Committee that concludes that Mr. Terry cannot be considered a bona fide Democratic candidate**, as he had not shown that he had a history of participation in the Democratic Party, was dedicated to the party's success and would participate in the Democratic Convention in good faith. But the FCC decision does not specifically state that the DNC letter ends the question of whether he is a bona fide candidate for the Democratic nomination. In a case in the late 1990s involving Lyndon LaRouche, the FCC stated that the determination of a political party as to who was a qualified candidate for its nomination was binding on the FCC and would not be second-guessed. Some have suggested that the LaRouche decision gives stations the ability to conclude based on the DNC letter that Mr. Terry is not a bona fide candidate, even where he is on the ballot. But the LaRouche case arose after all the primaries were done, and the only debate was whether the candidate could run ads about the party convention. The decision did not have to address the issue of what happens when a candidate is actually on the primary ballot in a state and demands time before the primary. As the FCC rules state that a place on the ballot is enough to be a legally qualified candidate, the FCC has left stations in states where Mr Terry is on the ballot in a precarious situation - can they rely on the Democratic Party letter and deny him advertising time, or simply because he paid his filing fee and secured a place on the ballot, is he then entitled to buy time? Certainly, the latter option opens up the campaign process to all sorts of shenanigans, as anyone could pay the filing fee in states where there are not complicated ballot qualification processes, and then be able to demand time on broadcast stations - at the cheapest rates that such stations sell advertising time during the **lowest unit rate windows** 45 days before an election, and rely on the no censorship rule to advertise almost anything that they wanted to - bypassing many station's standards for advertising content.

The second part of the decision, that stations need not sell advertising time to candidates in the Super Bowl, is much more straightforward. Stations have always known that **candidates do not have the right to demand access to any specific ad placement**, as long as the station offers the Federal candidate "reasonable" access. The Commission went further here, relying on one of its policy statements on the

political broadcasting rules that said that stations did not need to sell time to candidates in **one-time programs of special significance** where the stations would be unlikely to be able to provide equal opportunities to opposing candidates as required by law. As the Super Bowl is the highest rated program in the TV year, were the station to sell some of its limited advertising inventory to Mr. Terry, how could it offer equal opportunities to President Obama's campaign, which would have 7 days to make an equal time demand? As the Super Bowl is unique, it would simply be impossible to offer comparable time to opposing candidates after-the-fact, as required by law. This decision makes perfect sense as the Super Bowl's limited local advertising inventory provides all sorts of problems for stations - even without having to worry about political ads and the potential for equal opportunities.

This decision may not bring the Terry story to an end, as we'll have to see if more time is demanded on other stations in other states. But it does illustrate some of the many practical and philosophical questions about the implementation and obligations put on stations by Sections 312 and 315 of the Communications Act. First Amendment issues abound with forcing stations to sell time to candidates with whom they disagree and whose messages may be upsetting to many viewers. We'll see if these broader issues are further discussed as the still-young campaign season progresses.