

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BREF
CAMPBELL & WILLIAMS
DONALD J. CAMPBELL, ESQ. (1216)
J. COLBY WILLIAMS, ESQ. (5549)
700 South Seventh Street
Las Vegas, Nevada 89101
Telephone: (702) 382-5222
Facsimile: (702) 382-0540

Attorneys for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

DENNIS J. KUCINICH,)	CASE NO.	555207
)	DEPT. NO.	XXIII
Plaintiff,)		
)		
vs.)	DEFENDANT'S HEARING	
)	BRIEF IN OPPOSITION TO	
NBC UNIVERSAL, INC.)	REQUEST FOR INJUNCTIVE	
)	RELIEF	
Defendant.)		
)		

Defendant, NBC Universal, Inc. ("NBC"), through its undersigned counsel, hereby submits its Hearing Brief in Opposition to Plaintiff's Request for Injunctive Relief. Plaintiff's request fails on multiple levels. Given that NBC was only served with Plaintiff's Complaint during the mid-morning of January 14, 2008, and the Court has set a hearing for 1:30 p.m. that same date, NBC's brief will necessarily be short. NBC does, however, reserve its right to raise any and all applicable defenses when time permits.

POINTS AND AUTHORITIES

I. THE FEDERAL COMMUNICATIONS ACT DOES NOT APPLY TO A DEBATE BEING BROADCAST ON CABLE TELEVISION.

Plaintiff's Complaint asserts a claim that NBC has breached its duties under the Federal Communications Act (the "Act"), specifically 47 U.S.C. § 315(a), et seq. This section of the Act imposes equal time requirements on broadcasting stations that air programming regarding

1 candidates for public office on the nationally regulated airwaves. Contrary to Plaintiffs
2 allegations, this statute does not apply to debates being broadcast on cable television. See
3 generally, Braverman, *FCC Regulation of Cable Programming: Update on Indecency, TV*
4 *Ratings, Children's Programming, and Closed Captioning*, Practising Law Institute (2007)
5 (stating “[u]nlike broadcast, cable television [] is not regulated by the FCC and is only addressed
6 in certain specific contexts under the Communication Act and FCC Rules.”) The debate in
7 question here is not being broadcast on NBC but, rather, the cable network MSNBC. As such,
8 MSNBC is not bound by the equal time provision of the Act.¹

10 **II. PLAINTIFF HAS FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES.**

11 Even if MSNBC is bound by the Act, Plaintiff has failed to state a claim thereunder:

12 There is, however, no private cause of action under Section 315(a).
13 *Belluso v. Turner Communications, Corp.*, 633 F.2d 393, 397 (5th Cir. 1980);
14 *Forbes v. Arkansas Educational Television Communication Network*
15 *Foundation*, 22 F.3d 1423, 1427 (8th Cir. 1994), *rev'd on other grounds*, 523
16 U.S. 666, 118 S.Ct. 1633 (1998) (“There is no private cause of action to enforce
17 [the statute] . . .”). The proper course of action for a candidate seeking to
18 enforce Section 315(a) is to seek relief from the Federal Communications
19 Commission (“FCC”), and then appeal, if necessary, to a court of competent
jurisdiction. *Forbes*, 22 F.3d at 1427 (citing *DeYoung v. Patten*, 898 F.2d 628,
633-35 (8th Cir. 1990); see also *Belluso*, 633 F.2d at 397 (“the Commission has
promulgated rules and regulations which provide a candidate aggrieved by a
violation of section 315(a) an administrative remedy.”))

20 *Palmer v. Fox Broadcasting Corp.*, 2002 WL 31027440 at *1 (E.D.La. Jan. 15, 2002).² In
21 *Palmer*, the mayoral candidate excluded from the debate in that action argued that he had only
22 learned of his exclusion from the debate just days earlier and, thus, lacked sufficient time to seek
23 relief from the FCC. *Id.* at *2. The federal district court acknowledged that courts have
24 discretion to excuse a claimant's failure to exhaust his administrative remedies in “extraordinary
25

26
27 ¹ MSNBC was contemplating allowing the local NBC affiliate to carry the debate live, which may
28 potentially subject it to the application of the Act. If the Court finds this issue determinative, MSNBC
hereby advises that it will not permit the local affiliate to carry the debate.

² A copy of this opinion is attached hereto as Exhibit 1.



1 circumstances," but declined to do so in that instance because the plaintiff had "made no attempt
2 to contact the FCC to obtain a determination of the propriety of defendants' actions." *Id.* The
3 court rejected the plaintiffs other claims and denied his motion for injunctive relief. *Id.* at **3-4.

4 The same reasoning applies with equal force here. Plaintiff has made no showing what,
5 if any, efforts he has undertaken to obtain relief from the FCC. Very recently, Plaintiff filed a
6 similar action against ABC News for excluding him from a debate prior to the New Hampshire
7 primary. In that case, Plaintiff first filed an Emergency Complaint with the FCC. A copy of the
8 Complaint with the FCC is attached hereto as Exhibit 2. Thus, Plaintiff knows of the obligation
9 to first seek relief from the FCC, but has failed to do so here.³ His Motion should be denied.

11 **III. THERE IS NO CONTRACT HERE.**

12 Finally, Plaintiff claims that NBC's original invitation to participate in the debate
13 constituted a contract, which has now been breached. NBC submits that this argument fails in
14 light of the foregoing jurisdictional defects. In any event, Defendant be prepared to address this
15 argument at the time of hearing.

17 **IV. CONCLUSION**

18 Based on the foregoing, Plaintiff's Motion should be denied in its entirety.

19 DATED this 14th day of January, 2008.

21 CAMPBELL & WILLIAMS

22 By *Donald J. Campbell*
23 DONALD J. CAMPBELL, ESQ. (1216)
J. COLBY WILLIAMS, ESQ. (5549)

24 700 South Seventh Street
Las Vegas, Nevada 89101

25 Attorney for Defendant

26
27 ³ When this action did not succeed, Plaintiff thereafter filed suit against ABC, and lost on
28 grounds the state court in New Hampshire did not have jurisdiction because ABC is a private
entity and no state actor was involved. A copy of the ABC opinion is attached hereto as Exhibit
3. Again the same reasoning applies here.



Westlaw

Not Reported in F.Supp.2d

Page 1

Not Reported in F.Supp.2d, 2002 WL 31027440 (E.D.La.), 30 Media L. Rep. 2081

(Cite as: 2002 WL 31027440 (E.D.La.))

C

United States District Court, E.D. Louisiana.
Vernon V. PALMER

v.

FOX BROADCASTING CORPORATION d/b/a
WVUE-TV, and Educational Broadcast
Foundation, Inc. d/b/a WLAE-TV
No. CIV.A. 02-0108.

Jan. 15, 2002.

Sidney M. Bach, Bach & Wasserman, Metairie,
Vernon V Palmer, [Pro se], New Orleans, for
Vernon V Palmer, plaintiff.

Mary Ellen Roy, William Phillips Dunn, Phelps
Dunbar, LLP, Ralph Joseph Aucoin, Richard Arthur
Bordelon, Denechaud & Denechaud, New Orleans,
for Fox Broadcasting Corporation dba WVUE-TV,
Educational Broadcast Foundation, Inc. dba
WLAE-TV, defendants.

ORDER DENYING MOTION FOR
TEMPORARY RESTRAINING ORDER

VANCE, District J.

*1 Vernon V. Palmer seeks a temporary restraining order to enjoin two television stations from excluding him from their broadcasts of mayoral debates. Specifically, Palmer seeks to prevent WVUE from broadcasting its mayoral debate on Tuesday, January 15, 2002, and to prevent WLAE from broadcasting its mayoral debate on Friday, January 18, 2002.

Palmer submitted his application for a temporary restraining order to the Court at about 10:30 a.m. on January 14, 2002. The Court held a conference with the attorneys for all of the parties and set a deadline of 9:00 a.m. on January 15, 2002 for the filing of any additional pleadings. The Court heard oral argument on the motion at 12:00 p.m. on January 15, 2002.

I. Background

Palmer is a duly-registered and qualified candidate for election to the Office of Mayor of the City of New Orleans. There are fifteen candidates eligible for the primary election scheduled for February 2, 2002. Palmer alleges that defendants have excluded him from their scheduled mayoral debates in violation of the equal time provision of the Federal Communications Act, 47 U.S.C. § 315(a). [FN1] In addition, Palmer asserts that WLAE is a state actor, and its actions violate his rights of freedom of expression and equal protection under the First and Fourteenth Amendments to the United States Constitution, respectively.

FN1. Section 315 provides in pertinent part:

Candidates for Public Office (a) Equal opportunity requirement; censorship prohibition; news appearances exception; public interest; public issues discussion opportunities

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all such other candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any---

- (1) bona fide newscast,
- (2) bona fide interview,

...

- (4) on-the-spot coverage of bona fide new events (including but not limited to political conventions and activities incidental thereto,)

© 2008 Thomson/West. No Claim to Orig. US Gov. Works.

Not Reported in F.Supp.2d

Page 2

Not Reported in F.Supp.2d, 2002 WL 31027440 (E.D.La.), 30 Media L. Rep. 2081

(Cite as: 2002 WL 31027440 (E.D.La.))

Shall not be deemed to be use of a broadcast station within the meaning of this subsection.

47 U.S.C. § 315(a).

II. Discussion

A. Legal Standard

A temporary restraining order may only be granted if there is (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury if the injunctive relief is denied; (3) the threatened injury to the movant outweighs the harm the injunction will cause the opponent; and (4) the injunctive relief will not disserve the public interest. *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1088 (5th Cir.1987); *Gerhart Industries v. Smith International, Inc.*, 741 F.2d 707, 710 (5th Cir.1984).

B. Statutory Claim

Palmer alleges that by excluding him from the mayoral debates both defendants are in violation of the equal opportunity provision of 47 U.S.C. § 315(a). See 47 U.S.C. § 416(a) (requiring licensed broadcast stations that allow qualified candidates for office to use the stations to provide equal opportunities to all other qualified candidates for that office). There is, however, no private cause of action under Section 315(a). *Belluso v. Turner Communications Corp.*, 633 F.2d 393, 397 (5th Cir.1980); *Forbes v. Arkansas Educational Television Communication Network Foundation*, 22 F.3d 1423, 1427 (8th Cir.1994), *rev'd on other grounds*, 523 U.S. 666, 118 S.Ct. 1633 (1998) ("There is no private cause of action to enforce [the statute] ..."). The proper course of action for a candidate seeking to enforce Section 315(a) is to seek relief from the Federal Communications Commission ("FCC"), and then appeal, if necessary, to a court of competent jurisdiction. *Forbes*, 22 F.3d at 1427 (citing *DeYoung v. Patten*, 898 F.2d 628, 633-35 (8th Cir.1990)); see also *Belluso*, 633 F.2d at 397 ("the Commission has promulgated rules and regulations which provide a candidate aggrieved by a violation of section 315(a) an

administrative remedy."). Appellate courts construe Section 405(a) of the Federal Communications Act as codifying the exhaustion of administrative remedies doctrine, which requires complainants to give the FCC a fair opportunity to pass on a legal or factual argument before going to court. *American Tel. & Tel. Co. v. FCC*, 974 F.2d 1351, 1354 (D.C.Cir.1992); see also *McClendon v. Jackson Television, Inc.*, 603 F.2d 1174, 1176 (5th Cir.1979) (exhaustion of administrative remedies required under the Communications Act).

*2 Plaintiff concedes that he did not exhaust his administrative remedy, but he argues that the Court should ignore his failure because time constraints prevented him from obtaining relief from the FCC. The Fifth Circuit has stated that "[w]hile courts have discretion in applying the jurisprudential exhaustion requirement, the exercise of that discretion is circumscribed in that a court should only excuse a claimant's failure to exhaust administrative remedies in extraordinary circumstances. *Taylor v. United States Treasury Department*, 127 F.3d 470, 477 (5th Cir.1997) (citing *Central States S.E. & S.W. Areas Pension Fund v. T.I.M.E.-D.C., Inc.*, 826 F.2d 320, 329 (5th Cir.1987)). Courts have excused a claimant's failure to exhaust administrative remedies in the following circumstances: (1) when the unexhausted administrative remedy would be plainly inadequate, (2) when the claimant has made a constitutional challenge that would remain standing after exhaustion of the administrative remedy, (3) when the adequacy of the administrative remedy is essentially coextensive with the merits of the claim, and (4) when exhaustion of administrative remedies would be futile. *Id.* (citation omitted).

Plaintiff alleges that he learned of the debates and of his exclusion from them from the newspaper last Saturday and that any attempt to obtain a ruling from the FCC before the Tuesday, January 15 debate would have been futile. Plaintiff made no attempt to contact the FCC to obtain a determination of the propriety of defendants' actions. Furthermore, even if plaintiff could not obtain a ruling from the FCC before the WVUE debate scheduled for 6:00 p.m. on January 15, he

Not Reported in F.Supp.2d

Page 3

Not Reported in F.Supp.2d, 2002 WL 31027440 (E.D.La.), 30 Media L. Rep. 2081

(Cite as: 2002 WL 31027440 (E.D.La.))

could still seek relief from the FCC before WLAE's scheduled debate on Friday, January 18, and before any future debates that may be scheduled before the February 2 primary. Therefore, the Court declines to excuse plaintiff's failure to exhaust his administrative remedies. [FN2] In light of the foregoing factors, the Court finds that plaintiff is not likely to achieve success on the merits of his statutory claim.

FN2. WVUE also contends that candidate debates fall under a statutory exception to the equal opportunity doctrine. See 47 U.S.C. § 315(a)(4). Although the Court need not rule on this issue, it does note that the FCC has stated that the broadcast of a debate among legally qualified candidates can be an exception under Section 315(a)(4), whether the debate is sponsored by a third-party or by the broadcaster. See *In re Geller*, 1983 WL 182998, 95 F.C.C.2d 1236 (1983), *aff'd by League of Women Voters Educational Fund v. F.C.C.*, 731 F.2d 995 (D.C.Cir.1984).

C. Constitutional Claims

Plaintiff claims that WLAE is a state actor and that its exclusion of him from its debate violates the First and Fourteenth Amendments, respectively. The Court finds that there is a colorable argument that WLAE is a state actor. See, e.g., *Chandler v. Georgia Public Telecommunications Commission*, 917 F.2d, 486, 488 (11th Cir.1990). There is no colorable argument, however, regarding WLAE's alleged violation of plaintiff's First and Fourteenth Amendment rights.

The Supreme Court's decision in *Arkansas Educational Television Commission v. Forbes* establishes the standard for analyzing plaintiff's First Amendment claim. In *Forbes*, the Court addressed a claim by an independent political candidate that a state-owned public television broadcaster violated his First Amendment rights when it excluded him from a debate between the major party candidates for the 1992 presidential election. 523 U.S. at 670, 118 S.Ct. at 1637-38.

The Court explained the three types of fora recognized under First Amendment law and determined that the debate was a nonpublic forum. The Court reasoned that the broadcaster's process for selecting the candidates who would be eligible to participate in the debate evidenced "[s]uch selective access, [that] unsupported by evidence of a purposeful designation for public use, does not create a public forum." *Id.* (internal quotes omitted); see also *Estiverne v. Louisiana State Bar Association*, 863 F.2d 371, 376 (5th Cir.1989) ("The simple fact that the government sponsors a medium of communication does not, however, automatically render that means of communication a public forum [A] forum may be considered *nonpublic* where there is clear evidence that the state did not intend to create a public forum"). In the context of a nonpublic forum, the test for exclusion of a speaker is that the exclusion "must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property." *Id.* at 682, 118 S.Ct. at 1643; *Estiverne*, 863 F.2d at 376. In *Forbes*, the broadcaster's executive director testified that Forbes was excluded from the debates because, among other things, there was ample evidence that the voters and news organizations did not consider him to be a serious candidate and because he had little if any financial support. *Id.* The Court concluded that the broadcaster's decision to exclude Forbes from the debate was "a reasonable, view-point neutral exercise of journalistic discretion consistent with the First Amendment." *Id.* at 683, 118 S.Ct. at 1644

*3 Here, Jerry Romig, the executive producer of WLAE's debate, testified that he considered the following factors to determine which of the fifteen candidates would be eligible for the debate: (1) that the WLAE studio could only accommodate, at most, five of the fifteen candidates, (2) the results of public opinion polls conducted around Christmas 2001, and (3) whether the candidate raised \$50,000 in campaign funds, other than from his or her own money. See WLAE's Opp. Memo, Ex. A. Romig testified that he reviewed the results of a BK Research poll and a poll conducted by Susan Howell of the University of New Orleans, and he

© 2008 Thomson/West. No Claim to Orig. US Gov. Works.

Not Reported in F.Supp.2d

Page 4

Not Reported in F.Supp.2d, 2002 WL 31027440 (E.D.La.), 30 Media L. Rep. 2081

(Cite as: 2002 WL 31027440 (E.D.La.))

determined that the same four candidates finished in the top four of each poll, with another candidate finishing a strong fifth in Professor Howell's poll. *See id.* Romig further testified that a candidate either had to finish in the top of the public opinion polls or meet the contribution requirement to qualify for the debates. *See id.* Additionally, he testified that he did not consider the viewpoints, positions, or opinions of any candidate when he determined whether to invite a candidate to the debate. *See id.* Plaintiff does not allege that he met either of WLAE's criteria or that WLAE's criteria were designed to exclude the content of his or any other candidate's speech. WLAE's rationale mirrors that of the broadcaster in *Forbes*, in which the station based its decision on voters' views of and financial support for the candidates.

Palmer contends that, unlike *Forbes*, he is a serious candidate with a relatively well-funded and well-organized campaign. Despite Palmer's assertions about the seriousness of his campaign, he acknowledges that he did not qualify as a mayoral candidate until December 14, 2001, only weeks before the polls WLAE relied upon were conducted. The polls took place less than a month before the debate, and the debate will occur a mere two and a half weeks before the primary election. The Court does not read the Supreme Court's decision in *Forbes* to require a broadcaster to wait until a candidate meets its content-neutral criteria before conducting candidate debates. As in *Forbes*, WLAE used a reasonable basis to include and exclude candidates from its debates, based on objective indicia of support for their candidacy. **523 U.S. at 683, 118 S.Ct. at 1644.** Palmer was not excluded because of his platform. In light of the facts presented by the parties, the Court finds that it is not likely that plaintiff will succeed on the merits of his First Amendment claim.

Plaintiff's equal protection claim under the Fourteenth Amendment is similarly defective. Plaintiff is not a member of a protected class, and thus WLAE need exhibit only a rational basis for its decision. *See Chandler*, 917 F.2d at 489 (applying rational basis test to Equal Protection claim of gubernatorial candidate denied access to public

broadcast debate). WLAE's decision was demonstrably rational. Therefore the Court finds that plaintiff is not likely to succeed on the merits of his Equal Protection claim. Accordingly,

***4 IT IS ORDERED** that plaintiff's application for a temporary restraining order is hereby **DENIED**.

Not Reported in F.Supp.2d, 2002 WL 31027440 (E.D.La.), 30 Media L. Rep. 2081

END OF DOCUMENT

Dennis Kucinich for President

Campaign Legal Counsel
3886 N. High Street
Columbus, Ohio 43214

Tel: 614/263-7000
Fax: 614/263-7078
mctiguelaw@rrohio.com

January 4, 2007

Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Dear Chairman Martin:

Enclosed with this letter a complaint by Congressman Dennis J. Kucinich and Kucinich for President 2008, Inc. against the American Broadcasting Company.

Please call with at (614) 263-7000 with any questions.

Very truly yours,



Donald J. McTigue,
Campaign Legal Counsel

cc: FCC Political Programming Staff

Paid for by Dennis Kucinich for President 2008, Inc.

Complainant Kucinich has been the winner in national online polls conducted by Democracy for America (receiving almost 50,000 votes while the closest competitor only received 38,000), Virginia State Democratic Party (receiving 30% of the Democratic vote while the closest competitor received 27%), Independent Voters (75% of the Democratic vote out of 80,000 online voters), as well as polls by Progressive Democrats of America and the Nation. In an ABC News poll, Complainant Kucinich received the most support from 42,487 voters (garnering 35% of the vote to 22% for the next closest candidate) who were asked who won the Democratic presidential primary debate on August 19, 2007. Complainant Kucinich is a successful candidate because of his anti-war message and strong criticism of the American healthcare system, issues that are not championed by his presidential primary opponents. In these and other policy issues, his opponents share very similar policy platforms that differ from Complainant Kucinich.

2. Plaintiff Kucinich for President 2008, Inc. ("Committee") is the official presidential campaign committee of Dennis J. Kucinich.

3. American Broadcasting Company ("ABC") is a national broadcasting company and is sponsoring and televising a prime-time Democratic candidate presidential primary debate on January 5, 2008 in New Hampshire ("Debate"). It is a wholly-owned subsidiary of Walt Disney, Co., whose executives have contributed heavily to other Democratic presidential primary candidates, including Senators Hillary Clinton and Barack Obama, former Senator John Edwards, and Governor Bill Richardson. Sen. Clinton has received over \$154,000 from Walt Disney, Co. and its executives since 1990, Sen. Obama has received over \$40,000, former Senator Edwards has received over \$11,000, and Gov. Richardson has received over \$2,000. None of these presidential candidates were excluded from the Debate by ABC.

4. The Federal Communications Commission ("FCC") is an independent United States government agency, established by the Communications Act of 1934, as amended ("Act"), and is charged with regulating interstate and international communications by radio, television, wire, satellite and cable. The FCC's jurisdiction covers the 50 states, the District of Columbia, and U.S. possessions.

5. On January 4, 2007, ABC announced that it was excluding Congressman Dennis Kucinich's from its Debate. ABC's arbitrary and capricious criteria specifically excludes the diverse and anti-war voice of Complainant Kucinich and his grass-roots supporters, while showcasing the candidates supported by its corporate executives. The criteria required that candidates had to either place first through fourth in Iowa, poll 5 percent or higher in one of the last four major New Hampshire surveys, or poll 5 percent or higher in one of the last four major national surveys.

6. The exclusion of Complainant Kucinich undermines the purpose of the Act and is a blatant violation of the Act, including its equal time provisions as it does not fall under any exemption found in Section 315(a). It cannot be characterized as a bona fide news event unless it covers all credible candidates, including Complainant Kucinich. Also, ABC is violating its obligation to operate in the public interest and allow for the discussion of conflicting views. The decision excludes strong anti-war and national health care messages.

7. Section 315 of the Act (47 U.S.C. Section 315) requires ABC to afford equal time to Complainant Kucinich unless the Debate is considered a (1) bona fide newscast, (2) bona fide news interview, (3) bona fide news documentary, or (4) on-the-spot coverage of bona fide news events. Regardless of the exemptions, the Act states that: "Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts,

news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views of issues of public importance.”

8. In *Aspen Institute*, as well as in *Perot v. ABC, CBS, NBC, and Fox Broadcasting Co.*, the Commission used a two-part test when considering whether a program is a bona fide news event, (1) whether the format of the program reasonably fit within the news event exemption category and, (2) whether the decision to carry a particular event was the result of good faith news judgment.

9. Complainant Kucinich recognizes that the Commission has found that debates between at least two competing legally qualified candidates fit within the news event exemption, but this is not the case at hand because Complainant Kucinich is the only Democratic presidential candidate who has qualified for Federal matching funds who is being excluded by ABC. The Debate is not a news event because it is not a true presidential primary debate without including all credible candidates, but is instead is effectively an endorsement of the candidates selected by ABC. In addition, if ABC is given the liberty to designate every appearance with two candidates as “news,” then no third candidate will have the ability to enforce the equal time requirement, which is inconsistent with the intent of Congress in enacting Section 315(a).

10. ABC also violates the second part of the test, whether the decision to carry the debates is the result of good faith news judgment, because Complainant Kucinich has wide-spread support, as shown by his ability to obtain Federal matching funds and his victories in national online polls.

11. Even if the FCC determines that the exclusion of Complainant Kucinich from the Debate falls under an exemption to the equal time requirement, ABC nevertheless violates Section 315

and the equal time requirement because his exclusion is contrary to "the public interest and to afford reasonable opportunity for the discussion of conflicting views of issues of public importance." Congressman Kucinich's exclusion causes irreparable harm to the public interest by robbing the voters of the opportunity to hear his policy platform, including his pro-peace initiatives. As FCC Commissioner Susan Ness said in 2000 when NBC and Fox decided not to air the first presidential debate: "As a member of our national community, I urge all broadcast licensees to consider their civic duty to inform the public."

12. There has been a large public outcry against ABC's decision to exclude Complainant Kucinich. The chairman of the New Hampshire Democratic Party has publicly objected to his exclusion, the New Hampshire Secretary of State issued a statement objecting to his exclusion, and Joseph W. McQuaid, the publisher of the Manchester Union Leader, wrote in his editorial on January 3, 2007 that New Hampshire, not television, should decide who it wants to be President. Mr. McQuaid stated: "It is, after all, the New Hampshire citizens who will decide, come Tuesday, who is really in the 'top tier' of candidates. With Iowa's caucus process involving a ludicrously small percentage of that state's voters, it will be up to New Hampshire to make the first really representative determination of which candidates pass muster. It is the New Hampshire tradition that allows the lesser-known and less well-funded candidates, the underdogs, to make their case and have half a chance at success. For ABC and Fox to so arbitrarily reduce that chance, all to make for a better 'show,' is outrageous. If they want to exclude credible underdogs, they can go do that in another state, not here."

13. Although ABC would prefer to only report on easily described and well-known candidates, the proper enforcement of the Federal Communications Act ensures America's voters that they will have the ability to vote for candidates with varied and new ideas and policies.

14. ABC should not be the first primary.

WHEREFORE, Complainants respectfully demand judgment including, but not limited to, ordering ABC to allow Complainant Kucinich to fully participate in the ABC nationally televised debate on January 5, 2008 in New Hampshire.



Donald J. McTigue (OH 0022849)

Mark A. McGinnis (OH 0076275)

John M. Stephan (OH 0073903)

McTIGUE LAW GROUP

550 East Walnut Street

Columbus, OH 43215

Tel: (614) 263-7000

Fax: (614) 263-7078

mctiguelaw@rrohio.com

Counsel for Complainants