

## FCC Holds That *The Howard Stern Show* Includes “*Bona Fide News Interview*” Segments

By Steven A. Lerman

On September 9, 2003, in a ruling derided in some quarters as “ludicrous,” *Parents Television Council Press Release*, Sept. 10, 2003, at <http://www.parentstv.org>, but considered by others to be fully consistent with the law (as well as politically courageous), the Federal Communications Commission (“Commission” or “FCC”) held that certain segments of *The Howard Stern Show* were “*bona fide* news interviews,” and therefore exempt from the Commission’s “equal opportunities” requirements. DA 03-2865. Despite extensive media coverage of the agency’s action, for those familiar with FCC regulation in the political broadcasting arena, it was hardly a seismic event in administrative jurisprudence. Rather, the ruling reflected appropriate application of principles underpinning a string of cases which commenced in 1984, in which the “*bona fide* news interview” exemption has undergone significant expansion to encompass an eclectic variety of news interview programs and formats.

### ***Equal Opportunities***

The equal opportunities requirement is one strand of a complex web of FCC-administered political broadcasting regulations. The provision obligates broadcast stations that air appearances of legally qualified political candidates to offer “equal opportunities” to opposing candidates. “Equal opportunities” contemplates affording approximately equal time to opposing candidates during time periods likely to have an audience comparable to the program in which the first candidate appeared. *The Law of Political Broadcasting and Cablecasting, Public Notice*, 69 FCC 2d, 2209, 2216 (1978).

Having its genesis in the Radio Act of 1927, Pub. L. No. 632, 69<sup>th</sup> Cong. (1927), the equal opportunities provision was subsequently incorporated into Section 315 of the Communications Act of 1934. 47 U.S.C. § 315. The obli-

gation to provide equal opportunities is triggered by *any* appearance of a candidate through voice or image, whether or not his or her candidacy is the focus of, or even mentioned, in the appearance. Such “appearances” by qualified candidates have included the broadcast of movies featuring Ronald Reagan, *Adrien Weiss*, 58 FCC 2d 342 (B. Bur. 1976), the appearance of a comedian in a episode of a television series, 33 FCC 2d 297 (B. Bur. 1972); *aff’d* 33 FCC 2d 835 (1972); *aff’d Paulsen v. FCC*, 491 F.2d 887 (9<sup>th</sup> Cir. 1974), and even the appearance of a newscaster covering stories unrelated to his candidacy. *In re William H. Branch*, 101 FCC 2d 901 (1985), *aff’d* 63 RR 2d 826 (D.C. Cir. 1987).

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Originally interpreted to require a broadcast licensee to provide equal opportunities to opponents for *any* on-air candidate appearance, by the late 1950s the FCC consistently held that the rule did not apply to a candidate’s appearance on a newscast, on the theory that in such circumstances the can-

didate did not initiate coverage of an otherwise newsworthy event. *Hon. Shirley Chisholm v. FCC*, 36 RR 2d 1437, 1440 (D.C. Cir. 1976).

In 1959, however, the Commission abruptly reversed course, reverting to the strict construction that any candidate appearance, including an appearance on regularly scheduled newscasts, triggered equal opportunities obligations. *In re Telegram to CBS, Inc. (Lar Daly)*, 18 Rad. Reg (P&F) 238 (1959). Responding to a complaint by Lar Daly, a perennial candidate who often campaigned dressed as Uncle Sam using the nickname “America First,” the Commission held that the appearance by Chicago Mayor Richard J. Daley in a newscast, welcoming the President of Argentina, triggered equal opportunities.

### ***Congress Establishes Exemptions***

Concerned that the FCC’s *Lar Daly* ruling would “tend to dry up meaningful radio and television coverage of po-

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litical campaigns," S. REP. NO. 562, 86<sup>th</sup> Cong., 1<sup>st</sup> Sess. 10 (1959), Congress promptly amended Section 315 to establish four news-related exemptions for appearances by legally qualified candidates. These included (i) *bona fide* newscasts, (ii) *bona fide* news interviews, (iii) *bona fide* news documentaries (if the candidate's appearance was incidental to the subject of the documentary), and (iv) on-the-spot coverage of *bona fide* news events. P.L. 86-274, Sec. 1, 73 Stat. 557.

In establishing the exemptions, Congress indicated that for news interviews to be considered "*bona fide*," they had to be regularly scheduled and the content, format and participants had to be selected by the licensee through the exercise of "*bona fide*" news judgment, and not for the purpose of promoting the candidate. 105 Cong. Rec. 17777 (1959). The Commission has subsequently determined that for a program to qualify as a *bona fide* news interview, the broadcaster must also retain control of the program. See *Law of Political Broadcasting and Cablecasting*, 69 FCC 2d at 2249; *Multimedia Entertainment*, 56 RR 2d 143 (1984).

### Meet the Press Distinguished From Donahue

In response to early exemption requests, the Commission took the position that programs deviating from the time-honored question and answer format of *Meet the Press* and *Face the Nation* did not constitute *bona fide* news interviews for purposes of Section 315. For example, the FCC held that *The Lou Gordon Program* did not qualify for an exemption because in addition to news interviews, the program typically included interviews with entertainers, authors and sports celebrities. *Joseph A. Gillis*, 43 FCC 2d 584, 589 (B. Bur. 1973).

Along the same lines, the Commission later held that *Donahue* did not qualify as a *bona fide* news interview program. *Multimedia Program Productions, Inc.*, 84 FCC 2d 738 (1981). The Commission observed that the

program often allowed audience members to make statements or ask the guests questions, and there was no showing that selection of audience members was based on any journalistic judgment by the producer of the program. The Commission also asserted that *Donahue's* subject matter did not satisfy the narrow definition of "news" contemplated by Congress. While much of *Donahue's* content was derived from stories in newspapers and magazines, the Commission interpreted Congressional intent to extend the exemption to a very narrow category of "news," which did not include "all public affairs programs, or all programs in which controversial issues of public importance are discussed." *Id.* (referencing *Application by "The Advocates,"* 26 FCC 2d 377, 378 (1970)).

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### Donahue Revisited

Addressing a second exemption request for *Donahue* three years later, the Commission, in a seminal holding, reversed itself. *Multimedia Entertainment, Inc.*, 56 RR 2d

143 (1984). The Commission first noted that the audience participation element was not an unrestrained, open-mike format but that the producer retained control by establishing rules for audience participation, and that the host, Phil Donahue, exercised affirmative control over audience participants.

Revisiting Congressional intent, the FCC this time concluded that an "exhaustive review of the [exemptions'] legislative history does not explain how Congress would define news." *Id.* at 147. For the first time opening the door to exemptions for nontraditional news-oriented shows, the Commission observed that

"[a]ssuming 'Donahue' will regularly schedule [interviews with politicians and candidates] or other *bona fide* news programs dealing with political or other current events, the fact that other 'Donahue' segments may not include discussions pertaining directly to the political arena, or even to

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current news events, would appear immaterial." *Id.* at 148.

*Donahue* thus represented a major shift in the Commission's approach to the *bona fide* news interview exemption, effectively encouraging a wide range of shows to seek such exemptions. Following decades of narrow construction, the Commission had finally, and dramatically, altered its view, asserting that "Congressional intent [was for the Commission] to defer substantially to the good faith news judgments of broadcast licensees." *Id.* at 148.

**From Donahue to Springer to Oprah.**

Since *Donahue*, the Commission has granted "*bona fide* news interview" exemptions to a wide variety of non-traditional news-oriented programs. For example, the

76 RR 2d 825 (1994), and Oprah, *Letter to Counsel*, from Robert Baker, Chief, Office of Political Programming, 000831-HC (Off. Pol. Prog. 2000). These rulings contain scant discussion or analysis, relying instead on the applicants' assertions that the respective programs were analogous to *Donahue*.

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Commission exempted the television program *Politically Incorrect*. Hosted by humorist Bill Maher, the show typically included an opening monologue, followed by a wide-ranging discussion by four panelists, but not in the typical question and answer format. *ABC, Inc.*, 15 FCC Rcd 1355 (M.M.B. 1999). Referencing *Donahue*, the Commission re-emphasized its "willingness to recognize varying[,] less conventional interview formats as being consistent with Congress' overriding intent to increase news coverage of the political campaign process." *Id.* at ¶ 8.

The Commission has also afforded *bona fide* news interview status to non-traditional news vehicles such as Larry King, *Mutual Broadcasting System Inc.*, 56 RR 2d 956 (Pol. Prog. Branch 1984), Sally Jessy Raphael, *Multimedia Entertainment, Inc.*, 6 FCC Rcd 1798 (Pol. Prog. Branch 1991), Jerry Springer, *Multimedia Entertainment, Inc.*, 9 FCC Rcd 2811 (Pol. Prog. Branch 1994), Tom Joyner, *Joyner Management Services, Inc.*, 11 FCC Rcd 22360 (M.M. Bur. 1996), Rolanda, *King World Productions Inc.*,

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poses of the *bona fide* news interview exemption. In particular, the FCC has held that absent bad faith or unreasonableness, it will defer substantially to the broadcaster's good faith determination as to the newsworthiness of a particular topic. In its consideration of the program *Entertainment Tonight*, for example, the Commission noted that the subject matter reported on would not be determinative, but instead the Commission would consider "whether the program reports news of some area of current events." *Paramount Pictures Corp., et al.*, 3 FCC Rcd 245, 246 (Pol. Prog. Branch 1988). Coverage of news in the entertainment field thus qualified for exempt status. Similarly, the Commission has granted an exemption for a radio program that focused solely on religious news. *Rev. Donald L. Lanier*, 37 FCC 2d 952 (B. Bur. 1972).

### Stern Decision

When viewed against the backdrop of the almost 20 years of Commission precedent since the second *Donahue* decision, the FCC's holding that the news interview segments of *The Howard Stern Show* qualify as "*bona fide* news interviews," does not plow new legal ground.

In its Declaratory Ruling Request, Infinity Broadcasting Corporation, which has produced and originated *The Howard Stern Show* on its New York City station WXRK since 1985, demonstrated that (1) the program is regularly scheduled, (2) that Infinity and Mr. Stern retain control over the program and (3) that the format, content, and participants are selected based on their newsworthiness, and not to advance or harm a particular individual's candidacy. Infinity's Request also included anecdotal evidence highlighting recently conducted interviews with numerous political, sports and entertainment newsmakers, covering a wide range of newsworthy topics, and listed more than 220 news interviews that had been conducted on the program during the prior two years – including New York Mayor Giuliani, New York Governor Pataki, New York Yankees pitcher David Wells, Dr. Ruth Westheimer, Paul McCartney, actor James Caan, Simon Cowell, Geraldo Rivera, and the Osbournes.

In its Declaratory Ruling, the FCC's Media Bureau noted the FCC's early inclination only to exempt "programs with traditional question and answer formats," *Id.* at para. 3, but,

citing *Donahue*, observed that the Commission changed course in 1984 because

"it would be unsound to rule that a program involving a unique or innovative approach to interviewing its guests somehow lacks licensee control" because "to do so would discourage programming innovation...."

*Id.* The Media Bureau therefore correctly concluded that, based on Infinity's extensive showing, the news interview segments of *The Howard Stern Show* qualify for exemption, and therefore "that news interviews conducted on that program are exempt from the equal opportunities requirements of Section 315(a) of the Act." *Id.* at para. 5.

Perhaps as a signal to other broadcasters, or as an effort to further increase news coverage of the political process, the Commission also reiterated its prior finding that "licensees airing programs that meet the statutory news exemption, as clarified in our case law, need not seek formal declaration from the Commission...."

*Id.* See also *Letter to Arthur R. Block, Esq., from Milton O. Gross, Chief, Political Programming Branch*, 7 FCC Rcd 6882 (Pol. Prog. Branch 1992); *aff'd Lenora B. Fulani*, 9 FCC Rcd 2258 (1994); *aff'd Lenora B. Fulani*, 49 F.3d 904 (2<sup>nd</sup> Cir. 1995)).

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