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

In re Complaint of	)
	)
Randall Terry	)
	)
Against Station WMAQ-TV,	)
	)
Chicago, Illinois	)
	)
	)

MEMORANDUM OPINION AND ORDER

Adopted: February 3, 2012 **Released: February 3, 2012**

By the Chief, Media Bureau:

1. Introduction. We have before us a complaint filed on January 30, 2012, by Randall Terry ("Terry"), against Station WMAQ-TV, Chicago, Illinois,[1] a response to the complaint filed on February 1, 2012, by Station WMAQ-TV, Chicago, Illinois, and a reply to the response submitted on February 2, 2012, by Randall Terry. In his complaint, Terry states that he is a "candidate for President of the United States." Terry asks that the FCC enforce Section 312(a)(7) of the Communications Act of 1934, as amended ("Act"), against Station WMAQ-TV "for its failure to allow Terry's campaign to purchase campaign ads on its station during the Super Bowl."[2] WMAQ contends that the Commission should conclude that its refusal to sell Terry time on the Super Bowl broadcast was not "unreasonable or made in bad faith" and that the Commission "should dismiss this matter."[3] Based on the record before us, we deny the complaint on two grounds. First, we conclude that it was not unreasonable for WMAQ to conclude that Terry did not make a substantial showing that he is a legally qualified candidate entitled to reasonable access to broadcast stations in Illinois. Second, even if Terry were a legally qualified candidate, we do not find WMAQ's refusal to sell time to him specifically during the Super Bowl broadcast to be unreasonable.

2. Substantial Showing of Candidacy. Section 73.1940 of the Commission's rules defines a "legally qualified candidate" for nomination for the office of President as, *inter alia*, any person: who has publicly announced his or her intention to run for nomination; is qualified under the applicable local, State, or Federal law to hold the office for which he or she is a candidate; and has either qualified for the primary ballot or makes a substantial showing that he or she is a bona fide candidate.[4] The rule explains that "[t]he term 'substantial showing' of a bona fide candidacy . . . means evidence that the person claiming to be a candidate has engaged to a substantial degree in activities commonly associated with

[1] We note that this complaint was in the form of a letter from an attorney representing Terry and did not include any affidavit or supporting documentation.

[2] Complaint by Randall Terry Against Station WMAQ-TV ("Terry Complaint") at 1.

[3] Response of WMAQ-TV to Terry Complaint ("WMAQ Response") at 13.

[4] 47 C.F.R. § 73.1940.

political campaigning. Such activities normally would include making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee, and establishing campaign headquarters (even though the headquarters in some instances might be the residence of the candidate or his or her campaign manager). Not all of the listed activities are necessarily required in each case to demonstrate a substantial showing, and there may be activities not listed herein which would contribute to such a showing."[5]

3. In his complaint, Terry argues that he is a legally qualified candidate under Commission precedent and the Commission's rules, based essentially on his purported substantial showing of candidacy in Illinois,[6] and that "there is therefore no just reason not to run his ads."[7] Terry states that "he is eligible to be elected president of the United States, as he was born in the United States, has lived in the United States his whole life, and is over 35 years of age."[8] To meet the substantial showing criteria, Terry lists a number of activities in which he claims to have participated in the state of Illinois. He argues that these activities reflect that he has made a substantial showing and that WMAQ-TV's "rejection of his request to purchase advertising constitutes an improper denial of his rights."[9] Terry also notes that "a number of other stations have recognized his right to show [his] ads," stating that they have already aired in Boston, Massachusetts and Springfield, Missouri.[10]

4. In its response, WMAQ sets forth several arguments to support its position that its decision not to sell Terry time during the Super Bowl broadcast was reasonable and in good faith. WMAQ contends that Terry did not make a substantial showing of candidacy for the Democratic Party's Presidential nomination in Illinois.[11] Among other things, it states that Terry's campaign stops (in Highland, Granite City, and Edwardsville) were limited to "a small geographic section of Illinois," and did not demonstrate that he participated in "campaign activities throughout a substantial portion of the state." WMAQ contends that the only piece of literature that Terry indicated that he distributed "was labeled 'generic brochure' and lacked the legal disclaimers required for public dissemination, suggesting that [it] was never physically distributed in the state." WMAQ attaches a letter dated January 27, 2012, from Patrick Gaspard, Executive Director of the Democratic National Committee ("DNC") addressed "To

[5] 47 C.F.R. § 73.1940(f).

[6] In his complaint, Terry notes that he "is registered as a write-in candidate in several Illinois counties, including Cook County and Will County." Terry Complaint at 2. We note that, while publicly committing to seeking election by the write-in method is one of the possible bases to be considered a legally qualified candidate for certain offices under our rules, it is not a basis to be considered a legally qualified candidate for the nomination for President of the United States. 47 C.F.R. § 73.1940.

[7] Terry Complaint at 1.

[8] Terry Complaint at 2.

[9] Terry Complaint at 3.

[10] Terry Complaint at 3.

[11] The information that Terry included in his complaint to support his substantial showing for candidacy differs in a number of ways from the information that WMAQ states Terry submitted to it. For example, Terry states in his complaint that he campaigned in Chicago, but WMAQ states that he failed to communicate that fact when attempting to make a substantial showing of candidacy in Illinois. WMAQ Response at 9 n.49. Terry also included additional information regarding his campaign activities in his reply. We believe that the relevant information to review in determining whether WMAQ's decision regarding Terry was reasonable is the information that Terry submitted to the station because the station's decision was based on that information. Therefore, we will analyze that information in our discussion of the issue, *infra*. However, we note that, even taking all three sets of information into account, we would still conclude that it was not unreasonable for WMAQ to find that Terry had not made a substantial showing.

whom it may concern" ("DNC Letter").[12] WMAQ describes the letter as "proclaiming that Mr. Terry 'cannot satisfy' the 'presidential candidate' requirements under Democratic Party rules" and, therefore, argues that "Terry did not and could not prove to WMAQ that he was a 'legally qualified candidate' entitled to 'reasonable access' because the Democratic Party does not consider him an actual candidate for its presidential nomination."[13] In his reply to WMAQ's response, Terry argues that the DNC Letter does not give the station the right to refuse his ads. Terry contends that primaries are public, conducted by the state at public expense, and "a 'club' such as the Democratic Party cannot deny the public access to vote for the candidate of their choice therein."[14]

5. Review of the information provided by Terry to the station regarding his substantial showing demonstrates that much of it is either incomplete or without specific facts to support his claims regarding particular campaign activities. For example, he lists under "Literature Distributed" two pieces of campaign literature—an article and a fundraising envelope—but fails to indicate where they were distributed.[15] In addition, the few locations in which he mentions campaigning fail to demonstrate that he has engaged in campaign activities throughout a substantial part of the state, as required by Commission precedent. [16]

6. The Commission's rules and precedent place the burden of making a substantial showing on the candidate.[17] Therefore, the Commission does not require or expect broadcasters to act as private investigators to ascertain the facts relating to claims of campaign activities lacking the specificity needed to establish a showing. Furthermore, the fact that other stations may have chosen to air Terry's ads because they may have considered Terry a legally qualified candidate does not alone establish that a contrary determination by other stations was unreasonable.[18] Finally, we note that the DNC letter states that "Mr. Terry is not a bona fide Democratic candidate or representative of the Democratic National Committee."[19] It further says that, to be a *bona fide* candidate under Democratic party rules, a person must be "a 'bona fide Democrat whose record of public service, accomplishment, public writings and/or public statements affirmatively demonstrates that he or she is faithful to the interests, welfare and success of the Democratic party of the United States and will participate in the Convention in good faith.' Mr.

[12] WMAQ Response at Exhibit 1.

[13] WMAQ Response at 3.

[14] Terry Reply at 2 citing *U.S. v. Classic*, 313 U.S. 299, 312 (1941).

[15] WMAQ Response at Exhibit 2.

[16] The Commission's former Broadcast Bureau has stated that a candidate running as a write-in candidate in a state for President of the United States must demonstrate to the stations from which he seeks broadcast time that he "has engaged in campaign activities throughout a substantial part of the state" as part of his substantial showing. *In Re Complaint of Michael Stephen Levinson Against Television Station Licensees*, 87 FCC 2d 433, 434 (Broadcast Bur. 1980).

[17] *See* 47 C.F.R. § 73.1940; *Levinson*, 87 FCC 2d at 434 (speaking to candidate, "[t]he burden is on you to establish to the stations from which you seek broadcast time under Section 312 that you have 'engaged to a substantial degree in activities commonly associated with political campaigning.'").

[18] *Cf. Democratic National Committee v. Columbia Broadcasting System, Inc*., 91 F.C.C.2d 1170, 1177 (1982) ("It is clearly inappropriate to evaluate the reasonableness of CBS' news judgment based upon an analysis of the President's address [that] there were sufficient grounds for CBS to refuse to carry it; and we note that one of the other major networks apparently came to this conclusion. However, this does not establish bad faith or unreasonableness. It merely demonstrates that journalists differed regarding the newsworthiness of the President's address.").

[19] DNC Letter at 1.

Terry cannot satisfy these requirements."[20] The letter concludes, "Mr. Terry's claims to be a Democratic candidate for President are false. Accordingly, he should not be accorded the benefits of someone conducting a legitimate campaign for public office."[21] Based on the record before us, we conclude that it was not unreasonable for WMAQ to conclude that Terry had not made a substantial showing that he is a *bona fide* candidate for Democratic nomination for President in the State of Illinois.

7. Reasonable Access. 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 legally qualified candidates for federal elective office, including individuals seeking the nomination of a political party for such office.[22] The Commission has construed these provisions to require that access be provided to federal candidates during all parts of the broadcast day, excluding news programming.[23] However, the Commission has also stated that "there may be circumstances when a licensee might reasonably refuse broadcast time to political candidates during certain parts of the broadcast day,"[24] and that a federal "candidate is not entitled to a particular placement of his or her political announcement on a station's broadcast schedule."[25] The Commission recognized "that it would be very difficult for a licensee to afford 'equal opportunities' to opposing candidates if one candidate has his or her spot placed adjacent to a highly rated program which was broadcast only once or rarely."[26] Stations may also balance the individualized needs of each candidate against such factors as the multiplicity of competing candidates with a realistic chance of seeking equal opportunities, the timing of the request, and potential program disruption.[27]

8. In its response, WMAQ argues that, even if Terry were a legally qualified candidate, the right to reasonable access would not guarantee him ad placement in a specific program such as the Super Bowl.[28] WMAQ states that "a candidate is 'not entitled to purchase any amount of broadcast time which he desires, at whatever time he wishes,'"[29] and that the Commission has often stated that "the 'reasonable

[20] *Id*.

[21] DNC Letter at 1.

[22] 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.

[23] In 1990, the former Mass Media Bureau stated that the Commission had advised broadcasters that they did not have to sell time to candidates during news programming. *Questions and Answers Relating to Political Programming*, 68 RR 2d 188,189 (MMB 1990). The Commission reaffirmed this position in 1991. *In the Matter of Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, 682 ("*Political Programming Policies*").

[24] *Political Programming Policies*, 7 FCC Rcd at 682 (1991), quoting *In the Matter of Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 FCC 2d 1079, 1091 ("*Enforcing Section 312(a)(7)*"). Terry cites *Becker v. FCC* for the proposition that "any refusal to air Terry's ads during the specified time is an improper violation of his rights." Terry Complaint at 3; Terry Reply at 6. We disagree. The *Becker* court held that a station may not time channel advertisements by a legally qualified Federal candidate based on the content of the ad. It did not overrule the prior Commission determinations quoted above. In fact, it quotes those statements, stating that they were irrelevant there. *Becker. v. FCC*, 95 F.3d 75, 80 (1996).

[25] *Political Programming Policies*, 7 FCC Rcd at 682, quoting *Enforcing Section 312(a)(7)*, 68 FCC 2d at1091.

[26] *Id*.

[27] *See CBS, Inc. v. FCC*, 453 U.S. 367 (1981).

[28] WMAQ Response at 11.

[29] WMAQ Response at 11 quoting *In Re Complaint of Anthony R. Martin-Trigona Against Radion Station WGN, Chicago, Illinois*, 67 FCC 2d 743, 746 (1978).

access' guarantee was 'never intended to provide candidate access to specific programming.'"[30] It points out that the Commission has also stated that, in providing reasonable access, a station may consider its broader programming and business commitments such as "the multiplicity of candidates."[31] WMAQ contends that, in limiting the rights of a federal candidate under the reasonable access provision, the Commission has recognized the difficulties in providing equal opportunities to other candidates if one candidate had a spot appearing in a highly rated program which was broadcast only once.[32] WMAQ states that "[t]he Super Bowl is aired only on an annual basis and is consistently the highest-rated television program of the year" and that WMAQ's broadcast area covers jurisdictions in three different states which all have presidential and congressional primaries, leading to the possibility of a multiplicity of eligible federal candidates wanting to purchase time in the Super Bowl.[33]

9. We agree that, even if Terry were a legally qualified federal candidate, he would not be entitled to particular placement of his spots on a particular program on a station's broadcast schedule. The Commission's established policy in this regard closely fits the circumstances of this case. Terry requested time on a highly rated program that occurs only once annually—in this case typically the highest rated program of the year—and it may well be impossible, given the station's limited spot inventory for that broadcast, including the pre-game and post-game shows, to provide reasonable access to all eligible federal candidates who request time during that broadcast. Furthermore, given the lack of equivalent broadcasts, it would be reasonable for the station to conclude that it would be impossible to provide equal opportunities after the fact to opponents of candidates whose spots aired during the program. Given these factors, we do not find WMAQ's refusal to sell time to Terry specifically during the Super Bowl broadcast to be unreasonable.

10. Conclusion. For these reasons, the complaint filed by Terry is hereby DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau

[30] WMAQ Response at 11 quoting *Political Programming Policies*, 7 FCC Rcd at 682.

[31] *Id.*

[32] WMAQ Response at 11-12 citing *Political Programming Policies*, 7 FCC Rcd at 681.

[33] WMAQ Response at 12.