Before the
FEDERAL ELECTIONS COMMISSION
Washington, D.C. 20463

In the Matter of:	)	
	)	Notice 2002-13
Notice of Proposed Rulemaking Re:	)	
Electioneering Communications	)	

To: The Commission

COMMENTS OF
THE NATIONAL ASSOCIATION OF BROADCASTERS

I. Introduction and Background.

The National Association of Broadcasters ("NAB")[1] submits these comments in response to the Federal Election Commission's *Notice of Proposed Rulemaking* to implement certain provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA").[2] In the *Notice*, the Federal Election Commission ("FEC" or "Commission") specifically sought comment on proposed rules to define and to implement the prohibition on certain entities making "electioneering communications." NAB hereby submits comments on aspects of these proposed rules that most directly affect television and radio broadcasters.

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[1] NAB is a nonprofit association of radio and television stations and broadcast networks. NAB serves and represents the American broadcasting industry.

[2] Federal Election Commission, *Notice of Proposed Rulemaking*, 2002-13 Electioneering Communications, 67 Fed. Reg. 51131 (Aug. 7, 2002) ("*Notice*").

Since BCRA was signed into law on March 27, 2002, dozens of individuals and entities, including NAB, have filed suit in federal court, together challenging the constitutionality of all of BCRA's major provisions.[3] NAB and other plaintiffs have asserted, *inter alia*, that multiple provisions of BCRA limit and criminalize core political speech protected under the First Amendment, including speech contained in political advertising broadcast on television and radio stations. Recognizing the serious constitutional questions raised by BCRA, the law provides for judicial review by a three-judge panel of the United States District Court for the District of Columbia, with expedited appellate review by the Supreme Court.

The FEC is statutorily obligated, however, to adopt rules implementing BCRA before judicial review of the law can be completed. Although NAB will not reiterate its arguments as to the unconstitutionality of certain provisions of BCRA here, we do emphasize that the FEC should not exacerbate the constitutional problems raised by the legislation by interpreting the term electioneering communications so broadly as to encompass communications beyond paid advertisements. BCRA does not empower the FEC to regulate all political communications but only certain electioneering communications, which, given Congress' clear concern in this legislation with campaign contributions and expenditures and with uses of "hard" and "soft" money, should be

[3] Senator Mitch McConnell, *et al.* v. FEC, *et al.*, Civ. No. 02-582; National Rifle Association of America, *et al.* v. FEC, *et al.*, Civ. No. 02-581; Emily Echols, *et al.* v. FEC, *et al.*, Civ. No. 02-633; Chamber of Commerce of the U.S., *et al.* v. FEC, *et al.*, Civ. No. 02-751; National Association of Broadcasters v. FEC, *et al.*, Civ. No. 02-753; AFL-CIO, *et al.* v. FEC, *et al.*, Civ. No. 02-754; Congressman Ron Paul, *et al.* v. FEC, *et al.*, Civ. No. 02-781; Republican National Committee, *et al.* v. FEC, *et al.*, Civ. No. 02-874; California Democratic Party, *et al.* v. FEC, *et al.*, Civ. No. 02-875; Victoria Jackson Gray Adams, *et al.* v. FEC, *et al.*, Civ. No. 02-877; Representative Bennie G. Thompson, *et al.* v. FEC, *et al.*, Civ. No. 02-881.

limited to *paid* advertisements. In implementing BCRA, NAB also urges the FEC to make clear that radio and television broadcasters are not in any way responsible for enforcing the prohibition on making electioneering communications. Finally, NAB stresses that, in implementing BCRA, the FEC must be cognizant of the limits of its authority and expertise, and not unjustifiably expand that authority to encompass matters more appropriately left to the jurisdiction and expertise of the Federal Communications Commission ("FCC").

II. Electioneering Communications Should Encompass Only Paid Advertising.

The *Notice* requests comment on whether the definition of an electioneering communication should "be limited to paid advertisements." *Notice* at 51136. The answer is unequivocally yes. Indeed, Congress already has spoken to this issue in BCRA's Section 201(a) by expressly exempting from the definition of an electioneering communication many non-paid-for communications, including news stories, commentaries and editorials, as well as candidate debates conducted pursuant to regulations adopted by the FEC. Moreover, the heading of Title II of BCRA – "Noncandidate Campaign Expenditures" – references only *expenditures*, *i.e.*, money paid for programming on broadcast television, cable and satellite systems. Notably absent from BCRA and its legislative history is any discussion of candidate appearances, political communications or issue advertisements for which no money is expended by candidates or their supporters. As the House Report clearly states, "[w]hile the bills bearing the name of our colleagues Mr. Shays and Mr. Meehan have changed and evolved over the years, the *core principal* underlying their legislation has always been

their purported 'ban' on soft *money*."[4] Thus, if no money is exchanged, be it soft or hard, BCRA and its provisions are not invoked.

By definition, a candidate's appearance on an entertainment show, a news program, a news interview, a talk show or a debate does not constitute a campaign expenditure under Title II of BCRA if no consideration is paid to a broadcast station or a cable or satellite system for that appearance.[5] Similarly, if a candidate appears on the air to give a public service or similar announcement and no consideration was paid for the appearance, no expenditure has been made. Simply stated, the above are not exceptions to the definition of electioneering communications – they are fully outside the scope of both BCRA and the Commission's statutory authority to regulate electioneering communications.

III. Broadcasters Should Not Be Expected To Enforce Electioneering Communications Regulations.

In defining the term electioneering communications and in determining the scope of the prohibition on making such communications, the Commission's rules must be clear

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[4] Bipartisan Campaign Reform Act of 2002, House Report No. 107-131(I), July 10, 2001, Cong. Record Vol. 148 (2002) at 1 (emphasis added). *See also* Statement of Senator John McCain, *Campaign Finance Reform*, March 20, 2002: "With the stroke of the President's pen, we will eliminate hundreds of millions of dollars of unregulated soft money . . . ."

[5] As the FEC has recognized, NAB, along with a number of broadcasters, has already petitioned the Commission to amend its regulations to make clear that the sponsorship of a debate between political candidates by a news organization (or a related trade association) does not constitute an illegal corporate campaign contribution or expenditure in violation of the Federal Election Campaign Act. *See* CBS Broadcasting, Inc., *et al.*, *Petition for Rule Making Re: Sponsorship of Candidate Debates by News Organizations* (Apr. 10, 2002). The same principle should apply here, and the Commission should exclude from the definition of an electioneering communication any candidate debates selected by a broadcaster for airing. We therefore urge the Commission to address the pending request for rulemaking expeditiously.

and precise. The myriad parties affected by the disclosure requirements and the prohibitions relating to electioneering communications must have clear notice as to which communications are included and which are exempted from BCRA's reach. Broadcasters in particular should not be burdened with the task of deciding, under vague or contradictory standards, whether advertisements that persons want to air on broadcast stations fall within BCRA's prohibitions.

For example, the Commission proposes to exempt from BCRA's coverage a communication that clearly refers to a candidate if the communication is a public service announcement, or if it promotes local tourism, a ballot initiative, a referendum, or the candidate's business or professional practice. *Notice* at 51136. But an advertisement could, for instance, appear to fall within this proposed exemption while nonetheless praising or criticizing a candidate's business or professional practice or the candidate's position on a ballot initiative, a referendum, or promoting local tourism. Thus, the tone of an advertisement, and not its subject matter or content, could arguably determine whether it is an electioneering communication.

Were broadcasters required to ascertain whether such advertisements and other political programming constitute electioneering communications (or instead fall under an exemption), they may be reluctant to accept any noncandidate-purchased programming that refers to a candidate in any manner, because the task of determining permissible speech would be too onerous. Some broadcasters may simply refuse to air such advertising and programming for fear of civil and criminal liability. This could lead to a further chilling of protected political speech.

To avoid these difficulties, Commission should clarify each relevant entity's responsibility for compliance with electioneering communications regulations. In articulating these responsibilities, NAB urges the Commission to expressly state that broadcasters need not determine before airing any political advertising or program whether (1) such advertisement or program constitutes an electioneering communication; (2) the entity paying for the programming should be prohibited from airing such communications; and (3) the entity that paid for the programming adhered to BCRA's disclosure requirements. Moreover, the Commission must make clear that the inadvertent airing of an "impermissible" electioneering communication will not result in any broadcast licensee civil or criminal liability.

If, however, the Commission determines that broadcasters must play some role in ensuring compliance with the electioneering communications regulations, NAB urges the Commission to carefully craft its regulations to avoid any confusion as to what constitutes an electioneering communication. And in lieu of requiring or expecting broadcasters to pre-screen each and every noncandidate advertisement and program to determine whether an electioneering communication might be included, the Commission should adhere to the long-standing FCC policy governing political programming: so long as a broadcast station is not advancing an individual's candidacy, the agency should rely on the broadcaster's good faith journalistic judgment whether or not to air a program.[6]

[6] *See, e.g.*, Multimedia Entertainment, Inc. ("Sally Jesse Raphael"), 6 FCC Rcd 1798 (1991) (in which the FCC granted broadcasters the discretion to exempt bona fide news interview programs from the lowest unit charge and equal opportunity requirements); *see also Political Programming Policies*, 7 FCC Rcd 678, 683 (1991) (noting that while the licensee has the ultimate responsibility for exercising editorial discretion, there is the built-in safeguard of having FCC jurisdiction over a licensee). Indeed, the Supreme Court has stressed that "broadcasters are entitled under the First Amendment to exercise

In sum, the FEC cannot expect television and radio broadcasters to act as the "enforcers" of BCRA. NAB therefore urges the Commission to promulgate rules to ensure that the entity paying for the advertisement or programming is responsible for compliance with all applicable regulations.

IV. The Commission Should Defer to the FCC's Expertise in Determining the Audience Reach of an Electioneering Communication.

Section 201(a) of BCRA defines certain electioneering communications as those communications that can be received by 50,000 or more persons. The Commission accordingly has solicited comments on how best to determine the size of the audience reached by a broadcast signal. *Notice* at 51133. Calculating the number of persons a broadcast communication reaches, however, is a determination the FCC, and not the FEC, is best equipped to handle.[7]

The *Notice* also asks whether a broadcast licensee should "be required to provide the [FCC] with information regarding the cable system(s) and satellite system(s) that carry it

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'the widest journalistic freedom consistent with [their] public [duties].'" *FCC v. League of Women Voters of California*, 468 U.S. 364, 378 (1984) (*quoting CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 110 (1973)).

[7] In the past, Congress has both recognized and relied upon the FCC's expertise in this area. Section 1008 of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA") required the FCC to develop and prescribe by rule a point-to-point predictive model for determining the ability of individual locations to receive signals in accordance with the signal intensity standard in effect under section 119(d)(10)(A) of Title 17, United States Code. The FCC, in promulgating rules, recommended to Congress that a Grade B signal intensity standard be used as the basis for predicting eligibility of distant TV network signals under SHVIA, but that the location-dependent values are best calculated using the Individual Location Longley-Rice prediction model. *See* In the Matter of Technical Standards for Determining Eligibility For Satellite-Delivered Network Signals Pursuant to the Satellite Home Viewer Improvement Act, *Report*, 15 FCC Rcd 24321, 24322 (2000). Thus, the FCC may choose to use a single or a combination of methods for predicting whether a broadcast signal will reach the 50,000 person threshold.

in order that the cable and satellite systems' audience can be included in the calculation of the number of persons reached by the broadcast station." *Notice* at 51133. As an initial matter, we question the FEC's authority to adopt rules directly regulating broadcasters and other FCC licensees.[8] In any event, were the FCC to adhere to past predictive audience modeling, such information about carriage on cable and satellite systems may be deemed either unnecessary or duplicative of broadcasters' audience reach. The FCC may choose to determine the 50,000 person threshold by utilizing broadcast markets (such as the television Designated Market Area) alone. Alternatively, the FCC may choose to separately define the 50,000 audience reach for cable and satellite systems. The FCC could further delineate between electioneering communications that are disseminated on cable and satellite channels and not on broadcast channels. Given the complexity of these questions, any audience reach reporting requirements imposed on broadcast stations, cable systems or satellite systems should be promulgated by the FCC, the agency empowered with statutory authority to regulate those industries and possessing the relevant expertise.

Further, while Section 201(b) of BCRA requires the FCC to compile and maintain any information the FEC may require to carry out BCRA's regulation of electioneering communications, NAB strongly urges the Commission to defer to the FCC's expertise *before* it promulgates rules requiring another agency to create a database having specified capabilities and characteristics. The Commission's proposal directs the FCC to create a database "searchable by State, congressional district, radio and television station call letters, cable system or satellite system, and radio station frequencies" and solicits

[8] In the Communications Act of 1934, Congress gave broad authority to the *FCC* to regulate communications by wire and radio. *See* 47 U.S.C. § 151.

comment on additional search parameters. *Notice* at 51134. Because the FCC has much greater expertise in defining audience reach, it may find that FEC-defined database parameters constrain or inhibit its ability to best carry out the statutory mandate. The FCC may instead have suggestions for defining the 50,000 person standard and implementing its accompanying database not contemplated by this Commission.

Moreover, the FEC should refrain from making any assumptions as to the speed and ease with which the FCC can create this database. The FCC, for instance, may require additional federal funding and time to create, test and deploy the database system. As the agency statutorily charged with establishing an online database, the FCC is the appropriate agency to formulate its creation and solicit comments as to its search parameters. In the interim, NAB cautions the FEC against relying on the proposed database as "*definitive* evidence of whether a communication could have been received by 50,000 or more persons." *Notice* at 51134. It is the FCC that possesses the authority and expertise to determine audience reach, the reliability of its own database system, and the reporting responsibilities of the entities it regulates.

V. Low Power Television Should Not Be Exempted from Electioneering Communications Regulations.

The Commission states that it proposes to exempt low power television ("LPTV") from its electioneering communications regulations. *Notice* at 51133. However, in enacting the Community Broadcasters Protection Act of 1999 ("CBPA"), which authorized the creation of a Class A LPTV service, Congress expressly stated that Class A LPTV licensees "shall be subject to the same license terms and renewal standards as the [licensees] for full-power television stations except as provided in this subsection." 47 U.S.C. § 336(f)(1)(A)(i). The CBPA required Class A stations to comply with full-

powered television stations' programming requirements, including children's educational and informational programming requirements, sponsorship identification, participation in the Emergency Alert System and political programming regulations. And in implementing CBPA, the FCC stated that it will require "Class A applicants and licensees [to] comply with ....political programming rules ...." In the Matter of Establishment of a Class A Television Service, *Report and Order*, 15 FCC Rcd 6355, 6357 (2000). Thus, Class A LPTV licensees must adhere to the FCC's rules regarding legally qualified candidates for public office, equal opportunities, candidate rates, and the political file. *See* 47 C.F.R. §§ 73.1940-1943. Nowhere in BCRA or its legislative history does Congress contemplate a reversal of its CBPA position to require Class A LPTV stations to adhere to the same regulations as full-powered television stations. The Commission should therefore not exempt Class A LPTV stations from electioneering communications rules applicable to full-powered television stations.

It would, furthermore, be inconsistent to exempt Class A LPTV stations from one set of issue advertising regulations while requiring their strict adherence to another set of issue advertising regulations. Under current FCC rules, if a full-powered television station or a Class A LPTV station accepts issue advertising, the fact that the advertisement aired must be disclosed in the station's public file. *See* 47 C.F.R. § 73.1212; *see also Political Programming Policies*, 7 FCC Rcd 678, 685 n.54 (1991). In addition, a list of the chief executive officers, executive committee or board of directors of the sponsoring group must be maintained in the station's public file for two years. *Id.* Thus, exempting Class A LPTV licensees from electioneering communications regulations would not relieve them from complying with the FCC's existing issue

advertising rules, and would likely lead to greater confusion about the public disclosure obligations of Class A LPTV licensees. In sum, because Congress has already determined that Class A LPTV stations must follow the same programming requirements as full-powered television stations, and the FCC has codified these requirements, including the disclosure of issue advertising, the Commission should not now carve out an exception for electioneering communications.

VI. Conclusion.

For the above-stated reasons, the Commission should, as Congress intended, limit the definition of electioneering communications to paid advertising. NAB also urges the Commission to clearly articulate that broadcasters are not the enforcers of BCRA regulations, and to defer to the FCC's expertise in establishing the standard for measuring audience reach and in creating the relevant database. Finally, Class A LPTV stations, which are statutorily obligated to adhere to political programming rules, should not be exempted from any new electioneering communications regulations.

Respectfully submitted,

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