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Supplement

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October 2, 1996

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Ms. Susan E. Propper
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Via Hand Delivery

Supplement to

Re: Advisory Opinion Request 1996-41


Dear Ms. Propper:

Enclosed is a copy of yesterday's FCC decision approving A.H. Belo's proposal to provide free air time to candidates for the United States House, Senate, and gubernatorial races. The FCC determined that A.H. Belo's proposal was exempt from the "equal opportunities" requirements of the Communications Act, as programming providing "on-the-spot news coverage of a bona fide news event." This is the same proposal that the FEC will be considering at its meeting tomorrow, October 3, 1996.

As you are aware, the FCC previously approved a proposal by Fox Broadcasting, Capital Cities/ABC, and PBS to provide on-the-spot coverage of presidential candidates. In the A.H. Belo decision, the FCC applied the same principles in the context of congressional and statewide races, and determined that Belo's proposal for other contests also constituted "news coverage" for FCC purposes.

We would appreciate your making this decision part of the record in the FEC's consideration of A.H. Belo's advisory opinion request. Thank you very much for your assistance.

Sincerely,



James R. Bayes

Enc. FCC 96-1653 (Oct. 1, 1996)

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

In re Request of)
)
A. H. BELO CORPORATION)
)
For Declaratory Ruling)

STAFF RULING

Adopted: October 1, 1996

Released: October 1, 1996

By the Chief, Mass Media Bureau:

1. The Commission has before it a request for declaratory ruling filed September 23, 1996, by the A. H. Belo Corporation (Belo). Belo seeks a Commission ruling that its proposal to provide free air time in the context of news coverage of "major" candidates for the United States Senate, United States House of Representatives, and Gubernatorial races prior to the November 5, 1996, general election are exempt from the "equal opportunities" provision of Section 315(a) of the Communications Act of 1934, as amended. 47 U.S.C. Section 315(a). For the reasons discussed below, we believe that the proposal is consistent with the statutory exemptions and related Commission and judicial case law and, accordingly, it should be deemed exempt from the equal opportunities requirement as "on-the-spot coverage of *bona fide* news event" programming under Section 315(a)(4).

Factual Background

2. Belo proposes that, in each of the areas served by a station licensed to Belo,¹ the Belo station would, in cooperation with local Public Broadcasting Service (PBS) affiliates, produce a program or programs featuring candidates for the U.S. Senate and House of Representatives, and for Governor. Belo plans to begin airing these programs in October 1996. With respect to the U.S. House of Representatives races, Belo will present candidates from districts within its stations' respective Grade A contours. When more than two legally qualified candidates are competing for an office, Belo states that it will select candidates by utilizing "pre-established objective criteria for public support and credibility appropriate to each jurisdiction involved, such

¹ Belo is licensed to operate the following stations: WFAA-TV, Dallas, TX; KHOU-TV, Houston, TX; KIRO-TV, Seattle, WA; KXTV, Sacramento, CA; WWL-TV, New Orleans, LA; WVEC-TV, Norfolk/Hampton, VA; and KOTV, Tulsa, OK.

as significant levels of public support in independent public opinion polls, numbers of signatures on nominating petitions, receipt of substantial campaign contributions from varied sources, prior holding of significant public office(s), or receipt of a substantial level of votes in prior elections for the same or comparable offices." Each station licensed to Belo will invite the selected candidates to its studio to "videotape 'live'" their respective statements. Each program will be introduced by Belo and PBS station officials and moderated by a newscaster from the local Belo station's news division. The moderator will ask each candidate in turn to respond to the same question with five minutes accorded for the candidates' responses. Once taped, the questions and the "candidates' unedited five minute responses" will be combined by Belo news personnel into a one-hour program, with the statements presented back-to-back and the order of presentation to be determined by coin flip if two candidates are selected and by a drawing of straws if more than two participate. The programming would be aired by both the local Belo and PBS stations and will be broadcast without commercial interruption.²

3. Belo claims that its proposed format is fully consistent with Commission precedent, which Belo argues has held that similar programming satisfies Congressional intent for exempt bona fide "news event" broadcasts. Specifically, Belo contends that "[t]he presentation of unedited statements by Congressional and Gubernatorial candidates on issues central to their candidacies is, by any reasonable standard, newsworthy, and the Belo proposal is carefully structured to ensure against favoritism of any particular candidates." Furthermore, Belo notes in support of its request, that it has received a number of journalism awards, particularly for its coverage of local news, and that the proposed programming is in keeping with its concentration on public service by increasing local news coverage in each of the communities it is licensed to serve.

Discussion

Legal Background

4. Section 315 of the Act provides that if a broadcaster or origination cablecaster³ permits a legally qualified candidate for public office to "use" a broadcast station or cable television

² To accommodate all candidates in larger markets, Belo states that it may be necessary to produce "two episodes." Belo maintains, however, that all of the selected candidates competing for the same office would always appear in the same broadcast. Belo also states that it will offer the programming to local cable television systems and radio stations.

³ For purposes of applying the equal opportunities requirement, Section 315(c) defines "broadcasting station" as including cable television systems. In implementing this provision, the Commission has applied Section 315 only to a cable system's origination cablecasting, defined as programming over which it exercises exclusive control. 47 C.F.R. Section 76.5(p).

system.⁴ it must afford equal opportunities to all legally qualified opponents for the same office. In 1959, the Commission ruled that the appearance of the incumbent Mayor of Chicago on a local newscast during his reelection campaign triggered equal opportunities rights for his opponents. In re Telegram to CBS, Inc. ("Lar Daly"), 18 Rad. Reg. 238, recon. denied, 26 FCC 715 (1959). Congress, fearing that the ruling would inhibit news coverage of the political arena, within months enacted four news exemptions to the equal opportunities requirement:

- 1) *bona fide* newscast;
- 2) *bona fide* news interview;
- 3) *bona fide* news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary); and
- 4) on-the-spot coverage of *bona fide* news events (including but not limited to political conventions and activities incidental thereto).

47 U.S.C. Section 315(a)(1)-(4). In Aspen Institute, 55 FCC 2d 697 (1975), aff'd sub nom. Chisholm v. FCC, 538 F.2d 349 (D.C. Cir. 1976) cert. denied, 429 U.S. 890 (1976) ("Aspen"), which granted a news event exemption to candidate debates, the Commission adopted a two-part test for analyzing whether a program should be considered *bona fide* news event programming.⁵ First, it determined whether the format of the program reasonably fit within the news event exemption category and, second, it assessed whether the decision to carry a particular event was the result of good faith news judgment and not based on partisan purposes.

5. Since the Commission's decision in Aspen, the Commission has reevaluated its interpretation of the statutory exemptions to give broadcasters greater discretion to present "news event" coverage of the political process. Several years ago, in King Broadcasting Company, 6 FCC Rcd 4998 (1991), on remand from King Broadcasting Company v. FCC, 860 F.2d 465 (D.C. Cir. 1988), vacating WEBE-108 Radio Company, 2 FCC Rcd 5963 (M.M. Bur. 1987), review denied, FCC 88-162, released May 13, 1988 ("King"), the Commission ruled that back-to-back appearances by the major candidates for the office of President in programming produced by the broadcaster could qualify as *bona fide* news event programming.

⁴ In general, a use is any "positive" identified or identifiable appearance of a legally qualified candidate. This excludes disparaging depictions by opponents or third-party adversaries. See Report and Order, 7 FCC Rcd 678, 684 (1991).

⁵ Eight years later in Henry Geller, 95 FCC 2d 1236, aff'd sub nom. League of Women Voters v. FCC, 731 F.2d 995 (D.C. Cir. 1983) ("Geller"), the Commission held that its decision in Aspen had, in some respects, been unnecessarily restrictive. Applying the two-prong test formulated in Aspen, it therefore allowed broadcasters to sponsor and air debates from their own studios and to tape and air a "reasonably recent event." The Commission reasoned that, although there was a chance that according broadcasters additional freedom and flexibility in their news programming might result in an occasional abuse, Congress clearly had accepted that risk in order to foster a more informed electorate. Id. at 1244.

6. More recently, in Fox Broadcasting Company ("Fox"). FCC 96-355 (released August 21, 1996), the Commission relied on its King decision and granted the requests of Fox, Capital Cities/ABC and PBS that their respective proposals for the presentation of the major presidential candidates be deemed exempt as on-the-spot coverage of a *bona fide* news event. In Fox, however, the Commission noted that its holding was decided in the context of elections at the presidential level, and that, although it would utilize the same principles in considering requests for news exemptions involving candidate presentations for offices below the presidential level, those cases would be evaluated in the context of the specific circumstances of future requests.⁶

Analysis of Belo Request

7. Consistent with the principles set forth in King and Fox, we believe that Belo's proposed format for the presentation of congressional and gubernatorial candidates is exempt as "on-the-spot coverage of *bona fide* news events."

8. With respect to the first prong of the Aspen test, we agree with Belo that back-to-back appearances by major Congressional and Gubernatorial candidates are reasonably treated as news events. The Commission noted in King that Congress had concluded generally that the objective of equal opportunities "must be balanced against two other objectives no less vital: encouraging maximum coverage of all news events . . . in order to cultivate a fully informed public, and preservation of licensees' traditional independent journalistic judgment with respect to broadcasting such events." Id. (quoting the court in Kennedy for President Committee ("Kennedy"), 77 FCC 2d 965, 968-69, aff'd sub nom. Kennedy for President Committee v. FCC, 636 F.2d 417 (D.C. Cir. 1980).) News coverage of congressional and gubernatorial candidates is an extremely important element of local news coverage.⁷ Thus, consistent with the Commission's finding in King and Fox that statements by the major candidates for the Presidency are reasonably viewed as *bona fide* news events, we conclude that a broadcaster may reasonably determine that a Congressional or Gubernatorial race, as Belo has determined, is sufficiently newsworthy to warrant news coverage.

⁶ While we recognize that, as a practical matter, broadcasters may seek to assure that the Commission believes that a proposed format is exempt before it is broadcast, we note that broadcasters are not required by the statute or case law to seek our approval before presenting programming deemed by the broadcaster to fit one of the exempt *bona fide* news categories.

⁷ There is no indication in the statute or the legislative history that Congress intended that the Commission apply any different standards to congressional or gubernatorial elections.

9. Furthermore, as we noted in King and Fox, the Geller ruling⁵ established that the "on-the-spot" element of the news event exemption is not lost when programming is taped and shown at some later date as long as the broadcast is of a "reasonably recent event." Thus, Belo's proposed programming satisfies the first prong of our analysis.

10. With respect to the second prong of our analysis -- whether the broadcaster is exercising good faith judgment that the event is newsworthy -- it is also clear that Belo has met the guidelines enunciated in King and Fox. There is no evidence in the record of any intent to advance a particular candidacy. The structural safeguards outlined by Belo to avoid favoritism are consistent with the guidelines established in Fox and related case law. The proposed candidate statements are essentially identical to the back-to-back programming approved in King and the election eve statements in Fox, with the added safeguard also present in Fox that each candidate's statement would respond to the same question. Furthermore, Belo asserts that it will employ objective criteria in selecting the candidates, considering significant levels of public support in independent public opinion polls, numbers of signatures on nominating petitions, receipt of substantial campaign contributions from varied sources, prior holding of significant public office(s), or receipt of a substantial level of votes in prior elections for the same or comparable offices. As we stated in Fox, a licensee is not required to delegate the selection of the candidates to a third party as long as its own criteria for candidate selection are reasonable. We find that the criteria that Belo has committed to use for candidate selection meets this standard. We also believe that Belo's commitment to present the statements uninterrupted and unedited lends an additional assurance that the licensee does not intend to further any particular candidacies. We conclude, therefore, that Belo's decision to broadcast the event is not intended to favor one candidate over another.

11. In view of the foregoing, A. H. Belo Corporation's request IS GRANTED. Staff action is taken pursuant to delegated authority.

FEDERAL COMMUNICATIONS COMMISSION


Roy Stewart
Chief, Mass Media Bureau

⁵ See note 5, infra.