August 25, 1998

LATE COMMENT
ADV 1998-17

MEDIA ACCESS PROJECT

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

RE: AO 1998-17 (Daniels Cablevision Inc.)

Dear Mr. Noble:

Media Access Project ("MAP") respectfully submits these late filed comments on Daniels Cablevision's ("Daniels") pending request for an Advisory Opinion holding that its plan to provide program access to candidates for public office is not prohibited by 2 USC §3441b(a).

Request for Acceptance of Late-Filed Comments

MAP asks that these comments be accepted notwithstanding the fact that the deadline for their submission has passed. Given Daniels' request for expedition, and the imminence of the fall election cycle, consideration of MAP's views at this point in the FEC's decisionmaking process would serve the public interest. To the extent that the General Counsel's consideration of MAP's views at this time can facilitate prompt resolution of issues prior to their presentation to the Commission, this can reduce the need for subsequent revisions in the next phase of this proceeding. Accordingly, grant of this request for acceptance will assist the Commission in carrying out its mission to the benefit of the public.

Media Access Project and Its Interests

MAP is a twenty-six year-old non-profit, non-partisan public interest law firm which represents the First Amendment rights of the general public by promoting the free flow of information in the marketplace of ideas and in particular the right to have diverse sources of information in the electronic mass media. MAP's clients include civil rights, civil liberties, consumer and civic groups whose members rely upon the mass media in exercising their right to self-governance through the ballot box. MAP does not appear here on behalf of any of these organizations, but the views presented in these comments reflect perspectives MAP has acquired through representation of citizens interests over the last quarter century.

Requested Ruling

MAP endorses the legal analysis advanced to by FCC General Counsel Christopher J. Wright in his August 14, 1998 letter. *Letter of Christopher J. Wright to Lawrence W.*

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Noble, General Counsel, Federal Election Commission ("*Wright Letter*"). Accordingly, MAP urges the Commission to

1. find that broadcasters (including cable TV systems defined as broadcasters under 47 USC §315(c)) providing free time to candidates for public office pursuant to 47 USC §312(a)(7) and/or 47 USC §315 are not making "contributions" within the meaning of 2 USC §3441(b);

2. decline to issue an Advisory Opinion in the form sought by Daniels; and

3. declare that it will not exercise jurisdiction over airtime provided to candidates subject to the regulatory supervision of the Federal Communications Commission pursuant to the Communications Act of 1934.

COMMENTS

As a matter of law and policy, MAP believes that the Federal Election Commission should rule that "broadcasters" (a term which includes cable systems for this purpose)[1] providing time to candidates in fulfillment of their obligations to inform the public under the Communications Act,[2] do not make a contribution within the meaning of the Federal Election Campaign Act ("FECA").

Given the need for expedition, these comments are intended to supplement without duplication the observations of the *Wright Letter*.

The Legal Framework

A broadcast license (or cable franchise) can be usefully compared to real property leases. Broadcasters are limited term tenants allowed use of public property subject to certain conditions. Announcements required to meet national security, public health and safety needs can be considered as easements. Spectrum and public rights of way are not allocated for trustees' unlimited use, or for 24 hours per day, seven days per week. See, *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Rather, the "landlord" (that is, the public) retains use for a few minutes per week for these other purposes. Political broadcasting is one such conditioned use.

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[1]Significantly, 47 USC §315(c) defines cablecasters as "broadcasters" for the purposes of political broadcast matters.

[2]The statutory goals of creating a well-informed electorate are described in the *Wright Letter* at pages 1-2.

Simply put, broadcasters have agreed to take their licenses subject to certain use limitations. They are trustees operating for the benefit of the public in the administration of this public property (spectrum or rights of way). The use of that property to educate the electorate is not conferring of a gift or thing of value which they own. While they have the right to allow access to that property to advertisers or other programmers in exchange for payment, this function is tightly regulated with respect to candidates for public office. The law insures that there are "equal opportunities" (that is, non-discrimination in price, terms and conditions), the right of reply under certain circumstances, public disclosure of the use of that time, on-air identification of those paying for time, and rigorous, prompt enforcement of those provisions with strong sanctions for serious violations.

These provisions apply to appearances paid for, and used by, candidates. "Uses" under 47 USC §315(a) involves appearances of the candidates' voice or likeness. Section 315(a) does not prescribe the full panoply of price terms, equal opportunities or public disclosure of contract terms for independent expenditure committees and other unaffiliated groups purchasing or receiving time, although some aspects of these rules as well as other FCC statutes and policies may govern. Thus, free or discounted time afforded to those groups might present different questions, and need not be addressed in disposing of the pending request from Daniels Cablevision.

The *Wright Letter* correctly shows that the legislative history and structure of the Communications Act and the FECA demonstrate a Congressional intent that broadcasters and cablecasters not be subject to FECA regulation in providing time to candidates, including voluntarily-provided free and discounted time. (Indeed, FCC regulations specifically contemplate that some broadcasters and cablecasters may choose to provide free time under 47 USC §312(a)(7).) The two schemes work well together, and fulfill similar objectives. One especially noteworthy element of the FCC's authority over political broadcasting is that the remedy for denial of "equal opportunities" is a directive that broadcasters provide immediate and appropriate access to their stations, ***before*** election day. This specially tailored relief insures that voters receive relevant information in time to decide whether and how to vote. It is far more valuable to voters than reimbursement, civil penalties, and other *post facto* remedies available to the FEC.

Candidate appearances which come within four "exempt" categories of 47 USC §315(a) (newscasts, certain documentaries, live coverage of news events and some news interviews) are not subject to all of the "equal opportunities" requirements of Section 315. Such "exempt" programming is nonetheless subject to the disclosure and other requirements set forth in the FCC's rules, including sponsorship identification and other FCC regulations. Although MAP unsuccessfully opposed several FCC decisions relaxing interpretation of these rules, many of the worst abuses anticipated under these decisions have not materialized. This is at least partially attributable to the FCC's strong enforcement practices. ***It is especially important to note in this regard that a central element of***

programming granted "exempt" status is that the requirement that a producer establish that it employs journalistic standards in its production. There can be no indication of an intent to advance a particular candidacy. Systematic misrepresentation to the FCC as to such intent could subject broadcasters to the "death penalty" -- loss of license. (Cablecasters such as Daniels Cablevision are franchised by state and local governments, but they face severe FCC penalties as well.)

Before and after enactment of the FECA, many broadcasters have provided free time to candidates, almost invariably without seeking or receiving FEC approval. Assertion of FEC jurisdiction would create uncertainty, even as to the permissibility of such longstanding activities, and might well discourage current or expanded practices of providing free time to candidates. As the *Wright Letter* explains, at pages 3-4, broadcasters and cablecasters often charge legally qualified candidates somewhat less than the calculated "lowest unit rate" ceiling set forth in Section 315 of the Communications Act. This fulfills FECA objectives of reducing the cost of campaigns and promoting public access to candidates' views while protecting broadcasters and cablecasters from having to litigate complaints concerning what might have been inadvertent overcharges. If the FEC were to regulate these broadcasts and cablecasts, such discounts might well be perceived as contributions.

Daniels' tortured analysis of the FEC's 1982 *Turner* case (AO 1988-44) is very much beside the point. First, except with respect to candidates in Atlanta, where Turner operates a TV station, the cable service there was not otherwise subject to direct FCC regulation. Second, any "contribution" in that case was to ***parties***, not ***candidates***, and would not be governed by the ruling Daniels seeks. Because program time afforded to parties is not subject to the equal opportunities provisions of Section 315(a) of the Communications Act in the first instance, the legal issues raised are substantially different and have no bearing on the present case.

Policy Framework

MAP speaks from the perspective of an organization which supports an expansive role for the Federal Election Commission, including strong disclosure requirements, reasonable regulation of spending limits on individuals, PACs, and corporations, and jurisdiction over "soft money."

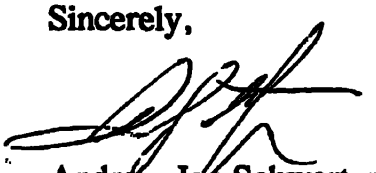
Even so, MAP is confident that there is no need for duplicative and counterproductive involvement of the Federal Election Commission in supervising the provision of time to candidates. The existing statutory scheme of the Communications Act of 1934 has been and remains and effective tool. FCC enforcement of the Communications Act is entirely consonant with the goals and policies of the FEC; by contrast, exercise of jurisidiction over contributions described in Daniels' request for an advisory opinion would complicate the task of both agencies and undermine the electoral process.

Providing free and discounted airtime to candidates pursuant to FCC regulation promotes core objectives of the FECA by reducing the cost of election campaigns, increasing public access to candidates' viewpoints and assuring full public disclosure of time received by candidates.

Conclusion

MAP asks that the FEC decline to issue an Advisory Opinion in the form requested by Daniels Cablevision, but that it instead hold that the provision of free or discounted time to candidates for public office by broadcasters (or cable systems) is not a contribution within the meaning of the Federal Election Campaign Act.

Sincerely,



Andrew Jay Schwartzman
President and CEO