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Federal Communications Law
Journal

Volume 53 | Issue 1

Article 10

12-2000

The FCC and Section 312(a)(7) of the Communications Act of 1934: The Development of the “Unreasonable Access” Clause

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NOTE

The FCC and Section 312(a)(7) of the Communications Act of 1934: The Development of the “Unreasonable Access” Clause

Philip J. Gutwein II*

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I. INTRODUCTION

On September 7, 1999, the Federal Communications Commission ("FCC" or "Commission") issued a *Memorandum Opinion and Order* in which it ruled "that a broadcast station should not be allowed to refuse a request for political advertising time *solely* on the ground that the station does not sell or program such lengths of time."¹ This ruling came in response to a petition for reconsideration of the FCC's October 3, 1994 *Declaratory Ruling*² filed by the Media Access Project ("MAP") and People for the American Way ("PAW").³ The 1994 *Declaratory Ruling*—consistent with most FCC precedent⁴—held "that broadcast stations need not sell or furnish legally qualified candidates for federal office time for political advertising in increments other than those which the station either sold commercial advertisers or programmed during the one-year period preceding the election."⁵ Commissioner Harold W. Furchtgott-Roth dissented on the ground that the FCC should have upheld its policy of requiring "regulatory parity as between candidates and advertisers with respect to time."⁶ Whether the FCC had a consistent policy with regard to access parity remains uncertain, but Commissioner Furchtgott-Roth advocated what has been the most sensible approach employed by the FCC to date.

This Note argues that the FCC should adopt Commissioner Furchtgott-Roth's position on reasonable access. In making this argument, Part II discusses the source of the reasonable access requirement. Part III tracks the FCC's attempts at clarifying its reasonable access policy, including discussions of the 1978 *Policy Statement*, departures from the 1978 *Policy Statement*, Supreme Court review of the FCC's reasonable access policy, the 1991 *Report and Order*, the 1994 *Declaratory Ruling*,

1. Petition for Reconsideration by People for the American Way and Media Access Project, *Memorandum Opinion and Order*, 17 Comm. Reg. (P & F) 186, para. 2 (1999) [hereinafter PAW/MAP, *Order*].

2. Request for Declaratory Ruling of Nat'l Ass'n Broad., *Memorandum Opinion and Order*, 9 F.C.C.R. 5778, 76 Rad. Reg.2d (P & F) 200 (1994) [hereinafter Broadcasters, *Memorandum Opinion*].

3. Declaratory Ruling of Nat'l Ass'n Broad., *Reply Comments*, DA 92-1478, 1 (Mar. 1, 1993) (on file with the FCC) [hereinafter PAW/MAP, *Reply Comments*].

4. The Commission's 1978 *Policy Statement* articulates the rule applied by the FCC in its 1994 *Declaratory Ruling* and is consistent with most, but not all, Commission policy that predates the 1999 ruling. Commission's Policy in Enforcing § 312(a)(7), *Report and Order*, 68 F.C.C.2d 1079, 43 Rad. Reg.2d (P & F) 1029 (1978) [hereinafter 1978 *Policy Statement*].

5. PAW/MAP, *Order*, *supra* note 1, para. 1.

6. *Id.* at 190.

and the PAW/MAP *Order*. Part IV discusses the fault of the PAW/MAP *Order*, and the merit of Commissioner Furchtgott-Roth's dissent.

II. THE SOURCE OF THE REASONABLE ACCESS REQUIREMENT

The controversy regarding the right of access to broadcast media for advertising by candidates for federal political office has existed for a long time. Prior to 1971, broadcast media licensees were subject to a series of policies developed by the FCC known as the "public interest standard".⁷ Under this standard, "some time had to be given to political issues, but an individual candidate could claim no personal right of access unless his opponent used the station and no distinction was drawn between federal, state, and local elections."⁸

Thus, under the pre-1971 public interest standard, *individual* political candidates did not have an affirmative, enforceable right to advertise using broadcast media.⁹ On the contrary, broadcast "stations were required to make reasonable, good faith judgments about the importance and interest of particular races,"¹⁰ and allocate accordingly the time devoted to political affairs between individual candidate advertisements and general coverage.¹¹ As a result, if a broadcast station dedicated ample coverage to political affairs, it did not have to worry a great deal about individual requests for airtime by political candidates, especially if doing so burdened the station's programming schedule.¹²

The FCC was forced to abandon this part of the public interest standard¹³ upon passage of the Federal Election Campaign Act of 1971

7. *CBS, Inc. v. FCC*, 453 U.S. 367, 377-78 (1981). The public interest standard consisted of fourteen elements, one of which was the requirement that adequate broadcast coverage be dedicated to political matters.

8. *Id.* at 378-79.

9. See *In Re Application of Summa Corp., Las Vegas, Nev. for Renewal of License of Station KLAS-TV, Report and Order*, 43 F.C.C.2d 602, 28 Rad. Reg.2d (P & F) 768 (1973) [hereinafter *Summa Corp., Report*].

10. *CBS*, 453 U.S. at 378.

11. See *Inquiry Concerning Political Advertisement Requirements, Decision*, 40 F.C.C. 342 (1962); *Inquiry Concerning Political Advertising Requirements, Decision*, 40 F.C.C. 346 (1962); *Inquiry Concerning Political Advertising Requirements, Decision*, 40 F.C.C. 347 (1962).

12. "The licensee was not required to sell time to any particular candidate . . ." *Summa Corp., Report, supra* note 9, at 603.

13. State and local political races are still subject to the public interest standard. *CBS*, 453 U.S. at 379 n.6. See also *In Re Complaint of Anthony Martin-Trigona, Memorandum Opinion and Order*, 64 F.C.C.2d 1087, para. 14, 40 Rad. Reg.2d (P & F) 1189 (1977) (in which the FCC denied the protection of § 312(a)(7) to a candidate in a city mayoral race because he was not a candidate for a federal political office) [hereinafter *Martin-Trigona, Memorandum Opinion and Order*].

("FECA").¹⁴ The FECA, which consists of four titles,¹⁵ was designed, in part, "to give candidates for public office greater access to the media so that they may better explain their stand on the issues and thereby more fully and completely inform the voters."¹⁶ Title I of the FECA contained the statutory provision from which the current controversy surrounding the right of access to broadcast media by federal political candidates emanates—the provision codified at 47 U.S.C. § 312(a)(7).¹⁷

Section 312(a)(7) is known as the "reasonable access" clause. It provides the FCC with the authority to revoke a station license or construction permit "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for [f]ederal elective office on behalf of his candidacy."¹⁸

This provision has been controversial from its inception because the terms "reasonable access" and "reasonable amounts of time" are inherently ambiguous. Moreover, the FCC assumed the responsibility of applying and enforcing § 312(a)(7) without meaningful guidance from Congress.¹⁹ In fact, Congress indicated little more than its intent for § 312(a)(7) to provide candidates with greater access to the media for the purpose of informing the voting public.²⁰ As a result, federal political candidates and broadcast stations, upon passage of § 312(a)(7), attempted to influence the FCC's interpretation of "reasonable access" and "reasonable amounts of time."²¹ Federal political candidates wanted the FCC to adopt a working definition of the terms that would provide them with strong, enforceable rights of access to broadcast media during elections.²² Broadcast stations,

14. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1994).

15. *Id.*

16. 1978 *Policy Statement*, *supra* note 4, para. 31 (quoting 117 CONG. REC. 28,792). The quote from the *Congressional Record* was an explanation of the bill's purpose by Senator Pastore, one of its sponsors. 117 CONG. REC. 28,792. The Senate Commerce Committee later incorporated his statement of purpose for § 312(a)(7) in a Report. S. REP. NO. 92-96, at 20 (1971).

17. *CBS*, 453 U.S. at 377.

18. 47 U.S.C. § 312(a)(7) (1994).

19. 1978 *Policy Statement*, *supra* note 4, para. 31.

20. *Id.*

21. *Id.* paras. 2-20.

22. See Martin-Trigona, *Memorandum Opinion and Order*, *supra* note 13; Hon. Donald W. Riegle v. WKZO-TV, 59 F.C.C.2d 1314 (1976); Campaign '76 Media Comms. v. WGN and WGN-TV, 58 F.C.C.2d 1142, 36 Rad. Reg.2d (P & F) 865 (1976) [hereinafter Campaign '76 Media Communications]; Complaint by Don C. Smith, 49 F.C.C.2d 678, 31 Rad. Reg.2d (P & F) 1309 (1974); Complaint of Hon. Pete Flaherty, 48 F.C.C.2d 838, 31 Rad. Reg.2d 259 (P & F) (1974); Summa Corp., *Report*, *supra* note 9; Complaint by Humphrey for President Campaign, 34 F.C.C.2d 471, 24 Rad. Reg.2d (P & F) 84 (1972).

conversely, sought a definition of the terms that would maintain the status quo by preserving the pre-1971 public interest standard.

Not surprisingly, the FCC adopted something of a middle ground. It dismissed “the contention that Section 312(a)(7) was meant merely as a codification of the Commission’s already existing policy concerning political broadcasts.”²³ Likewise, it dismissed the federal political candidates’ suggestion that the terms be read to impose rigid, formalized rules, under which broadcasters would be forced to provide special rights of access to candidates independent of their programming needs and advertising policies for commercial advertisers.²⁴ Instead, the Commission read § 312(a)(7) to “impose[] an additional obligation on the general mandate to operate in the public interest.”²⁵ This position, the FCC asserted, was consistent with Congress’s express desire that “licensees afford candidates for Federal office a special right of access to a broadcasting station which no other group enjoyed.”²⁶ The FCC tempered its position, however, by noting that § 312(a)(7) was not “intended to require stations to accept all requests for political time during election campaigns to the exclusion of all or most other types of programming or advertising.”²⁷ The Commission stated:

[A]lthough we recognize a right of access to prime time programming, we decline[] to recognize any right, by a Federal candidate, to program time of any particular or minimum duration. Nor d[o], we recognize any right, by a Federal candidate, to have his programming or announcement given any particular placement—in terms of a specific date and/or specific time—during prime time, or during any other portion of the broadcast day.²⁸

In deciding when federal political candidates should receive airtime, the FCC deferred “to the reasonable, good faith judgment of licensees as to what constitutes ‘reasonable access’ under all the circumstances present in a particular case.”²⁹ The Commission’s position gave federal political candidates a right to purchase³⁰ time for political advertisements in

23. 1978 *Policy Statement*, *supra* note 4, para. 34.

24. *Id.* paras. 39-40.

25. *Id.* para. 33.

26. *Id.* para. 38; *see also* *Columbia Broad. Sys. v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973).

27. *Summa Corp., Report*, *supra* note 9, at 604; *see also* *Use of Broad. Cablecast Facilities*, *Public Notice*, 37 Fed. Reg. 5796, 5804 (Mar. 16, 1972) (noting that as “[i]mportant as an informed electorate is in our society, there are other elements in the public interest standard, and the public is entitled to other kinds of programming than political.”).

28. *Complaint of Hon. Pete Flaherty*, *supra* note 22, para. 29.

29. 1978 *Policy Statement*, *supra* note 4, para. 1.

30. *See* *Kennedy for President Comm., Memorandum Opinion and Order*, 80 F.C.C.2d

increments either sold to commercial advertisers or programmed during the one-year period preceding an election.³¹ What remained unclear was the extent to which the FCC required broadcast stations to accommodate the particular desires of candidates for airtime when doing so would disrupt a station's programming schedule—that is, how inconvenient did a candidate's request for airtime have to be to warrant refusal by the broadcast station?

A. *The 1978 Policy Statement*

The FCC attempted to clarify its interpretation of § 312(a)(7) in its 1978 *Policy Statement*.³² This *Report and Order* responded directly to the concerns of broadcast stations about the difficulties associated with the promulgation of rigid rules given the "diversity of circumstances with which each licensee is faced during an election period."³³ The prospect of mandatory compliance with rigid rules frightened many broadcast stations not only because of the potential complications in programming, but also because of the severe penalty for noncompliance—revocation of their licenses.³⁴

The FCC's 1978 *Policy Statement*, however, tried to make it easy for broadcast stations to avoid losing their licenses. In fact, the Commission believed that its policy would, in most cases, leave undisturbed the practices of stations affording federal candidates access to broadcast times.³⁵ The Commission stated that it would utilize § 312(a)(7) only to ensure that federal political candidates would "be at least on par with commercial advertisers."³⁶ The concept of access parity between commercial and political advertisers became a principle of § 312(a)(7) interpretation and underscored one of the Commission's ultimate policies of the 1978 *Policy Statement*—that it was "generally unreasonable for a licensee to follow a policy of flatly banning access by a Federal candidate to any of the classes and lengths of program or spot time *in the same*

93, 46 Rad. Reg.2d (P & F) 1539 (1980) [hereinafter Kennedy for President, *Order*].

31. See PAW/MAP, *Order*, *supra* note 1, para. 1.

32. 1978 *Policy Statement*, *supra* note 4.

33. *Id.* para. 2.

34. *Id.* para. 3; see Summa Corp., *Report*, *supra* note 9, at 604-05 ("[R]ather than engaging in any attempt to formulate specific rules for licensee compliance with the requirement of the new section, we remain committed to leaving licenses and candidates free to work out solutions for reasonable access through discussion, negotiations, and cooperation, subject only to the standard of reasonableness and good faith.")

35. 1978 *Policy Statement*, *supra* note 4, para. 42.

36. *Id.* para. 41.

periods which the station offers to commercial advertisers.”³⁷ In turn, the 1978 *Policy Statement* highlighted the Commission’s belief “that the best method for achieving a balance between the desires of candidates for *airtime* and the commitments of licensees to the broadcast of other types of programming is to rely on the reasonable, good faith discretion of individual licensees.”³⁸

The FCC provided guidance to broadcast stations on how best to exercise their discretion. It suggested that they consider such factors as “the unavailability of particular classes of time[,] a multiplicity of candidates[, and] the specific desires of candidates.”³⁹ It is important to note, however, that the FCC forbade broadcast stations from contemplating the *merit* of an individual candidate’s “desires” in deciding whether to grant a request for access.⁴⁰ In addition, if a broadcast station refused a candidate’s request for airtime, or responded to a request with a more limited counteroffer, the Commission required that it provide the candidate and the FCC with a written explanation of its decision. Despite these rules, though, the FCC claimed that the 1978 *Policy Statement* was intended only to require that “licensee[s] follow [their] usual commercial practices,”⁴¹ and treat federal political candidates like commercial advertisers.

B. *Departure from the 1978 Policy Statement*

The FCC changed its tone shortly after the release of the 1978 *Policy Statement*. This change was not part of an official statement made by the FCC in which it announced departure from, or alteration to, past interpretation of § 312(a)(7); rather, the change became evident in the enforcement measures taken by the FCC against broadcast stations. The FCC’s decision in *In Re Complaint of Kennedy for President Committee* provides an example.⁴² The Kennedy for President Committee tried to purchase five-, ten-, and thirty-minute prime-time programs from the

37. *Id.* (emphasis added).

38. *Id.* para. 39.

39. *Id.* para. 41.

40. See Campaign '76 Media Communications, *supra* note 22. The FCC found the broadcast station to have violated § 312(a)(7) for disallowing the sale of spots that are under five minutes to political candidates solely because “of its belief that ‘no spokesman can state his position on political matters in a broadcast of less than five minutes.’” *Id.* at 1144. The FCC went on to explain that it found “no reason to conclude that in enacting § 312(a)(7) Congress intended to vest in licensees the power to supplant a candidate’s determination that his political interests would best be served by the purchase of spot announcements rather than of broadcasts of five minutes in duration.” *Id.*

41. 1978 *Policy Statement*, *supra* note 4, para. 42.

42. See Kennedy for President, *Order*, *supra* note 30.

broadcast station, BBI.⁴³ BBI refused each request, and the Committee subsequently filed a § 312(a)(7) complaint with the FCC.⁴⁴ The Committee's complaint emphasized the importance to Kennedy's campaign of the time requested, his supposed "entitlement" to the purchase of thirty-minute prime-time programs, and the unreasonable nature of BBI's refusal.⁴⁵ BBI responded to the Committee's complaint by discussing its reasons for refusing to sell the time in terms of the "factors" from the 1978 *Policy Statement*—exactly the showing required for compliance with FCC policy.⁴⁶ BBI noted (1) the amount of time that it had already afforded Senator Kennedy;⁴⁷ (2) the disruptive impact of the requested sales on its programming schedule;⁴⁸ and (3) the number of other candidates who could request equal access time.⁴⁹ Further, BBI underscored that it had only refused to sell to the Committee airtime in increments unavailable to commercial advertisers⁵⁰—a justification grounded in one of the foundational principles of the 1978 *Policy Statement*, access parity between commercial advertisers and political candidates.⁵¹

The FCC sharply rejected BBI's response to the Committee's complaint.⁵² This would not have been so strange had the FCC confined its analysis to an examination of BBI's application of the factors from the 1978 *Policy Statement*. The FCC, however, after finding unpersuasive BBI's application of the factors to the Committee's request,⁵³ introduced additional standards that BBI could not have foreseen. Most notably, the FCC all but ignored the concept of access parity between commercial advertisers and political candidates.⁵⁴ It found unreasonable BBI's "blanket ban on the sale of 5-, 10- and 30-minute program time,"⁵⁵ even though BBI did not offer programs in such increments to commercial advertisers. As if that were not enough, the FCC went on to hold that, "for the purpose of administering Section 312(a)(7), a station accepting a half-hour program from a network or broadcasting local half-hour programs may not refuse

43. *Id.* para. 2.

44. *Id.* paras. 2-4.

45. *Id.*

46. *Id.* paras. 5-10.

47. *Id.* para. 5.

48. *Id.*

49. *Id.* para. 6.

50. *Id.*

51. 1978 *Policy Statement*, *supra* note 4, para. 41.

52. Kennedy for President, *Order*, *supra* note 30, paras. 11, 24.

53. *Id.*

54. *Id.* paras. 16, 19.

55. *Id.* para. 16.

half-hour program requests from candidates solely on the ground that it does not sell such programs to commercial advertisers.⁵⁶ Clearly, the FCC demanded more of BBI than mere access parity—it demanded affirmative accommodation of Kennedy’s wishes largely irrespective of the extent to which they posed complications for BBI’s programming schedule.

The FCC continued to invoke in subsequent cases the demanding standard for § 312(a)(7) compliance that it applied in *Kennedy for President Committee. In Re Complaint of Ed Noble for U.S. Senate Committee*⁵⁷ and *In Re Complaint of Ed Clark for President Committee*⁵⁸ provide two examples. In both cases, the FCC charged the broadcast stations with the duty to be especially sensitive to the special desires of political candidates and to accommodate those desires unless doing so was substantially disruptive to their programming schedules. This requirement applied even if the broadcast stations were accommodating political candidates to an extent equal to or greater than commercial advertisers.

In *Ed Noble*, the candidate requested a series of five-minute programs during prime time.⁵⁹ The station sold some five-minute programs to the candidate, but not as many as had been requested.⁶⁰ To justify its refusal, the station noted the potential for equal opportunity requests, the amount of time previously sold to the candidate, the short notice given to the station by the candidate, and the substantial disruption to its programming schedule that would result if the requests were granted.⁶¹ In its analysis of the broadcast station’s justification for the refusal, the FCC noted: In addition to the “public interest factors” cited by the broadcasters to justify their denial of time, “a broadcaster should be required to demonstrate the extent to which he has attempted to tailor his offer of airtime to be as reasonably responsive as possible (given countervailing factors) to a particular candidate’s stated purpose in seeking airtime.”⁶² The broadcast station convinced the FCC that it had been reasonably responsive to the candidate’s requests in this case by demonstrating that it was not technically feasible given the time involved—that is, it was essentially

56. *Id.* para. 19.

57. 79 F.C.C.2d 903, 48 Rad. Reg.2d (P & F) 61 (1980) [hereinafter *Ed Noble*].

58. 87 F.C.C.2d 417, 48 Rad. Reg.2d (P & F) 433 (1980) [hereinafter *Ed Clark*].

59. *Ed Noble*, *supra* note 57, at 904.

60. *Id.*

61. *Id.* at 905.

62. *Id.* at 908 (quoting *Complaint of Carter-Mondale Presidential Committee, Inc. Against the ABC, CBS, & NBC Television Networks, Memorandum Opinion and Order*, 74 F.C.C.2d 657, 668, 46 Rad. Reg.2d (P & F) 899, 908 (1979) [hereinafter *Carter-Mondale, Order II*]).

impossible for it to delay network programming by five minutes.⁶³ The FCC afforded less weight to the other factors demonstrated by the broadcast station.⁶⁴

The broadcast station in *Ed Clark* was subjected to a similar standard. The FCC, early in its discussion, stated that "broadcasters need not necessarily sell *all* the time requested by a candidate."⁶⁵ The opinion made clear, though, that to avoid the sale of airtime requested by a candidate, a broadcast station must be able to prove that doing so would either be impossible or result in unusual hardship. The Commission said, "We recognize that the process of editing five minutes from a regularly scheduled program is not easy. However, a broadcaster cannot use this reason to avoid the sale of five-minute prime time program time."⁶⁶ To the contrary, the Commission went on to say, "Only substantial disruption of a broadcaster's regular programming is entitled to weight in the balancing process."⁶⁷ The issue, then, becomes the definition of "substantial disruption" of a broadcaster's regular programming. Under the standard employed by the FCC in *Ed Noble* and *Ed Clark*, a "substantial disruption" in regular programming makes accommodation of the candidate's request nearly impossible.

C. Supreme Court Review of the FCC's Heightened Standard

The Supreme Court, in *CBS, Inc. v. FCC* ("*Carter/Mondale*"), reviewed the FCC's new, more demanding interpretation of § 312(a)(7) developed in *Kennedy for President Committee*, *Ed Noble*, and *Ed Clark*.⁶⁸ In this case, the Carter-Mondale Presidential Committee "requested each of the three major television networks to provide time for a 30-minute program between 8 p.m. and 10:30 p.m. on either the 4th, 5th, 6th, or 7th of December 1979,"⁶⁹ but "[t]he networks declined to make the requested time available."⁷⁰ The Carter-Mondale Presidential Committee found unreasonable the networks' explanations for their refusals of its airtime requests, alleged that the networks had violated their duties under § 312(a)(7), and filed a complaint with the FCC.⁷¹ The FCC ruled that the

63. *Id.* at 905-06.

64. *Id.* at 909.

65. *Ed Clark*, *supra* note 58, at 421.

66. *Id.* at 422.

67. *Id.* (quoting *CBS, Inc. v. FCC*, No. 79-2403, slip op. at 36 (D.C. Cir. Mar. 14, 1980)).

68. 453 U.S. 367 (1981).

69. *Id.* at 371.

70. *Id.* at 372.

71. *Id.* at 373-74.

networks had violated their duties under § 312(a)(7).⁷² As a result, “[t]he networks, pursuant to 47 U.S.C. § 402, then petitioned for review of the Commission’s Orders in the United States Court of Appeals for the District of Columbia Circuit.”⁷³ The D.C. Circuit affirmed the FCC’s decision.⁷⁴ The Supreme Court “granted certiorari to consider whether the [FCC] properly construed 47 U.S.C. § 312(a)(7) and determined that petitioners failed to provide ‘reasonable access to . . . the use of a broadcasting station’ as required by the statute.”⁷⁵ The majority supported the FCC in *Carter/Mondale*.⁷⁶ It approached the issue from the perspective that the FCC was “the experienced administrative agency long entrusted by Congress with the regulation of broadcasting, and . . . responsible for implementing and enforcing § 312(a)(7) of the Communications Act.”⁷⁷ As a result, the Court stated that the FCC’s construction of § 312(a)(7) was entitled to judicial deference “unless there are compelling indications that it is wrong.”⁷⁸ The majority found no such indications.

The *Carter/Mondale* opinion first confirmed that the language and legislative history of § 312(a)(7) supported the FCC’s interpretation that it created affirmative rights of reasonable access to broadcast media for federal political candidates.⁷⁹ In so doing, it also confirmed the FCC’s position that § 312(a)(7) was not a codification of the pre-1971 public interest standard.⁸⁰

The Supreme Court also affirmed the criteria that the FCC required broadcast stations to use in evaluating requests for airtime by federal

72. *Id.* at 374. The FCC ruled on this matter twice. The first decision was handed down on November 20, 1979. Complaint of Carter-Mondale Presidential Committee, Inc. Against the ABC, CBS, & NBC Television Networks, *Memorandum Opinion and Order*, 74 F.C.C.2d 631, 46 Rad. Reg.2d (P & F) 829 (1979). The networks were given until November 26, 1979, to indicate how they would fulfill their obligation under § 312(a)(7). The networks, however, sought reconsideration of the decision. On November 28, 1979, for the second time, the FCC arrived at the same decision. *Carter-Mondale, Order II, supra* note 62.

73. *CBS*, 453 U.S. at 374.

74. *Id.* at 375; *CBS, Inc. v. FCC*, 629 F.2d 1 (D.C. Cir. 1980).

75. *CBS*, 453 U.S. at 371 (quoting 47 U.S.C. § 312(a)(7) (1994)).

76. *See CBS*, 453 U.S. 367. The opinion is written as though FCC policy had been entirely consistent prior to the *Carter/Mondale* case. *See id.*

77. *Id.* at 390.

78. *Id.* (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 (1969)).

79. *Id.* at 384-85.

80. *Id.* at 379. In a dissenting opinion, however, Justice White argued that the legislative history reveals that Congress actually did intend simply to codify the pre-1971 public interest standard, and that § 312(a)(7) did little more than aid in the enforcement of the pre-existing standard by adding a more severe penalty for noncompliance. *Id.* at 404-05.

political candidates.⁸¹ The individual factors that the Court discussed—taken from the 1978 *Policy Statement*—included: (1) that broadcasters need not sell airtime to candidates before the start of a campaign;⁸² (2) that, once a campaign has begun, requests for airtime must be considered on an individual basis;⁸³ (3) that broadcasters may consider the amount of time previously sold to a candidate;⁸⁴ (4) that broadcasters may consider the disruptive impact of a candidate's requests on regular programming;⁸⁵ and (5) that broadcasters may consider "the likelihood of requests for time by rival candidates under the equal opportunities provision of § 315(a)."⁸⁶ The Court emphasized that broadcast stations could not use the factors as pretexts for avoiding their reasonable access responsibilities under § 312(a)(7) and that, "to justify a negative response, [they] must cite a realistic danger of substantial program disruption . . . or . . . an excessive number of equal time requests."⁸⁷ In turn, the Court also affirmed the FCC's policy of showing deference to a broadcast station's determination, with regard to a candidate's request for airtime, as long as the broadcast station considered the appropriate factors and acted reasonably and in good faith.⁸⁸

The *Carter/Mondale* opinion, however, failed to incorporate into its holding one of the overriding principles of the 1978 *Policy Statement*—the principle of access parity. In fact, one could read the language in the case to require broadcast stations to consider all requests for access to airtime, even if in increments other than those sold to commercial advertisers or programmed in the preceding year.

The dissent found the majority opinion disturbing. The dissent argued that the majority had not only oversimplified the issue presented by the case,⁸⁹ but had supported Commission policy contrary to the legislative history of § 312(a)(7), unduly burdensome to broadcast stations, and violative of broadcast stations' editorial freedom.⁹⁰

Kennedy for President Committee, Ed Noble, Ed Clark, and Carter/Mondale all suggest that the FCC had become unconcerned both with access parity and with affording deference to the good faith decisions

81. *Id.* at 386-87.

82. *Id.*

83. *Id.* at 387.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 397.

90. *Id.* at 397-419.

of broadcasters as to when to sell airtime to political candidates. The concepts of access parity and deference to broadcasters had been incorporated into the opinions of these cases, but seemed to have little effect on their outcomes. Instead, the FCC and the Supreme Court seemed to rely heavily on the extent to which broadcast stations worked to accommodate the special desires of political candidates.

D. *The 1991 Report and Order*

In 1991, the FCC released a *Report and Order* entitled *In the Matter of Codification of the Commission's Political Programming Policies*.⁹¹ This *Report and Order* contained a detailed discussion of the Commission's policy on the duties of broadcast stations under § 312(a)(7).⁹²

The FCC began its discussion by reiterating that it would not adopt rigid rules to define "reasonable access." The Commission said, "[We] continue[] to believe that formal rules would not be practical and that we should continue to rely upon the reasonable, good faith judgments of licensees to provide reasonable access to federal candidates."⁹³ Following cases such as *Ed Noble* and *Ed Clark*, however, one could have expected the concept of "deference to the broadcaster's judgment" to be subordinate to the concept of "accommodation of the candidate's desires." Surprisingly, though, the 1991 *Report and Order* did not speak to the concept of accommodating the special desires of candidates for airtime. Instead, it listed nine guidelines, taken from the Commission's 1978 *Policy Statement* and the Supreme Court's *Carter/Mondale* case, that broadcast stations should consider when responding to a political candidate's request for airtime.⁹⁴

The *Report and Order's* nine guidelines failed to mention the duty of broadcast stations to accommodate the special desires of political candidates for airtime, but did mention that "[l]icensees may not adopt a policy that flatly bans federal candidates from access to the types, lengths, and classes of time which they sell to commercial advertisers."⁹⁵ Thus, despite cases such as *Ed Noble* and *Ed Clark* that held it unacceptable for a

91. Codification of the Comm'n's Political Programming Policies, *Report and Order*, 7 F.C.C.R. 678, 70 Rad. Reg.2d (P & F) 239 (1991), modified by Codification of the Comm'n's Political Programming Policies, *Memorandum Opinion and Order*, 7 F.C.C.R. 4611, 70 Rad. Reg.2d (P & F) 1331 (1992).

92. *Id.* paras. 6-23. The *Report and Order* also discussed the Commission's policies regarding equal access opportunities under § 315(a), lowest unit charge duties under § 315(b), and political file requirements. *Id.* paras. 24-124.

93. *Id.* para. 8.

94. *Id.* para. 9.

95. *Id.*

broadcaster to flatly ban the sale of any increment of time to a political candidate, the Commission again asserted that broadcast stations must allow access parity between commercial advertisers and political candidates.

The Commission reflected its departure from "special accommodation" in the character of its actions following the 1991 *Report and Order*. Two examples include letters to attorney Arthur R. Block⁹⁶ and Michael Steven Levinson.⁹⁷ Each letter responded to complaints implicating rights under § 312(a)(7). For the most part, the FCC's general approach to the complaint was like that of older cases—it examined the extent to which the broadcast station used the "factors" in deciding to refuse the candidate's request for airtime.⁹⁸ These letters differed from earlier cases,⁹⁹ though, to the extent that they did not suggest that the FCC required licensees to extend extra efforts to accommodate the special desires of candidates. Rather, each stated that "if broadcasters take the appropriate factors into account and act reasonably and in good faith, their decisions will be entitled to deference even if the Commission's analysis would have differed in the first instance."¹⁰⁰ While the FCC had included similar language in earlier cases, many cases decided during the period between the 1978 *Policy Statement* and the 1991 *Report and Order* in reality showed little deference to the judgment of the broadcast station. The FCC's letters to Block and Levinson, however, afforded meaningful deference to the broadcast stations. Each broadcast station explained its refusal of the candidate's request for airtime in terms of the factors, and the FCC accepted its explanations.¹⁰¹

E. The 1994 Declaratory Ruling—A Victory for the Broadcasters

In 1994, the National Association of Broadcasters ("NAB") asked the FCC to clarify its policy with regard to access parity.¹⁰² In its petition for a Declaratory Ruling, the NAB asserted that federal political candidates interpreted both the Commission's 1978 *Policy Statement* and its ruling in *Ed Noble* to entitle them to odd-length program times neither sold to

96. Arthur R. Block, *Letter*, 7 F.C.C.R. 1784, 70 Rad. Reg.2d (P & F) 1024 (1992) [hereinafter Block, *Letter*].

97. Michael Steven Levinson, *Letter*, 7 F.C.C.R. 1457, 70 Rad. Reg.2d (P & F) 1027 (1992) [hereinafter Levinson, *Letter*].

98. See Block, *Letter*, *supra* note 96; see also Levinson, *Letter*, *supra* note 97.

99. See, e.g., Ed Noble, *supra* note 57, at 907.

100. Block, *Letter*, *supra* note 96, at 1785; Levinson, *Letter*, *supra* note 97, at 1457 (quoting *CBS, Inc. v. FCC*, 453 U.S. 367, 387(1981)).

101. See Block, *Letter*, *supra* note 96; see also Levinson, *Letter*, *supra* note 97.

102. Broadcasters, *Memorandum Opinion*, *supra* note 2.

commercial advertisers nor regularly programmed by the station.¹⁰³ Political candidates, the NAB argued, believed that the 1978 *Policy Statement* forbade *all* blanket bans on the sale of airtime to them.¹⁰⁴ The NAB supported its position with dictum from *Ed Noble*. The NAB said:

In *dictum*, the staff also indicated that if candidates request five-minute programs far enough in advance, licensees may have to go so far as to preempt one-half hour of network time, air the candidate's five-minute program "and fill[] the remaining 25 minutes with local programming or with other candidates' programming."¹⁰⁵

Moreover, the NAB argued:

These passages have led some to conclude that licensees cannot refuse to sell odd-length programs to candidates in any time period, so long as the request is not made at the "last minute." Under this logic, a candidate would have the right to buy a 13-minute prime time program,¹⁰⁶ regardless of the disruption to the station's schedule, so long as the request were [sic] made well in advance of election day. NAB believes that this is a misinterpretation of the fundamental intent of the Commission's reasonable access decisions.¹⁰⁷

The NAB argued that the "blanket ban" language taken from the 1978 *Policy Statement* was intended only to apply to increments of time sold to commercial advertisers or regularly programmed by the station.¹⁰⁸ As a result, the NAB sought "a declaratory ruling that broadcast stations need not provide legally qualified candidates for federal office with program time in increments other than those which the station ordinarily sells to commercial advertisers or which it ordinarily programs."¹⁰⁹

The People for the American Way and Media Access Project ("PAW/MAP") submitted reply comments in opposition to NAB's petition for a Declaratory Ruling.¹¹⁰ PAW/MAP argued that § 312(a)(7) prohibits blanket bans on the sale of advertising time to federal political candidates in any particular length, irrespective of the broadcast station's policy for the sale of time to commercial advertisers and its regular programming

103. Pet. from NAB, to Milton O. Gross, Chief, Political Programming Branch, FCC 1-2 (Aug. 18, 1992) (on file with the FCC).

104. *Id.*

105. *Id.* at 2 (quoting *Ed Noble*, *supra* note 57, at 909-10).

106. The NAB included a footnote in the passage stating, "The Clinton campaign prepared such a program for showing at the Democratic National Convention, although they apparently have plans to expand it to 30 minutes for broadcast. Still, the § 312(a)(7) construction presented in *Ed Noble* apparently would put no obligation on any Federal candidate to make such changes." *Id.* at 2 n.11.

107. *Id.* at 2.

108. *Id.* at 2-3.

109. Broadcasters, *Memorandum Opinion*, *supra* note 2, para. 1.

110. *Id.* para. 5.

practices.¹¹¹ PAW/MAP structured their argument around the theory that NAB misread Commission precedent and that, in truth, the FCC never interpreted § 312(a)(7) to permit broadcasters to ban the sale of any length of advertising time to federal political candidates.¹¹² As a part of this argument, PAW/MAP contradicted the NAB's contention that *Ed Noble* represented a departure from longstanding Commission policy, asserting that the decision was consistent with both prior and subsequent FCC decisions.¹¹³ PAW/MAP stated, "These decisions establish that the Commission has always understood 312(a)(7) to prohibit any blanket policy on sales of times of particular lengths, regardless of whether a broadcaster does not program or sell commercial time in those lengths. The Commission has *never* spoken to the contrary."¹¹⁴ PAW/MAP applied their interpretation of the Commission's policy on "reasonable access" to support their ultimate position that "requests for time must be considered on a case-by-case basis,"¹¹⁵ and that broadcasters may refuse requests for time only after "a sincere examination of all the circumstances with a view towards trying to accommodate the candidates' request."¹¹⁶

The FCC responded to the NAB's request for a Declaratory Ruling with refreshing clarity. After considering the positions advanced by the NAB and PAW/MAP, it ruled that broadcasters need only "provide access to qualified federal candidates consistent with their own sales and programming decisions."¹¹⁷ In short, the FCC ruled for the NAB, rejecting entirely the position advanced by PAW/MAP.

The 1994 *Declaratory Ruling* was significant because it cleared up ambiguities in the FCC's interpretation of § 312(a)(7) that befuddled broadcasters since the Commission's decision in *Ed Noble*. The *Declaratory Ruling* held that (1) limitations and flat bans on the kinds and lengths of time offered to commercial advertisers during the year preceding a particular election period were prohibited;¹¹⁸ (2) program time in the lengths programmed by the station in the year preceding a particular

111. PAW/MAP, *Reply Comments*, *supra* note 3.

112. *Id.* at 1-3.

113. *Id.* at 2-3.

114. *Id.* at 3. This passage was followed by a lengthy footnote stating that those broadcast stations that had echoed the NAB's request for a Declaratory Ruling, including CBS, Inc., A.H. Belo, and Hearst, had misconstrued the language of the 1978 *Policy Statement* by reading it to allow them to refuse advertising time to federal political candidates in increments other than those sold to commercial advertisers. *Id.* at n.3.

115. *Id.* at 1.

116. *Id.* at 1-2.

117. Broadcasters, *Memorandum Opinion*, *supra* note 2, para. 10.

118. *Id.*

election, regardless of whether offered to commercial advertisers, must be made available;¹¹⁹ and (3) *Ed Noble*, to the extent it suggested anything contrary to points (1) and (2), was superseded.¹²⁰ The broadcast stations applauded this holding because a requirement that they provide advertising time to candidates in increments neither sold to commercial advertisers nor programmed in their regular schedule would impose severe burdens on them, including the difficulty of delaying programming to accommodate advertisements of nonstandard length and the resultant difficulty in meeting their contractual obligations with syndicators and networks.¹²¹ In addition, because it superseded the dictum in *Ed Noble*, the ruling foreclosed the possibility that broadcast stations would have to sort out the technical and contractual complications associated with the sale of odd-length advertising time should a qualified candidate request such time sufficiently far in advance.¹²²

F. *The 1999 Memorandum Opinion and Order—Defeat of the Broadcasters*

The reasonable access standard that the FCC set in the 1994 *Declaratory Ruling* was short lived. In 1999, PAW/MAP filed a petition with the FCC for reconsideration of the 1994 *Declaratory Ruling*. The FCC reconsidered PAW/MAP's argument, accepted their position, and overturned the 1994 ruling.¹²³ In fact, to the disappointment of broadcast stations, the 1999 ruling was a near return to the standard that the Commission had embraced in the early 1980s—the standard that required broadcast stations to cater to the individual desires of qualified federal political candidates.¹²⁴ The FCC held “that a broadcast station should not be allowed to refuse a request for political advertising time *solely* on the ground that the station does not sell or program such lengths of time.”¹²⁵ Clearly, this holding did not resurrect the dictum from *Ed Noble*¹²⁶ that suggested broadcast stations should accommodate requests by qualified candidates for advertising time in nonstandard increments if submitted far enough in advance. It did, however, overturn the heart of the 1994 *Declaratory Ruling*, which held that broadcast stations could impose

119. *Id.*

120. *Id.* para. 11.

121. *Id.* para. 4.

122. *Id.* para. 11.

123. PAW/MAP, *Order, supra* note 1, para. 11.

124. *CBS, Inc. v. FCC*, 453 U.S. 367, 387 (1981).

125. PAW/MAP, *Order, supra* note 1, para. 2.

126. *Ed Noble, supra* note 57, 910.

blanket bans on the sale of advertising time in increments other than those sold to commercial advertisers or programmed during the one-year period preceding an election.¹²⁷ The FCC explained its change in position by holding the 1994 *Declaratory Ruling* to have been a departure from an established "framework" laid out in earlier cases—a framework that prohibited flat bans on the sale of program time in nonstandard increments.¹²⁸

As a result of 1999 ruling, the FCC abandoned not only the holding of the 1994 ruling, but the analysis that supported that holding, as well. The 1994 ruling required broadcast stations to "provide access to qualified federal candidates consistent with their own sales and programming decisions,"¹²⁹ in part because the sale of advertising time in nonstandard lengths created severe technical difficulties for broadcast stations.¹³⁰ In the 1999 decision, the FCC acknowledged that the sale of advertising time in nonstandard lengths imposed technical burdens on broadcast stations, but ruled that "disruption to normal programming" was just one of a number of factors that broadcast stations must take into account when evaluating a qualified candidate's request for a nonstandard increment of advertising time.¹³¹ The FCC said, "The disruption to regular programming that would be caused by granting a request for a nonstandard length of time, while clearly relevant, must be considered in light of whether the broadcaster could make adjustments in its schedule that would accommodate the candidate's needs."¹³² As a result, programming disruption, commercial sales practices, and general program scheduling practices could no longer stand on their own as reasons for denying a candidate's request for any length of advertising time.¹³³ On the contrary, the 1999 decision imposed the obligation on broadcast stations to consider how they could accommodate candidates' desires *in every instance*.¹³⁴

Commissioner Harold W. Furchtgott-Roth dissented. He asserted that the 1994 *Declaratory Ruling* "[did] not suffer from legal error and . . . policy considerations cut in favor of establishing a clearer rule regarding the duties of broadcasters to sell time."¹³⁵ With regard to legal considerations, he argued that the 1999 decision misinterpreted the 1978

127. PAW/MAP, *Order*, *supra* note 1, para. 1.

128. *Id.* para. 11.

129. Broadcasters, *Memorandum Opinion*, *supra* note 2, para. 10.

130. *Id.* para. 11.

131. PAW/MAP, *Order*, *supra* note 1, para. 2.

132. *Id.* para. 13.

133. *Id.* paras. 2, 13.

134. *Id.* para. 15.

135. *Id.* at 190 (Comm'r Furchtgott-Roth, dissenting).

Policy Statement by reading it to prohibit *all* flat bans on the sale of advertising time to qualified candidates. He noted:

That decision did not, however, generally prohibit across-the-board policies. Rather, it prohibited across-the-board policies that deny candidates the chance to buy time under the same terms as commercial advertisers. To repeat: "Licensees may not adopt a policy that flatly bans federal candidates from access to the types, lengths, and classes of time which they sell to commercial advertisers."¹³⁶

In short, the Commissioner believed that the "linchpin of petitioners' argument" and the underlying theory of the *Order* could not be squared with the 1978 *Policy Statement*—the source from which both drew their authority.¹³⁷

Commissioner Furchtgott-Roth also asserted that policy considerations weighed in favor of maintaining the 1994 *Declaratory Ruling*.¹³⁸ In his opinion, the 1999 *Memorandum Opinion and Order*, unlike the 1994 *Declaratory Ruling*, provided broadcast stations with too little guidance on the definition of "reasonableness," as well as too few "general principles to help [them] better understand, *ex ante*, their obligations in this area—such as simple equal treatment standards."¹³⁹ In turn, he argued that requiring a "full-scale negotiation and compromise *every single time* that a federal candidate makes a request to purchase time . . . [would] impose[] great transaction costs on the [broadcast] stations."¹⁴⁰ All of these unfortunate effects, he suggested, would be avoided if the Commission adopted a reading of § 312(a)(7) that, consistent with the 1978 *Policy Statement*, would simply put political candidates on par with commercial advertisers.¹⁴¹

III. THE 1999 MEMORANDUM OPINION AND ORDER—A PERVERSION OF § 312(a)(7) AND THE MEANING OF REASONABLE ACCESS

The language and history of § 312(a)(7) support the analysis and conclusion of Commissioner Furchtgott-Roth's dissent to the 1999 *Memorandum Opinion and Order*.¹⁴² The plain text of § 312(a)(7), its relationship to the pre-1971 public interest standard, the terms of the 1978 *Policy Statement*, and policy considerations all lead to the conclusion that

136. *Id.* at 190-91 (quoting 1978 *Policy Statement*, *supra* note 4, para. 55).

137. PAW/MAP, *Order*, *supra* note 1, para. 2.

138. *Id.* at 191.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

the 1994 *Declaratory Ruling* is an accurate and workable interpretation of § 312(a)(7).

A. *The Plain Language of § 312(a)(7)*

Broadcast stations and federal political candidates dispute the correct interpretation of “reasonable access” as defined by the Communications Act of 1934. The resolution of the dispute lies in understanding how Congress intended for “reasonable” to modify “access.” To gain that understanding, consider the section’s plain language. Section 312(a)(7) states:

(a) Revocation of station license or construction permit

The Commission may revoke any station license or construction permit—

....

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.¹⁴³

Section 312 does not define the adjective “reasonable.” By contrast, § 312(f) contains definitions for “willful” and “repeated.”¹⁴⁴ Congress’s failure to define “reasonable,” in light of it defining “willful” and “repeated,” makes it proper to assume that Congress meant for the word to carry its ordinary and usual definition. “Reasonable” ordinarily is synonymous with “sensible,” “rational,” and “moderate”¹⁴⁵—not “affirmative,” “special,” or “guaranteed.”

When § 312(a)(7) is read with the usual definition of “reasonableness” in mind, the holding from the 1994 *Declaratory Ruling* comports nicely with its language. That ruling held that “broadcasters [must] provide access to qualified federal candidates consistent with their own sales and programming decisions.”¹⁴⁶ That is, they had to provide sensible or moderate access to federal political candidates, but not special or greater access than that offered to commercial advertisers. The 1999 ruling, however, requires an unusual definition of “reasonableness.” Its mandate that broadcast stations give special consideration to requests for airtime by qualified candidates in increments not offered to commercial advertisers, as Commissioner Furchtgott-Roth noted in his dissent, “elevates federal candidates to a status that is not just on a par with, but

143. 47 U.S.C. § 312(a)(7) (1994).

144. *Id.* § 312(f)(1)-(2) (defining “willful” and “repeated”).

145. WEBSTER’S THIRD NEW DICTIONARY 1892 (3d ed. 1993).

146. Broadcasters, *Memorandum Opinion*, *supra* note 2, para. 10.

superior to, commercial advertisers.”¹⁴⁷ That interpretation of § 312(a)(7) does not square with its plain language. “[R]easonable treatment is equal treatment,”¹⁴⁸ and had Congress intended for § 312(a)(7) to require something other than equal treatment, it would have described the time and access that broadcast stations must provide to federal candidates with a word other than “reasonable.”

B. *Section 312(a)(7) and the Pre-1971 Public Interest Standard*

The relationship between § 312(a)(7) and the pre-1971 public interest standard also suggests that Congress intended for “reasonableness” to carry its ordinary definition. The public interest standard required that broadcast stations allot airtime to political affairs, but did not require that broadcast stations sell airtime to individual candidates for advertising.¹⁴⁹ In fact, if political affairs received adequate airtime, the pre-1971 public interest standard did not require broadcast stations to sell advertising time to *any* candidate in *any increment* of time, irrespective of the station’s sales and programming practices.¹⁵⁰ Because the pre-1971 public interest standard placed no emphasis on affirmative rights of access for *individual* candidates, Congress likely would have used more forceful language had it intended a radical departure from that standard in adopting § 312(a)(7). Moving from a system that provided candidates with no individual rights of access to one that provides candidates with rights of access equal to those of commercial advertisers seems more “reasonable” than a move to a system that provides candidates with not only individual rights of access, but rights far greater than those enjoyed by any other group.

C. *Reasonableness Under the 1978 Policy Statement*

The concept of “reasonableness” as equal treatment or access parity is also incorporated into the plain language of the 1978 *Policy Statement*. Commissioner Furchtgott-Roth was correct in noting that:

A careful reading of [the 1978] Policy Statement indicates that the 1994 Commission correctly understood it to establish regulatory parity as between candidates and advertisers with respect to time. That Statement specifically concludes:

We believe it to be generally unreasonable for a licensee to follow a policy of flatly banning access by a federal candidate to *any of the classes and lengths of program or spot time in the same periods which the station offers to commercial*

147. PAW/MAP, *Order*, *supra* note 1, at 191 (Comm’r Furchtgott-Roth, dissenting).

148. *Id.*

149. CBS, Inc. v. FCC, 453 U.S. 367 (1981).

150. Summa Corp., *Report*, *supra* note 9.

advertisers

[Thus,] [l]icensees may not adopt a policy that flatly bans federal candidates from access to the types, lengths, and classes of time which they sell to commercial advertisers.¹⁵¹

It is difficult to read these passages as articulating anything but a clear intention by Congress to give federal candidates access to broadcast stations equal to that of commercial advertisers. The FCC, however, managed to do so. In striking down the concept of access parity, it stated, "In effect, the [1994] *Declaratory Ruling* permitted what amounts to an 'across-the-board' policy, or flat ban, on the sale of program time in non-standard increments."¹⁵² While that statement is factually correct, the FCC erred in holding it contrary to the intention of the 1978 *Policy Statement* and, ultimately, Congress. The FCC's rule in the 1999 *Memorandum Opinion and Order* can rally no support from the 1978 *Policy Statement*, and is inconsistent with the plain language of § 312(a)(7).

D. *Policy Considerations that Favor the 1994 Declaratory Ruling*

The 1994 *Declaratory Ruling* is superior to the 1999 *Memorandum Opinion and Order* for policy reasons, as well. The 1994 *Declaratory Ruling* provides broadcast stations with a concrete standard against which reasonable access requests must be considered. If a candidate requested an increment of time either sold to commercial advertisers or programmed in the preceding year, the request merited full consideration. If the candidate requested something different, the broadcast station was not obligated to give it full consideration. That standard allows broadcast stations to plan. They may enter into programming contracts and *know* that reasonable access requests will not interfere with their contractual obligations. Likewise, the 1994 *Declaratory Ruling* allows broadcast stations to *know* in exactly what increments they must be prepared to sell advertising time to qualified federal political candidates. No such standard exists under the 1999 *Memorandum Opinion and Order*.

The 1994 *Declaratory Ruling* also imposes fewer transaction costs on broadcast stations.¹⁵³ It allows for certain situations under which broadcast stations are not required to give full consideration to reasonable access requests. The 1999 *Memorandum Opinion and Order*, however, "require[s] broadcasters to engage in full-scale negotiation and compromise *every single time* that a federal candidate makes a request to purchase time . . .

151. PAW/MAP, *Order*, *supra* note 1, at 190 (Comm'r Furchtgott-Roth, dissenting) (citing 1978 *Policy Statement*, *supra* note 4, paras. 41, 55).

152. *Id.* para. 11.

153. *Id.* at 191.

[and] imposes great transaction costs on the stations.”¹⁵⁴ Such expenditures are unnecessary and, as Commissioner Furchtgott-Roth stated, “should not be underestimated.”¹⁵⁵

IV. CONCLUSION

The FCC’s 1999 *Memorandum Opinion and Order* ruled “that a broadcast station should not be allowed to refuse a request for political advertising time *solely* on the ground that the station does not sell or program such lengths of time.”¹⁵⁶ This ruling ran contrary to the FCC’s 1994 *Declaratory Ruling*, as well as long-standing Commission precedent based on the 1978 *Policy Statement*. The shift to the 1999 *Memorandum Opinion and Order* from the 1994 *Declaratory Ruling* is misguided. The plain language of § 312(a)(7), its relationship to the pre-1971 public interest standard, the plain language of the 1978 *Policy Statement*, and policy considerations all point to the conclusion that the 1994 *Declaratory Ruling* accurately and workably interprets § 312(a)(7). Commissioner Furchtgott-Roth’s dissent from the 1999 *Memorandum Opinion and Order* hit the mark; the 1994 *Declaratory Ruling* should continue to control.

154. *Id.*

155. *Id.*

156. *Id.* para. 2.

