



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

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**MEMORANDUM**

TO: The Commission  
General Counsel  
Staff Director  
Public Information  
Press Office  
Public Records

FROM: J. Duane Pugh, Jr. *JDP*  
Acting Special Assistant General Counsel

SUBJECT: Comment on Interim Final Rules: FCC Database on Electioneering  
Communications

Attached please find one comment submitted in response to the above Interim Final Rules, published on October 23, 2002 (67 FR 65212). The comment period ended on January 21, 2003, and the attached comment was filed before the deadline.

Attachment

cc: Associate General Counsel for Policy  
Congressional Affairs Officer  
Executive Assistants

**Before the  
FEDERAL ELECTION COMMISSION  
Washington, D.C. 20463**

In the Matter of: )  
 ) Notice 2002-21  
FCC Database on )  
Electioneering Communications )  
  
To: The Commission

**COMMENTS OF  
THE NATIONAL ASSOCIATION OF BROADCASTERS**

**I. Introduction.**

The National Association of Broadcasters (“NAB”)<sup>1</sup> submits these brief comments in response to the Federal Election Commission’s (“Commission”) *Interim Final Rules With Requests For Comments*.<sup>2</sup> The *Interim Final Rules* attempt to define how the Federal Communications Commission (“FCC”) will craft its “electioneering communications” database in order to comply with Section 201(b) of the Bipartisan Campaign Reform Act of 2002 (“BCRA”). NAB again urges that, in implementing BCRA, the Commission must be cognizant of the limits of its authority and expertise, and not unjustifiably expand that authority to encompass matters more appropriately left to

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<sup>1</sup> NAB is a nonprofit association of radio and television stations and broadcast networks. NAB serves and represents the American broadcasting industry.

<sup>2</sup> Federal Election Commission, *Interim Final Rules With Requests For Comments*, 2002-21 Electioneering Communications, 67 Fed. Reg. 65212 (Oct. 8, 2002) (“*Interim Final Rules*”).

the jurisdiction and expertise of the FCC.<sup>3</sup> As discussed below, given the complexity in determining audience reach for over-the-air broadcasts, cable systems and satellite systems, the Commission should defer to the FCC, the agency empowered with the statutory authority to regulate those industries, possessing the relevant expertise and requesting inter-agency deference.

**II. The FCC May Or May Not Conclude That Broadcast Contours Are The Only Method Or Most Appropriate Method For Determining Audience Reach.**

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 solicited comments on how best to determine the size of the audience reached by a broadcast signal.<sup>4</sup> NAB explained in its comments that there are a variety of methods for determining signal reach.<sup>5</sup> Indeed, 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

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<sup>3</sup> See Comments of NAB, In the Matter of Federal Election Commission's Notice 2002-13 Electioneering Communications, Aug. 29, 2002, at 7-9.

<sup>4</sup> Federal Election Commission, *Notice of Proposed Rulemaking*, 2002-13 Electioneering Communications, 67 Fed. Reg. 51131, 51133 (Aug. 7, 2002) ("*Notice*").

<sup>5</sup> NAB Comments at 7.

prediction model.<sup>6</sup> Thus, the FCC may choose to use a single broadcast contour (such as Grade A, Grade B or city grade contour) or a combination of methods for predicting whether a broadcast signal will reach the 50,000 person threshold.

Alternatively, the FCC may choose to determine the 50,000 person threshold by utilizing broadcast markets (such as the television Designated Market Area) alone. Or 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 choices, the FCC specifically requested inter-agency deference:

We also ask that the FEC give us flexibility and discretion to implement the database where appropriate. For example, the NPRM seeks comment on what signal measurement (such as a television station's Grade B contour) should be used to measure whether or not a communication reaches 50,000 or more persons. We ask that the FEC defer determinations like that to the FCC, to be made based upon our expertise and available resources.<sup>7</sup>

Yet despite this request and despite the issues raised by NAB's comments, the Commission tentatively determined that "broadcast contours appear to be the best way to gauge viewership."<sup>8</sup> Accordingly, the *Interim Final Rules* direct the FCC to use the Grade B contour to predict over-the-air broadcast television audience reach. Notably absent, however, from the *Interim Final Rules* is any evidence which supports (1) a

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<sup>6</sup> 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).

<sup>7</sup> Comments of FCC, *In the Matter of Federal Election Commission's Notice 2002-13 Electioneering Communications*, Aug. 29, 2002, at 3.

<sup>8</sup> *Interim Final Rules* at 65215.

justification for ignoring the FCC's expertise or (2) using the Grade B contour standard to the exclusion of other audience predicting models. The Commission's interim conclusion was not based on agency expertise or regulatory experience. Further, the Commission has no engineering staff to best evaluate detailed comments and suggestions on calculating audience reach, *e.g.*, should the Longley-Rice model be incorporated into an audience reach calculation, and if so, how.

Additionally, because the entire over-the-air broadcast system is transitioning from analog to digital transmission, the Commission is ill-equipped to address the myriad issues raised by the transition, including actual audience reach, signal strength of broadcast stations not yet transmitting digital signals at full power, and shifts in community coverage patterns. The only agency suited for addressing these issues is the FCC; accordingly the Commission should heed its request and not mandate database standards that, without proper expert evaluation, may frustrate Congress' intent.

In sum, NAB strongly urges the Commission refrain from mandating to the FCC the use of a Grade B contour or any other audience reach calculation. Moreover, the FCC should refrain from making any assumptions as to the speed and ease with which the FCC can create the database. The FCC will likely 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 criteria.

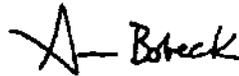
**III. Conclusion.**

For the above-stated reasons, the Commission should not adopt broadcast contour standards for determining audience reach. NAB urges the Commission to defer to the FCC for determinations of whether an electioneering communication can be received by 50,000 or more persons.

Respectfully submitted,

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OF BROADCASTERS**

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