

FCC Denies Political Advertising Complaint

Digital Media and Data Privacy Law Blog

on 02.10.2012

Posted in Political Advertising

In the final hours of the last business day before the Super Bowl, the Chief of the FCC's Media Bureau released an order denying the "reasonable access" complaint of Randall Terry against a Chicago television station.

Terry's campaign had been seeking to place ad buys on stations around the country leading up to and during the game. He claimed he was a "legally qualified candidate" for the Democratic nomination for President. The ads featured disturbing images of aborted fetuses that would be potentially disturbing to some audiences.

As we wrote previously, a "legally qualified candidate" for federal office is entitled to certain benefits under federal law, including "reasonable access" to broadcast facilities. Terry's complaint was based on a denial of access---Chicago TV station WMAQ-TV refused to grant the campaign's request to place a Terry spot during the Super Bowl.

The Bureau's decision to deny the Terry complaint was based on two rationales.

First, the Bureau found Terry had not made a substantial showing that he was a "legally qualified candidate" entitled to access.

Evidentiary issues were important to this aspect of the decision and are worth mention. FCC rules and precedent have long held that it is the candidate's burden to make a substantial showing of candidacy. And, when the FCC reviews access complaints, it will examine the evidence made available to the station at the time access is sought (not evidence later submitted with a complaint) in determining whether the station acted reasonably in denying access. While not dispositive, the Bureau noted that the station had received a letter from the Democratic National Committee stating that the DNC did not consider Terry an actual candidate for its presidential nomination and that Terry could not satisfy its presidential candidate requirements.

Second, the Bureau determined that even if Terry had been a "legally qualified candidate" entitled to access, WMAQ-TV was justified in refusing to place spots during the Super Bowl game. While legally qualified candidates are entitled to "reasonable access" to broadcast air time, no candidate is entitled to "particular placement of his spots in a particular program on a station's broadcast schedule." Stations may reasonably take into account limited spot inventory for highly rated annual programs and the fact that there may be no "equivalent broadcasts" should an opposing candidate

seek equal opportunities after the fact.

Television stations in particular should keep the Terry decision in mind as we enter into this season of college basketball tournaments and awards shows. While the decision is not an invitation to ignore ad buys from candidates during the most sought after programming (or to ignore buys from candidates based on disturbing content in the ad), it does offer insight into who qualifies as a "legally qualified candidate" and what kinds of things a station can consider when evaluating requests for time in highly rated annual broadcasts.