

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of)
)
Randall Terry for President)
)
And Pro-Life Candidates)
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Against)
)
Station WUSA (TV))
)
Washington, D.C.)
)
)

MEMORANDUM OPINION AND ORDER

Adopted: October 31, 2012

Released: October 31, 2012

By the Chief, Media Bureau:

1. Introduction. We have before us a complaint filed on October 19, 2012, by Randall Terry for President, campaign committee for Randall Terry (“Terry”), and Pro-Life Candidates, a joint fundraising committee,¹ against Station WUSA(TV) (“Station”), Washington, D.C.;² a response to the complaint filed on October 22, 2012, by Gannett Co., Inc. (“Gannett”), parent company of the licensee of the Station; and several other pleadings filed by the parties. In his complaint, Terry states that he is a legally qualified candidate for president in West Virginia. Terry states that the Station has refused his recent request to air his advertisements in late October in violation of Sections 312 and 315 of the Communications Act of 1934, as amended (“Act”), which require that stations afford qualified federal candidates reasonable access.³ He requests that the Commission direct the Station to immediately grant Terry reasonable access. Gannett contends that its Station is not required to provide reasonable access to any West Virginia candidate because the Station does not serve West Virginia. Based on the record before us, we grant the complaint as indicated below. We conclude that it would be unreasonable for the Station not to provide reasonable access to Terry because Terry is a legally qualified candidate in West Virginia and the

¹ Pro-Life Candidates does not have standing to file a complaint against the Station because the right of reasonable access applies only to federal candidates. 47 U.S.C. § 312(a)(7).

² E-mail from Patrick Purtill, Counsel for Randall Terry, to Robert Baker, Federal Communications Commission (October 19, 2012) (“Terry Complaint”).

³ 47 U.S.C. §§ 312 and 315.

Station's digital noise limited service contour ("NLSC") encompasses more than a de minimis portion of the population of West Virginia.

2. Reasonable Access/Applicable Service Area. Section 312(a)(7) of the Act, implemented by Section 73.1944 of the Commission's rules, requires broadcast stations "to allow reasonable access to or to permit the purchase of reasonable amounts of time for the use of a broadcast station...by a legally qualified candidate for federal elective office."⁴ The Commission has stated that "reasonable access obligations are incurred by stations within their normal service area," and that "[g]enerally, a television station's [analog] Grade B contour will establish the service area for this purpose."⁵ Since the transition to digital television, the Commission has determined that the NLSC is directly comparable to the analog Grade B contour used prior to the digital transition.⁶

3. Pleadings. Terry's complaint, which includes portions of e-mails between representatives of the Station and Terry's representative, Kathy Offerman ("Offerman"), indicates that he is a federal candidate for President who has qualified for the ballot in West Virginia.⁷ Terry states that when he requested reasonable access to air advertisements in late October, the Station replied via e-mail that the Station "covers the DC area" and that Terry has no right of access to the Station because he is on the ballot in West Virginia and "we put a signal over a negligible portion of West Virginia."⁸ Offerman responded via e-mail, arguing that Terry was entitled to reasonable access at the Station because the Station's service area covers all of Jefferson County, West Virginia and possibly portions of Berkeley County, West Virginia. To support this contention, Offerman points to the Station's 36 dBu Service Contour Map – the NLSC – on the Commission's website. In its e-mail response, the Station maintains that its service contour does not include West Virginia. Regarding the map cited by Offerman, the Station contends that "[t]he issue is not where the FCC predicts that our signal reaches under an abstract interpretation of the propagation curves in its rules. The issue is whether WUSA puts an actual signal, in

⁴ 47 C.F.R. § 312(a)(7); 47 C.F.R. § 73.1944. Section 312(a)(7) was amended in 2000 to exempt non-commercial educational stations.

⁵ *In re Complaint of Michael Steven Levinson v. New Hampshire Noncommercial Television Stations, et al.*, 9 FCC Rcd 3018, 3021 n.4 (1994) ("*Levinson*") (citing *The Law of Political Broadcasting and Cablecasting*, 100 FCC 2d 1476, 1486 (1984)).

⁶ *Study of Digital Television Field Strength Standards and Testing Procedures*, ET Docket No. 05-182, 20 FCC Rcd 19504, 19507 (2005) ("For digital television stations, the counterpart to the Grade B signal intensity standards for analog television stations are the values set forth in Section 73.622(e) of the Commission's Rules describing the DTV noise-limited service contour."). See also, e.g., *Implementation of Section 203 of the Satellite Television Extension and Localism Act of 2010 (STELA)*, MB Docket No. 10-148, Report and Order and Order on Reconsideration, 25 FCC Rcd 16383, 16410, ¶ 51 (2010); *Report To Congress: The Satellite Home Viewer Extension and Reauthorization Act of 2004; Study of Digital Television Field Strength Standards and Testing Procedures*, 20 FCC Rcd 19504, 19507, ¶ 3, 19554, ¶ 111 (2005); *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Implementation of Section 340 of the Communications Act*, Report and Order, 20 FCC Rcd 17278, 17292, ¶ 31 (2005); KXAN, INC., *Petition For Waiver of Sections 76.92(f) and 76.106(a) of the Commission's Rules*, CSR-7825-N, KXAN, Inc., 25 FCC Rcd 3307, 3312, ¶ 8 n.32 (MB 2010) (using the NLSC in place of the Grade B contour for purposes of the cable network non-duplication and syndicated program exclusivity rules); Lenfest Broadcasting, LLC, 19 FCC Rcd 8970, 8974, ¶ 7 n.27 (MB 2004) (using the NLSC in place of the Grade B contour for purposes of the market modification rules).

⁷ The Station does not dispute that Terry is a legally qualified candidate in West Virginia under our rules.

⁸ E-mail from Greg Sodano, National Sales Manager, WUSA-TV, to Kathy Offerman (October 17, 2012), attached to Terry Complaint.

real life terms, over more than a negligible number of viewers in West Virginia. Because of terrain in an intervening mountainous region, our signal does not reach more than a negligible number of viewers in West Virginia, if it reaches any at all. Accordingly, we have no obligation to broadcast Mr. Terry's advertisement."⁹

4. Terry argues that, if a station is allowed to deny reasonable access based on its own determination that its coverage of the area in which a candidate is running is negligible, then the Commission will be allowing a station "to determine whether it will grant reasonable access to a candidate with no reference to an objective criteri[on] determined by the Commission." Terry asks that the Commission immediately order the Station to grant him reasonable access.

5. In its response, Gannett reiterates that it "has no obligation under Section 312 to provide reasonable access to any West Virginia candidate because the station does not serve West Virginia."¹⁰ As support for its position, the Station quotes several decisions in which the Commission stated that "[r]easonable access obligations are incurred by stations within their normal service area,"¹¹ and that licensees that did not serve a candidate's Congressional district were not required to provide the candidate with reasonable access under Section 312.¹² The Station attaches a coverage map that indicates that its normal service area – determined by "using the terrain-dependent Longley-Rice methodology recognized and widely used by the industry and the Commission"¹³ – does not include West Virginia and states that, if any West Virginians could receive its signal, the number would be de minimis in relation to the Station's overall viewership, West Virginia's entire population, or even any political subdivision of the State.¹⁴ The Station concludes that it has complied with the Commission's political broadcasting rules and that the Commission should dismiss Terry's complaint.¹⁵

6. In its reply to the Station's response, Terry argues that the map cited by Gannett "is not readily available to candidates for Federal office nor is it accessible under the Station's profile on the

⁹ E-mail from Khalim Piankhi, Vice-President, Community Relations, WUSA-TV, to Kathy Offerman (October 19, 2012) attached to Terry Complaint.

¹⁰ E-mail from Kerry Monroe, Counsel for Gannett Co., Inc. to Robert Baker, Federal Communications Commission (October 22, 2012) ("Gannett Response") at 1.

¹¹ Gannett Response at 1, quoting *Levinson*.

¹² Gannett Response at 1, quoting *Reply to Letter of Bob White Concerning Political Advertising in the State of Texas*, 87 FCC 2d 748, 749 (1980).

¹³ Gannett Response at 2. The station cites Section 73.622(e), which states that "[t]he service area of a DTV station is the geographic area within the station's noise-limited F(50,90) contour where its signal strength is predicted to exceed the noise-limited service level," and that "[w]ithin this contour, service is considered available at locations where the station's signal strength, as predicted using the terrain dependent Longley-Rice point-to-point propagation model, exceeds [36 dBu]." *Id.*, citing 47 C.F.R. § 73.622(e). The fact that the Commission relies on the Longley-Rice propagation model for purposes of the digital television table of allotments in Section 73.622 of the Commission's rules does not mandate that we rely upon it for purposes of determining reasonable access in this case.

¹⁴ The political programming staff has repeatedly expressed informally its view that stations are obligated to provide reasonable access to federal candidates running for office within their service area unless the population covered is de minimis in the jurisdiction in which the candidate is qualified. We note that this de minimis view has never been the subject of any formal rulings.

¹⁵ Gannett Response at 2.

Commission's website but is, instead is a 'customized Longley Rice engineering study prepared by consulting engineers Cavell Mertz and Associates, Inc., for the Station.'"¹⁶ Terry mentions that the two publicly available maps regarding the Station's service contour—the one in the Station's own 2012 Media Kit and the one on the Commission's website—both indicate that West Virginia is included in the Station's coverage area. Terry also disputes the Station's assertion that it has the right to make the determination that its signal coverage in West Virginia is de minimis and, therefore, "insufficient to entitle a legally qualified candidate for Federal office reasonable access under Section 312." In contrast, Terry's position is "that if any portion of a candidate's state or electoral district is served by the broadcaster's signal, that candidate is entitled to reasonable access under section 312."¹⁷ Furthermore, he argues "that there must be one certifiable standard based on readily available information from the Commission.... To conclude otherwise would subject a Federal candidate's reasonable access and political speech to a determination by a private entity outside of the control of the Commission and based on information not readily available to the candidate or the public."¹⁸

7. In response to Terry's reply, the Station asserts that the publicly available maps that Terry references do not reflect the station's service area. According to the Station, the map in its Media Kit provides information regarding the Washington, D.C. designated market area, as determined by Nielsen Media Research, and it is common for a station not to be capable of serving this entire area, as is the case here. Regarding the map available on the Commission's website, the Station repeats the position that it set forth previously when communicating with Terry, that that is "a predictive map that does not take into account real-world terrain features, such as the Appalachian Mountains."¹⁹ It restates its earlier communication to Terry that, according to the Station's terrain-dependent coverage map, if any West Virginians can receive the Station's signal, it would be a de minimis portion of the Station's viewership, West Virginia's population, or any political subdivision thereof. It also contends that Commission staff has repeatedly indicated orally that a station does not have political broadcasting obligations in a jurisdiction where it has only de minimis coverage.

8. Discussion. Based on the record before us, we believe that it is unreasonable for the Station to deny Terry reasonable access. As discussed above, the Commission stated before the digital television transition that "[g]enerally, a television station's grade B contour will establish the service area for [the] purpose" of determining reasonable access obligations.²⁰ The Commission has since stated that the NLSC is the counterpart to the Grade B contour for digital television stations, and it uses that measurement for various purposes previously governed by the Grade B contour.²¹ Given the importance of issuing a prompt decision, particularly in the short time remaining before the election, we conclude that we should use the NLSC, the present-day equivalent of the Grade B contour used in *Levinson*, to determine reasonable access rights in this case. The Station's NLSC, as it appears on WUSA's Station

¹⁶ E-mail from Patrick Purtill, Counsel for Randall Terry, to Robert Baker, Federal Communications Commission (October 22, 2012) ("Terry Reply") at 2.

¹⁷ Terry Reply at 2.

¹⁸ Terry Reply at 2.

¹⁹ E-mail from Kerry Monroe, Counsel for Gannett Co., Inc., to Robert Baker, Federal Communications Commission (October 24, 2012) at 2.

²⁰ *Levinson*, 9 FCC Rcd at 3021 n.4

²¹ *See supra* n.6.

Profile on the Commission's website,²² covers all of Jefferson County and part of Berkeley County in West Virginia. According to the Census Bureau, Jefferson County, West Virginia, has a population of approximately 54,000 and the State of West Virginia has a total population of about 1,855,000.²³ Even ignoring the population in Berkeley County, which is partially covered by the station's NLSC, the Station's contour covers nearly 3% of the state's population. We do not think this percentage can be considered de minimis.²⁴ Therefore, because the Station's NLSC covers more than a de minimis number of people located in the jurisdiction in which Terry is a legally qualified candidate, we believe that it is unreasonable for the Station to refuse to provide reasonable access to Terry.

9. Accordingly, IT IS ORDERED that the complaint filed by Terry IS GRANTED as indicated above.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau

²² See <https://stations.fcc.gov/station-profile/wusa/contour-maps/>.

²³ U.S. Census Bureau: State and County QuickFacts, <http://quickfacts.census.gov/qfd/states/54/54037.html> (accessed October 26, 2012).

²⁴ A chart in WUSA's Media Kit indicates that the Washington, DC designated market area includes 100,830 viewers in West Virginia. Although this does not mean that that number of viewers can receive WUSA's signal over the air, it is worth noting that that WUSA markets the fact that it has a service presence in West Virginia. Terry Reply, attachment (WUSA 2012 Media Kit).