OFFICIAL OPINION NO. 72-31, Educational television network. Giving time on station for political candidates.

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

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Martin P. Busch
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University of South Dakota
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OFFICIAL OPINION NO. 72-31

Educational television network. Giving time on station for political candidates.

Dear Mr. Busch:

You have asked my official opinion in answer to the following question:

Is it legal for the Educational Television stations in South Dakota, licensed therefor, to produce and broadcast programs allowing statements and opinions from candidates running for local, state and federal offices assuming that provisions of "equal time" under the FCC Fairness Doctrine are complied with?

Insofar as such television programming affects a "federal elective office," your question has been answered by the United States Congress by the adoption of the Federal Election Campaign Act of 1971 of February 7, 1972. (Public Law 92-225), and the rules and regulations promulgated thereunder by the Federal Communications Commission.

Tersely stated, the Federal Election Campaigning Act of 1971 requires, at a fee fixed by Congress, that every commercial "broadcasting station" must make time available for any candidate for "federal elective office," (and once such time is made available to one such candidate, equal opportunity to all other candidates for the same office for similar use) to advocate his candidacy for federal office on such broadcasting media.

The Act defines the term "Federal Elective Office" to mean the office of the President of the United States, or of Senator or Representative in, or resident commission or delegate to, the Congress of the United States, and perhaps (because of the restrictive language used), the Vice President.

The Congressional enactment further provides criminal penalties if the candidate and the broadcasting station fail to meet certain requirements of such Federal Act. It further provides that the Federal Communications Commission may revoke a license or permit of such broadcasting station:

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.

In its rules and regulations, adopted March 15, 1972, the Federal Communications Commission has made it clear that the quoted authority to revoke licenses for failure to allow a federal elective office candidate access to the station applies to noncommercial educational stations as well as other nonprofit stations. The Commission has ruled that both types of stations would be required to give reasonable access to legally qualified candidates for federal elective office.

47 USC Sec. 153 (k) defines a "radio station" as being equipped to engage in radio communication. "Radio communication" is defined in 47 USC Sec. 153 (b). In **Allen B. Dumont Laboratories v. Carroll** (CCA (pa) 1950) 184 F. 2d 153 (cert. den.) 340 U.S. 929, 71 S.Ct. 490, 95 L. ed. 670, the United States Court of Appearls held that as television communication is within the definition of "radio communication" the Federal regulative acts applied to television stations. It further held that as television broadcasting is interstate commerce, that the Federal laws were exclusive of state action.

In view of this unchallenged holding of the Federal courts, it appears to me that your television station is included in the term "broadcasting station." In view of the court rulings, it appears that no case may be made that the Rules and Regulations of the Commission are invalid.

Such Federal law, of course, does not command giving such access to candidates for state or local offices. It would appear to me that such access might be granted to such local and state candidates, if the South Dakota Educational Television Board concluded that

programming was available for all of such candidates, after accommodating those candidates for Federal office who have a right, and to whom you owe a duty to grant access.

Because of the nature of the Federal Statute and its interpretation by the Federal Communications Commission, I am concluding this opinion with the regulations of such Commission, as set forth in a question and answer format in Volume 37, No. 55, page 5805 of the Federal Register of Tuesday, March 21, 1972. This statement should answer many questions concerning the problem and any incidental charges that may be made in connection with such access.

9. Q. Does section 312 (a) (7) apply to noncommercial educational stations, and other nonprofit stations, as well as to commercial stations.

A. Yes. There are no provisions in the Campaign Communications Reform Act exempting such stations, nor is there anything in the legislative history of the Act that would indicate that such an exemption was in tended. Both types of stations would be required to give reasonable access to legally qualified candidates for Federal elective office.

10. Q. May noncommercial educational stations and nonprofit stations charge for broadcast time by or on behalf of legally qualified candidates for Federal elective office?

A. Under the provisions of the Commission rules, noncommercial educational stations operating on channels reserved for noncommercial educational use are not permitted to levy charges for time - for political broadcasts or otherwise. Some such stations presently are providing political programming without charge, and it appears that as a practical matter the new provision will not greatly alter their practices. On the other hand, those stations that do not engage in such programming will be required under the new law to provide reasonable access to candidates without charge. Non-commercial educational stations that are operating on unreserved channels, and nonprofit stations that are not educational, e.g., those offering religious broadcasting, may charge for political broadcast time (if their charters or articles of incorporation permit them to make time charges) although it is their policy normally not to charge for any time. If they do charge, notice must be given to the Commission of this change in operation. The lowest unit charge provisions of section 315(b) cannot apply to such stations since they have no rates on which to base such a charge. However, any charges made must be reasonable when viewed in the light of charges made by commercial stations in the same broadcast service licensed to serve the same

community. If the charges made by nonprofit stations are unduly high, it is conceivable that they might be construed as an attempt to circumvent the reasonable access provision of section 312 (J) (7). Noncommercial educational stations and nonprofit stations, whether giving free time for political broadcasts or charging for such time, may make necessary charges for production-oriented services, and for other things of the type mentioned in Q. and A. VI 15 above.

Respectfully submitted,

Gordon Mydland
Attorney General