Federal Communications Commission
Washington, D.C. 20554

 August 14, 1998

COMMENTS ON
AOR 1998-17
w/attachment

BY FAX AND FIRST CLASS MAIL

Lawrence M. Noble
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: AOL 1998-17 (Daniels Cablevision, Inc.)

Dear Mr. Noble:

Daniels Cablevision, which operates two cable television systems in Southern California, has submitted to the FEC a plan to provide, in Daniels' words, "free campaign airtime for California candidates for Federal political office."[1] Daniels seeks an advisory opinion from the FEC to the effect that its plan is not prohibited by 2 U.S.C. § 441b(a), which generally prohibits corporations from making contributions or expenditures in connection with a federal election. You asked the FCC for guidance with respect to the interpretation of provisions of the Communications Act that are relevant to Daniels' request. This letter presents my own views concerning those provisions, but does not necessarily reflect the views of the FCC. In my view, to harmonize the Communications Act and the Federal Election Campaign Act, section 441b(a) should be construed not to prohibit any provision of advertising time to candidates that fulfills the obligations of a broadcaster or cable operator under the Communications Act. Daniels' plan fulfills its obligations under section 315 -- which requires broadcasters and cable operators to give discounts to candidates -- and therefore should be approved.

Daniels has offered to provide up to 750 free 30-second spot advertisements per week to candidates for four elective offices during the eight weeks preceding the November 3, 1998, election. Under the plan, all candidates on the ballot for the United States Senate and three seats in the House of Representatives would be entitled to an equal amount of free time. Daniels' plan appears to be the sort of plan that a number of persons have urged the FCC to mandate with respect to broadcasters.[2] It is fair to say that proposals to mandate the provision

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[1] The Daniels Plan at 1 (attachment to Request for Advisory Opinion submitted to FEC by Daniels Cablevision, Inc. (Aug. 3, 1998) (AOR 1998-17)).

[2] The President asked the FCC "to develop policies, as soon as possible, which ensure that broadcasters provide free and discounted airtime for candidates to educate voters." Letter from President Clinton to Chairman William E. Kennard. Feb. 5, 1998. In addition, many Members of Congress have proposed a system of mandated free airtime for political

of free time to candidates have been controversial, but as far as I know no one at the FCC has questioned the desirability of permitting broadcasters or cable operators voluntarily to contribute free or discounted advertising time to candidates. As the Supreme Court stated in upholding 47 U.S.C. § 312(a)(7) -- which directs the FCC to revoke the license of a broadcaster "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time" by federal candidates -- the provision of advertising time contributes "to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process." *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981). It would materially and adversely affect the FCC's ability to implement the Communications Act if FECA were construed to prohibit the Daniels' plan.

Section 315(a) of the Communications Act requires a broadcaster or cable operator to "afford equal opportunities" to all candidates for an elective office if one candidate for that office is permitted to advertise on the facilities of the broadcaster or cable operator.[3] Section 315(b) provides that, during the 45 days preceding a primary election and the 60 days preceding a general or special election, a candidate is entitled to pay for advertising at no more than "the lowest unit charge of the station for the same class and amount of time for the same period." At other times, section 315(b) provides that candidates cannot be charged more

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candidates to address the problem of mounting campaign costs and provide more information to the electorate. For example, 42 Members of the United States House of Representatives signed Rep. Tierney's February 19, 1998, letter to President Clinton, supporting the President's request that the FCC propose regulations providing for free or reduced rate time for candidates. In addition, on May 29, 1998, Rep. Louise Slaughter and 38 colleagues sent a letter to the FCC stating: "We urge you to proceed without delay with a notice of inquiry, and allow the Commission to begin to consider the obligation of broadcasters to provide free and reduced-cost air time to candidates for public office." Last year, 30 Members of the House of Representatives signed Rep. Slaughter's and Rep. Bonior's June 4, 1997, letter to the FCC and four more supplemental signatures were added subsequently. The letter asks the FCC to conduct an inquiry into what "additional public interest responsibilities" should accompany the expanded rights of broadcasters "in a digital age"; it also specifically urges the FCC to focus on "the proposals for licensees to provide free broadcast airtime to candidates, as advocated by Members of Congress, broadcast executives like Rupert Murdoch and Barry Diller, and respected public figures such as Walter Cronkite and David Broder." On June 13, 1997, 11 Senators, led by Senator Dick Durbin, sent a similar letter requesting that the FCC solicit and examine free time proposals as a method of facilitating campaign finance reform. Recommendations for free airtime for political campaigns have also been made by many individuals and groups, including the Center for Responsive Politics, Common Cause, Henry Geller, Delmer Dunn, John Ellis, Paul Taylor, and Newton Minnow.

[3] Operators of direct broadcast satellite (DBS) facilities also are required to comply with the requirements of section 315. 47 U.S.C. § 335(a).

than "the charges made for comparable use of such station by other users thereof." As an initial matter, I trust it is clear that, by fulfilling its responsibilities under section 315 of the Communications Act, a broadcaster or cable operator does not violate section 441b(a) of FECA. The fact that section 315(b) of the Communications Act was enacted as part of FECA[4] makes it particularly clear that Congress intended that the provisions be read harmoniously so that a broadcaster or cable operator that fulfills its duties under section 315 has not thereby violated section 441b(a) -- even though those duties may include providing a substantial discount to candidates for federal office that is not available to other purchasers of advertising time.

Congress's intent that FECA be read so as not to conflict with the Communications Act is further supported by a letter addressing certain FEC regulations relating to candidate debates from then House Administration Committee Chairman Frank Thompson to then FEC Chairman Tiernan, which was made part of the record, stating the Committee's understanding that

> the regulations will have no effect on present communication policy as expressed in sections 312 and 315 of the Communication[s] Act. Under no circumstances would a broadcaster in fulfilling his obligation to provide reasonable access to candidates for public office be considered to have made an illegal contribution. Similarly, a broadcaster's coverage of a candidate which is not a "use" under section 315 of the Communication[s] Act would under no circumstances be considered a contribution by the broadcaster.[5]

That statement directly supports my view that section 441b(a) should be construed not to prohibit any provision of advertising time that fulfills the obligations of a broadcaster or cable operator under the Communications Act.

The FCC recognizes that, due to the complexity of broadcast and cable advertising practices, calculation of the lowest unit charge may be difficult. There have been a considerable number of complaints by candidates alleging that they were charged more than the lowest unit charge.[6] By providing a discount safely below any reasonable estimate of the lowest unit charge -- and free time plainly qualifies -- a broadcaster or cable operator may fulfill its duties under section 315 and avoid litigation altogether. Former FCC General Counsel Robert L. Pettit discussed the complexity of the lowest unit charge calculation in 1992 in the attached letter involving *EZ Communications*. He also noted that, due to those

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[4] 1972 U.S.C.C.A.N. 1773.

[5] 126 Cong. Rec. 5408 (1980).

[6] See, e.g., Exclusive Jurisdiction with Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, as amended, 7 FCC Rcd 4123, 4123 ¶ 2 (1992).

difficulties and "[g]iven Congress' clear intent to reduce campaign costs in enacting the lowest unit charge provision, . . . stations are permitted under FCC regulations to establish a special discounted class of time to sell to candidates." In addition, our regulations specifically contemplate the provision of free time: 47 C.F.R. § 76.207(b) states that "[w]hen free time is provided for use by or on behalf of candidates, a record of the free time provided shall be placed in the political file."[7] Thus, just as any conclusion that providing discounted advertising time at the lowest unit charge violates FECA would interfere with our implementation of the Communications Act, so would a conclusion that any discount below the lowest unit charge violates FECA. Then broadcasters and cable operators would truly be in a bind: if they did not calculate the lowest unit charge with perfect precision, they either would be liable to candidates for an overcharge or subject to liability under FECA on account of an "undercharge."

As noted above, a broadcast license may be revoked under section 312(a)(7) of the Communications Act for failure "to allow reasonable access to" a broadcast facility by federal candidates.[8] Cable operators are not subject to that provision. Nevertheless, in my view it would be perverse to conclude that cable operators may avoid a conflict between the lowest unit charge requirement of section 315(b) of the Communications Act and section 441b(a) of FECA by refusing to sell any time to candidates, and to conclude that the provision of free or discounted time by a cable operator to a candidate therefore violates FECA. That surely is not what Congress intended by providing in section 315(c) that cable operators, as well as broadcasters, are subject to the equal opportunities and lowest unit charge requirements. In addition, as the Supreme Court has stated, "[t]he First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office,'" *CBS*, *supra*, 453 U.S. at 396 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)), and it would undermine first amendment values if FECA and the Communications Act were "harmonized" in a manner that discouraged the provision of free or discounted time to candidates.

It is important to bear in mind that section 315(a) of the Communications Act ensures that all donations of time -- as well as sales of time -- are distributed fairly to all legally qualified candidates. That provision requires any broadcaster or cable operator that "permit[s] any person who is a legally qualified candidate for any public office to use a broadcasting television station" to "afford equal opportunities to all other such candidates for that office in the use of such broadcasting station." Thus, to the extent that section 441b of FECA is designed to prevent improper corporate favoritism or harmful skewing of election coverage, section 315(a) of the Communications Act ensures that this will not occur. Indeed, that

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[7] Section 76.207(b) applies to cable operators. The comparable rule as applied to broadcast licensees can be found at 47 C.F.R. § 73.1943(b).

[8] 47 U.S.C. § 312(a)(7); see 47 U.S.C. § 335(a) (applying these requirements to DBS providers also).

provision reinforces the view that Congress intended the Communications Act to act as a comprehensive scheme governing the sale or gift of advertising time by broadcasters and cable operators to candidates.[9]

Although the proposal before you was submitted by a cable operator, I would like to point out that, with respect to broadcasters, who are granted the free use of the public airwaves, the public interest standard of the Communications Act provides an additional basis for concluding that the provision of free time to candidates is permissible. The Communications Act imposes only a handful of specific requirements on broadcasters. Rather than impose specific requirements, Congress instead gave the FCC considerable discretion in regulating broadcasting by providing that, to obtain or renew a broadcast license, a broadcaster must demonstrate that it has served the "public interest, convenience, and necessity." *See* 47 U.S.C. § 309(a) (licensing); § 309(k) (renewal); § 336(d) (makes clear that the public interest standard applies after conversion to digital broadcasting). The Supreme Court long ago described the public interest standard as a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative authority." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). The FCC often has needed a "supple instrument" because its role as "ultimate arbiter and guardian of the public interest" requires a "delicate balancing of competing interests." *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 117 (1973). The Court has described the FCC's job of enforcing the public interest standard while preserving First Amendment values as "walk[ing] a 'tightrope.'" *Id.*

In performing that difficult task, the FCC sometimes has sought to avoid issuing specific regulations, choosing instead to permit broadcasters to exercise discretion in fulfilling their public interest obligations. At the same time, the FCC has long recognized that providing political and public affairs programming are "major elements usually necessary to meet the public interest" standard and obtain renewal. *En Banc Programming Inquiry*, 44 FCC 2303, 2314 (1960). Under this approach, a broadcaster that voluntarily implemented a plan such as the Daniels plan would, in doing so, demonstrate that it was serving the public interest and thereby advance its claim that its license should be renewed under section 309(k). Some broadcasters currently are fulfilling their obligation to serve the public interest by providing campaign coverage beyond that minimally required by sections 312(a)(7) and 315. Indeed, the National Association of Broadcasters (NAB) recently reported that, in addition to traditional news coverage, in 1996 broadcasters voluntarily devoted time valued at $148

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[9] In addition, section 76.207 of the FCC's regulations requires that cable operators keep a political file available for public inspection that includes records of all requests for cablecast time by candidates, the disposition of any such requests, and all free time provided to candidates. 47 C.F.R. § 76.207. Thus, the FCC's regulations also ensure that the public has ready access to this information, thereby ensuring increased accountability.

million to campaign coverage.[10] Thus, if extended to broadcasters, a conclusion by the FEC that voluntary implementation of a plan like the Daniels plan would constitute a violation of FECA could lead to a substantial diminution in the amount of campaign-related information made available to voters. Such a conclusion also might undermine broadcasters' ongoing efforts to satisfy their public interest obligation and complicate the FCC's implementation of the public interest standard by limiting the FCC's ability to provide discretion to broadcasters. But in my view, broadcasters should not be held to have violated FECA by providing free time to candidates, when the provision of free time would help to fulfill their public interest obligation. In addition, the FCC should not be required to issue specific regulatory mandates if it believes the Communications Act is better construed to allow it to give some discretion to broadcasters under the public interest standard.

Of course, these problems would be avoided if the FEC harmonizes FECA and the Communications Act by concluding that a corporation with responsibilities under section 315 of the Communications Act does not violate section 441b(a) of FECA by providing free or discounted advertising time to candidates. However, I wanted to make clear, even though the matter before the FEC involves a cable operator, that the public interest provisions of the Communications Act would provide a basis for concluding that broadcasters may voluntarily provide free time to candidates even if the FEC should conclude that a cable operator violates FECA by doing so.

Please let me know if I can provide further assistance.

Sincerely,

Christopher J. Wright
General Counsel

Attachment

[10] National Association of Broadcasters, "Bringing Community Service Home: A National Report on the Broadcast Industry's Community Service," April 1998, at 3.

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FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

* Attachment to Comments on AOR 1998-17

IN REPLY REFER TO:

July 17, 1992

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RECEIVED FEDERAL ELECTION COMMISSION

Lawrence M. Noble, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: AOR 1992-26

Comments On AOR 1992-26

Dear Mr. Noble:

This is in response to your request that I comment on the validity of various representations with respect to the "reasonable access" and "lowest unit charge" requirements of the Communications Act that are made in Advisory Opinion Request 1992-26 by EZ Communications, Inc. ("EZ"). This letter presents my own legal assessment of EZ's representations under applicable FCC precedents, but does not necessarily reflect the views of the Commission. EZ proposes to offer free or substantially reduced rate announcement time to federal candidates in fulfillment of its reasonable access obligation and believes that such free or reduced rates should not be viewed as illegal campaign contributions under the Federal Election Campaign Act ("FECA").

With limited exceptions noted below, the representations made by EZ concerning the reasonable access and lowest unit rate requirements are generally accurate. I take no position as to whether EZ's proposed plan would afford reasonable access or satisfy the lowest unit charge rules, given the necessarily fact-specific nature of these assessments.

Reasonable Access Requirements. In 1972, Congress amended the Communications Act through FECA, adding the requirement in Section 312(a)(7) that stations provide "reasonable access" to federal candidates, and Section 315(b), which provides that stations cannot charge more than the "lowest unit charge" for the same class and amount of time in the same time period to any candidate for public office making a "use" of a broadcast

facility.[1] Congress added these provisions to the Communications Act for the express purpose of giving "candidates for public office greater access to the media and... to halt the spiraling cost of campaigning for public office."[2]

While the FCC determines whether the obligations imposed by Section 312(a)(7) have been met by licensees on a case by case basis, the Commission has articulated formal guidelines for stations to use to determine what is required to comply with the reasonable access requirement. Report and Order in the Matter of Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 FCC 2d 1079 (1978). These guidelines have recently been reaffirmed. Report and Order in the Matter of Codification of the Commission's Political Programming Policies, 7 FCC Rcd 678 (1992).

In describing these requirements, EZ states that reasonable access "can be provided by selling candidates commercial announcements or program time and by giving them access to free coverage during certain news and public affairs programming." Stations do have considerable discretion in deciding how to implement the reasonable access requirement. The FCC has recognized that the reasonable access obligation cannot be defined with detailed specificity, because what may be reasonable in one situation may not be reasonable in another.[3] I would note,

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1 The FCC has recently revised its definition of what specific candidate appearances constitute a "use" of a broadcast station that triggers the obligations imposed by Section 315. See Report and Order, 7 FCC Rcd 678 (1992); Memorandum Opinion and Order, 57 Fed. Reg. 27705 (June 22, 1992). In addition, Section 315(a) prohibits stations from censoring candidate "uses." The Supreme has held that, because of this prohibition against censorship of candidate "uses," a licensee is immune from liability for damages in civil actions based on allegations of libel or defamation. Farmers Educational and Cooperative Union of America v. WDAY, Inc., 360 U.S. 525, 535 (1959).

2 S. Rep. No. 96, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S. Cong. 7 Ad. News 1773, 1774.

3 In this regard, EZ states that the number of announcements offered for each race would vary with EZ's good faith judgment about the amount of access time that would be required to meet existing criteria of reasonableness, including, for example, the number of candidates in each race and the proximity of the district or election area to the station's community of license or

however, that contrary to EZ's suggestion, coverage of a federal candidate or race through news and public affairs programming alone would not be viewed as sufficient to meet a broadcaster's reasonable access obligation.[4] Thus, a station could not refuse to sell (or give) spot or program time to a federal candidate by arguing that it had provided sufficient coverage of the candidate through news and public affairs programming.

EZ further states that it wishes to offer free and/or substantially reduced rate announcement time to federal candidates,[5] and that equal amounts of time would be offered to candidates in specific races, as required by the equal opportunities provision of Section 315(a). FCC regulations implementing Section 312(a)(7) do not require the donation of broadcast time to federal candidates. The Commission has stated that "reasonable access must be provided to legally qualified federal candidates through the gift or sale of time for their 'uses' of the station." (emphasis added). 7 FCC Rcd at 681.[6] FCC policy does require that "if a commercial station chooses to

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core coverage area. Such factors have been articulated by the FCC, and affirmed by the Supreme Court, as relevant to the determination of what constitutes reasonable access. See CBS v. FCC, 453 U.S. 367 (1981).

4 Indeed, the Commission has specifically found that Section 312(a)(7) created additional access rights for federal candidates beyond the political coverage already required by the FCC prior to the enactment of FECA. See Report and Order, Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 FCC 2d 1079, 1088-92 (1978). This interpretation was specifically affirmed by the Supreme Court in CBS v. FCC, supra., 453 U.S. at 377.

5 EZ is correct in its assertion that Section 312(a)(7) of the Communications Act does not require stations to sell time to state or local candidates. Under Section 315(a) of the Act, however, stations that decide to sell time to such candidates are required to afford the candidates' opponents equal opportunities to purchase time.

6 In reaffirming this requirement in the Report and Order, the Commission noted the comments filed by the FEC that concluded that the FEC was unable to offer specific guidance apart from the advisory opinion process as to whether a gift of broadcast time was an illegal "contribution" under FECA. 7 FCC Rcd at 681, n.16.

donate rather than sell time to candidates, it must make available to federal candidates free time of the various lengths, classes and periods that it makes available to commercial advertisers."[7]

As noted by EZ, the FCC also requires that commercial stations must make prime-time spot announcements (typically 30 to 60 seconds) available (either through sale or donation) to federal candidates. 7 FCC Rcd at 681. Furthermore, both commercial and noncommercial stations must make program time (more than five minutes in length) available to legally qualified federal candidates during prime time and other time periods unless unusual circumstances exist that render it reasonable to deny such access. Id.

Lowest Unit Charge. EZ states that "although stations have a forceful incentive to comply with the [lowest unit charge] requirements of the Communications Act, such compliance may require computations and assumptions which are both complex and highly debatable." The FCC has often recognized the complexity involved in determining what constitutes the "lowest unit charge" described in Section 315(b).[8] The difficulty of these calculations is a function of the increasing complexity of broadcast sales practices and the need for constant regulatory adaptation to enforce this obligation.[9]

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7 7 FCC Rcd at 681. In addition, because the right of access is an individualized right of each candidate, stations may not have flat bans or policies strictly limiting what time they will make available to federal candidates. See CBS v. FCC, 453 U.S. at 387. FCC policy requires that stations individually negotiate with each federal candidate seeking access to its facilities. Should a federal candidate challenge whether EZ's described practices provide reasonable access, the FCC would then evaluate EZ's actions in light of these requirements.

8 See Report and Order in the Matter of Codification of the Commission's Political Programming Policies, 7 FCC Rcd 678 (1992); see also Memorandum Opinion and Order, 57 Fed. Reg. 27705 (June 22, 1992).

9 We would obviously dispute EZ's statement that compliance with lowest unit charge rules involves "highly debatable" assumptions and calculations. To the contrary, the principles underlying these rules reasonably reflect industry sales practices. Furthermore, EZ's specific description of the necesary calculations is not entirely accurate. For example, EZ describes the difficulty of calculating the lowest unit charge when

In addition, FCC policy does not prohibit stations from selling time to candidates at a discount. Given Congress' clear intent to reduce campaign costs in enacting the lowest unit charge provision, the FCC has determined that it would not be reasonable to conclude that Congress intended to prohibit such a practice.[10] Thus, stations are permitted under FCC regulations to establish a special discounted class of time to sell to candidates.

Moreover, EZ points out that current lowest unit rate requirements already provide substantial monetary benefits to candidates because they allow candidates to purchase time at rates that are only available to commercial advertisers who buy in bulk. This is correct, and in fact describes the original intent of the lowest "unit" charge provision of Section 315(b).

Finally, EZ's representations concerning the penalties for violating these rules is accurate. While the Commission has never revoked a license for lowest unit charge violations, that is an enforcement sanction available to the FCC. In addition, the FCC can (and has) impose fines, issue admonitions, and require stations to repay overcharges to candidates.

In conclusion, I would also like to point to some legislative history that may shed some light on congressional intent in this area. In 1980, in approving certain FEC regulations pertaining to candidate debates, Congress directed that a letter be sent to then FEC Chairman Tiernan which stated:

> We understand that in approving these regulations, that the regulations will have no effect on present communications policy as expressed in sections 312 and 315 of the Communications Act. Under no circumstances would a

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providing promotional items such as billboards, bumper stickers or other hard-to-calculate items. The Commission has recently ruled that non-cash promotional items of "hard-to-calculate" value need not be included in the calculation of the lowest unit charge, but must be offered to candidates on the same basis as they are made available to commercial advertisers, unless they are de minimis in value or imply a relationship between the advertiser and the station or product. Report and Order, supra., 7 FCC Rcd at 695; Memorandum Opinion and Order, supra., 57 Fed. Reg. at 27707.

10 Report and Order, supra., 7 FCC Rcd at 692, n.144; Memorandum Opinion and Order, supra., 57 Fed. Reg. at 27706.

broadcaster in fulfilling his obligation to provide reasonable access to candidates for public office be considered to have made an illegal contribution. Similarly, a broadcaster's coverage of a candidate which is not a "use" under Section 315 of the Communications Act would under no circumstances be considered a contribution by the broadcaster.[11]

If you would like anything further, please let me know.

Sincerely,

Robert L. Pettit
General Counsel

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11 126 Cong. Rec. 5408 (1980).