FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

THIS IS THE BEGINNING OF MUR # 4592

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CAMERAMAN EES

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December 3, 1996

MUR4592

Federal Election Commission
999 "E" Street, N.W.
Washington, D.C. 20463

Re: Complaint Against Iowa Public Television

Ladies & Gentlemen:

This will constitute a complaint against Iowa Public Television (IPTV) by the undersigned Jay B. Marcus.

IPTV is a public television broadcaster located at 6450 Corporate Drive, Johnston, Iowa, 50131. The complaint is for violation of CFR § 110.13(c), requiring broadcasters who stage debates to use "pre-established objective criteria" to determine which candidates may participate.

IPTV sponsored five debates which were aired on its Iowa Press Show on consecutive Sundays, beginning September 22, 1996, and ending Sunday, October 20, 1996. One taped copy of the debate of September 22 between Congressman Latham and his challenger MacDonald Smith is enclosed. This same format applied to all five debates. Six third party candidates for U.S. Congress asked to be in these five debates, but their request was denied. The candidates are Jay B. Marcus, Edward T. Rusk, Peter Lamoureux, Michael Dimick, Michael Cuddehe, and Rogers Badgett.

The exclusion of third party candidates by IPTV is the subject of a lawsuit by these plaintiff candidates for federal office. That case, however, only challenges the right of IPTV to exclude the candidates based on a denial of First and Fourteenth Amendment rights under the United States Constitution. A copy of the decision of the trial court and a decision of the 8th Circuit Court of Appeals on plaintiffs' Emergency Motion for an Injunction During the Pendency of an Appeal are enclosed (see the addendum to the Brief; three copies are enclosed).

One of the important issues at the trial was whether the programs at issue were debates. The defendants argued they were just part of the regular weekly Iowa Press news shows and that debates have formal requirements as, for example, set time limits for

answers or rebuttals and an agreement with the candidates on the structure. The judge and the jury rejected defendants' arguments, and on October 3, 1996, the jury found the programs at issue were debates, and the judge agreed. The judge's October 9, 1996 decision begins at page 1 of the Addendum. The ruling on debates appears at page 5 of the Addendum.

The judge and jury properly decided this issue. These debates need not have been inserted into the regular Iowa Press shows (otherwise, what is in substance a debate could be transformed by the process of inserting it into a regularly scheduled program that is typically not a debate, and the show's label would dictate the result). Moreover, the testimony of plaintiffs' expert witness (professor of political science Mack Shelley of Iowa State University) made it clear that political debates take a variety of forms ranging from formal Lincoln/Douglas type debates to the Oprah style town hall debates used in the last two presidential elections (see pages 11-12 and 19-21 of the Brief). IPTV knew of the necessity to use objective criteria, knew the Programs were debates, and intentionally used subjective criteria for selecting candidates in violation of the law.

While IPTV may argue that it did not intend these programs to be debates, it is important to note that there were three debates still remaining to be held on October 3 when the judge and jury made it clear that the programs were debates (the judge orally agreed with the jury on October 3 and furnished his opinion on October 9, when two debates still remained to be held). And IPTV's representatives had previously admitted that the criteria for the selection of candidates was *not* objective, but was, as IPTV's director stated, "extraordinarily subjective." Moreover, defendants had been made aware by the undersigned in my letter of September 6, 1996, of the requirements of CFR § 110.13(c) (pre-established, objective criteria for candidate selection for debates) and, therefore, knowingly violated Federal law (see my letter to IPTV of September 6 and September 12, 1996).

While a public broadcaster may not have to include third party candidates under some circumstances based on the First Amendment claims (the matter is on appeal), the failure of IPTV to use objective criteria is, of course, a separate matter.

In this regard, Michael Newell, the producer of the IPTV programs at issue, testified that the decision about which candidates to invite was "subjective." As can be seen from the enclosed portions of the Brief (pages 25 -31), Newell made his decision based in large measure on which candidates had, in Newell's opinion, a realistic chance of winning or being news at the Iowa Press table. Dan Miller, the programming director of IPTV who affirmed Newell's decision, testified that a decision about who to invite was

based on who was "newsworthy" enough to be in the debates, and that such a decision was "extraordinarily subjective" (see page 22 of Miller's deposition transcript).

Summary

On July 14, 1996, I wrote to Mr. Newell and asked him for the criteria for my inclusion in a debate involving the Republican and Democratic candidates in the Third District Congressional race (see the enclosed letter). Mr. Newell did not respond to that letter or to several follow-up calls that I made, as he admitted at trial (see the Brief, page 5). In addition, on September 6, 1996, I wrote to Mr. Miller, and informed him of the Code of Federal Regulations requiring that debates be based on objective criteria (see the enclosed letter). Again, Mr. Miller never provided me with any objective criteria, and in his later deposition testimony, he said that the criteria for being included was "extraordinarily subjective." At no time did anyone at IPTV attempt to develop objective criteria.

Rather than develop objective criteria, IPTV used admittedly subjective criteria and stated in Mr. Miller's September 10, 1996 response to my September 6 letter, that if I succeeded in having a judge order my inclusion in the debates, IPTV would cancel the debates rather than include me (see the enclosed September 10, 1996 letter from Miller to me).

Because of the nature of this matter, and the extensive testimony that has occurred, I hereby request an opportunity to respond to any materials provided to you by IPTV, and to be informed of matters as they continue. I agree to keep any further information provided to you in confidence during the pendency of this matter, unless, of course, that information is already public by virtue of the lawsuit.

Very truly yours,

Jay B. Marcus

Subscribed to and sworn before me this 3rd day of December, 1996.

Notary Public in and for the State of Iowa.

JBM:chh
Enc.
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REBECCA EATING
MY COMMISSION EXPIRES
February 19, 1998

LAW OFFICES
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EXHIBIT A

September 6, 1996

BY FAX: 515-281-6611

The Honorable Terry Branstad
Governor, State of Iowa
State Capitol Building
Des Moines, Iowa 50309

BY FAX: 515-242-4113

Iowa Public Television
Public Television Center
6450 Corporate Drive
Johnston, Iowa 50131
Attn: Betty Jean Fergerson and Daniel K. Miller

Ladies and Gentlemen:

As you may know, I am a candidate for U.S. Representative in Iowa's third Congressional district. My law firm also acts as counsel to the Natural Law Party of the United States and the Natural Law Party of Iowa.

IPTV is a state agency. As a result, under the recent decision of Forbes and the People v. The Arkansas Educational Television Commission, 1996 U.S. App. LEXUS 22152 (8th Cir.), a legally qualified candidate under state law cannot be excluded from a debate. The exclusion violates the First Amendment, as made applicable to the states through the Due Process Clause of the Fourteenth Amendment.

In view of the recent decision, demand is hereby made that the joint appearances (the equivalent of debates) on Iowa Press between only the Republican and Democratic candidates for U.S. Representative scheduled to begin September 22, 1996, immediately be changed to include all qualified third party candidates. The same demand is made with respect to any future debates for the U.S. Senate seat now held by Mr. Harkin.

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In addition, IPTV, in its Program Guide for September, 1996, describes the new season on Iowa Press as featuring "co-appearances by the *major candidates* seeking to represent Iowa's five congressional districts" (emphasis added). Republican and Democratic party candidates may be "major party candidates," but this is different from calling them the major candidates. Characterizing these candidates in this way is a form of state discrimination against third party and independent candidates. Accordingly, demand is also made that you immediately correct this characterization concerning the viability of candidates made more than two months in advance of the election. As stated in the Forbes case, whether a candidate is viable is a judgment to be made by the people of the State of Iowa, not by those who are deemed officials of government in charge of the channels of communication.

The life of a third party candidate is a constant battle trying to overcome the many obstacles preventing our voices from being heard. Elections should be a time for hearing new ideas, yet only the ideas of two parties are presented. And these two parties largely present what is already popular (and, therefore, calculcated to win votes) as measured by their polls and focus groups. I have, for example, been excluded from a debate sponsored by *The Oskaloosa Herald*, and another by KMA radio, both of which only wanted the Republican and Democratic candidates to participate in the interests of giving all available time to those candidates. In addition, a state supported youth or violence program (Young House Family Services in Burlington) made its facilities available to Democrat Leonard Boswell on a few hours notice, but they refuse to make the facilities available to me. And, of course, newspapers typically report every hiccup by the major party candidates, but often treat third party candidates as if they don't exist. Still, while newspaper and certain media may decide who they want to cover under different legal requirements, state controlled agencies cannot.

In the past, you have scheduled Congressional debates between the major parties, while relegating the third party and independent candidates to appearances at the tail end of the campaign, when there is virtually no time for our appearances to gain support for our candidacies. And segregating the minority candidates for Congress is much like the situation in education that existed before Brown v. Board of Education. That case told us 40 years ago that the concept of "separate but equal" marginalizes the minorities and cast us as inferior in the public eye.

Sometimes it is difficult to see things from a minority perspective, but it should be obvious that times have changed. According to a recent poll, 63% of Americans now

favor the emergence of a third party, and another poll of the chairmen of political science departments says that four candidates can readily be accommodated in a debate format.

I suspect from my conversation with Mike Newell that you intend to distinguish the situation in Iowa from Arkansas and avoid compliance with the 8th Circuit decision. You will not be successful. I suspect that the real question will be, whether, after a court rules on this issue, you will cancel the joint appearances, or let Iowans hear us in a give and take with the Republican and Democratic party candidates. If you review your tapes you will see that when NLP candidates appeared in 1994 along with the major party candidates (i.e., the attorney general and secretary of agriculture appearances), we did fine; no one was embarassed by us, and we made a significant contribution to voter education.

I have already been told that as a third party candidate for U.S. Representative, I will be scheduled for a "meet the candidate" session, rather than included in the joint appearance scheduled for October 6. Accordingly, I will commence an action in the U.S. District Court as soon as possible on behalf of myself and my clients. I believe you are also required as a broadcaster to comply with 11 C.F.R. § 110.13(c) requiring debate sponsors to use "pre-established objective criteria" for the selection of candidates. This will also prompt my complaint to the Federal Election Commission for failure to have pre-established objective criteria other than major party affiliation.

Very truly yours,

Jay B. Marcus

JBM/re

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To Jay Marcus	From Anja
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Dept.	Phone #
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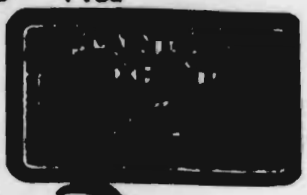

Iowa Public Television

By Fax: 515-472-5404

EXHIBIT B

September 10, 1996

Mr. Jay B. Marcus
Marcus & Thompson, P.C.
Suite 201
51 West Washington
Fairfield, Iowa 52556

Dear Mr. Marcus:

I read with interest your letter of September 6, 1996, in which you demanded that Iowa Public Television include you and "all qualified third-party candidates" on our regularly scheduled news program IOWA PRESS. I appreciate the time you took to set forth your views -- both in your letter and in previous telephone conversations with Mike Newell, the producer of that program.

Political programming at Iowa Public Television is something that matters a great deal to this Network, and we take our responsibilities quite seriously. That's why we offer more political programming than any television station in the state. And that's why this year, as has been the case in the past, all legally qualified candidates for federal offices will be offered access to IPTV's airwaves -- either through regularly scheduled news programming, special election-related programs for those not able to reach constituencies via commercial airwaves, or through airtime made available as a result of "reasonable access" requests under Section 312 of the Communications Act. Except for appearances subject to "reasonable access" and to "equal opportunities" under Section 315 of the Communications Act, decisions about which candidate to invite to which program are judgments that we believe are bona-fide exercises of journalistic discretion protected under the First Amendment, the Communications Act, and the laws of Iowa.

We are very much aware of the decision by the 8th Circuit Court of Appeals in the matter of *Forbes v. The Arkansas Educational Television Commission*. We are also aware that this decision is in direct and fundamental conflict with an opinion of the 11th Circuit Court of Appeals in *Chandler v. Georgia Public Telecommunications Commission*. We believe the 8th Circuit Court is wrong in its decision and the 11th Circuit is correct. For that reason and many others, a number of public television entities support the Arkansas Network in its request for a stay of the *Forbes* decision; Iowa Public Television has contributed an affidavit to this appeal, and we are awaiting the Court's decision.

As our affidavit states, "we do not believe that we can fulfill our obligations as an FCC licensee and our responsibilities to the people of Iowa under Iowa statute if the staff members of Iowa Public Television are prohibited from exercising their good faith journalistic discretion" in assembling political programming that we think best serves the citizens of our state.

Our editorial integrity cannot be preserved if our independent journalistic judgments are compromised. And our independent journalistic judgment is that, by demanding to be included on IOWA PRESS, you are attempting to force Iowa Public Television to confer on your campaign a degree of newsworthiness and public interest that is not warranted.

Consequently, if a stay is not granted, so that the *Forbes* decision applies to Iowa Public Television during the 1996 elections, and IPTV is forced to include you on IOWA PRESS, we would cancel 3rd District candidate appearances on that program rather than compromise the program's journalistic integrity.

We do not think that *Forbes* will apply, however. After a careful review of both decisions of the 8th Circuit in the *Forbes* litigation, Iowa Public Television believes that nothing in those decisions extends beyond political debates. To accede to your demand that we include you on IOWA PRESS would apply the Court's decision to an area that was not considered in *Forbes* -- a regularly scheduled news program -- and would destroy the journalistic integrity of that program. Consequently, your demand to appear on IOWA PRESS is refused.

In a similar fashion, nothing in the Court of Appeals' decision in *Forbes* extends to Advance magazine, Iowa Public Television's program guide. Because of that, your demand that we make editorial changes in the program guide to conform it to your views is also refused.

As you know, as a federal candidate you have a right to "reasonable access" to IPTV's facilities. Please be assured that we are ready to respond promptly to a "reasonable access" request that you may make. And we hope you take advantage of our offer to appear on the Tuesday, October 29th edition of our 1996 Candidate Forum programs, which, as you probably know, will be taped at 12:00 p.m., Sunday, October 27, 1996. These programs will air during the final days of the campaign, when viewer interest in election activities is very high.

Our journalistic standards are principles that we hold in the highest regard. They are a cornerstone of our credibility with the public. They are protected by the First Amendment, the Communications Act, and Iowa statute. And they would be compromised if we are forced to confer on any campaign a degree of prominence that it has not earned on its own.

I hope you will contact me should you desire to take advantage of your "reasonable access" rights, and also hope you will take advantage of your opportunity to appear on our Candidate Forum program.

Sincerely,

Daniel K. Miller
Director of Programming
and Production

cc: Betty Jean Furgerson

EXHIBIT C

LAW OFFICES
MARCUS & THOMPSON, P.C.

Y. ARCUS
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September 12, 1996

VIA FAX TRANSMISSION
Daniel K. Miller, Director
Programming & Production
Iowa Public Television
P. O. Box 6450
6450 Corporate Drive,
Johnston, IA 50131-6450

Dear Mr. Miller:

Thank you for your letter of September 10, 1996. Certainly, I don't intend to undermine anyone's journalistic judgement about who to cover in the news, but even if this were an issue of news coverage, I would hope that journalists would be mindful of he fact that minority voices help educate the public, and historically have been responsible for many of our greatest reforms, including the abolition of slavery, equal rights for men and women, and the abolition of child labor. The issue at stake, however, is not journalistic judgement concerning a news event. This is not simply a matter of reporting the news, but an arm of the state government making the news and sponsoring a debate.

As for your statement that if IPTV was forced to include me in the Iowa Press Show, it would cancel the appearances on the program, I would urge you to reconsider in the interest of voter education and also in the interest of not taking what I believe would be oppressive action against third party candidates *and* the voters of Iowa. First, you would be sending an unmistakable message that third party candidates are so unworthy of inclusion in your debate that you would rather cancel the debate (and deny the public any voter education) than go forward. I also believe such action would not be in accordance with your mandate under the law to provide educational television.

On another matter, you have indicated that I am trying to force IPTV to confer on my campaign a degree of newsworthiness and public interest that is not warranted. This suggests you have thoroughly evaluated my candidacy, which I suspect is not the case. If, however, you have set criteria for the selection of candidates to appear in the debate, I would like to know. I did refer in my letter to the federal law requiring debate sponsors

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to have "pre-established objective criteria" for the inclusion of candidates, and I would reconsider a complaint to the FEC based on your response to this letter. For your information, I am enclosing a copy of the relevant section of the federal regulations. There is a recent amendment that makes the provisions applicable to cable television as well as broadcasters and bona fide newspapers.

I do hope that in the course of this dispute, you will appreciate that I have great respect for Iowa Public Television, and its educational programming, but this current issue is one where I disagree with your conclusions, and I believe the U.S. Constitution is on my side.

Finally, my request for inclusion in the debates was not intended to be simply limited to my candidacy. I am hereby requesting inclusion on behalf of the following NLP candidates for federal office: Michael Cuddehe, Michael Dimick, Peter Lamoureaux, Rogers Badgett and Fred Gratzon.

I will assume that all of us are being denied inclusion in the debates.

Finally, tomorrow or Monday, I will file my complaint, motion for injunction, and supporting papers. I would appreciate hearing who your counsel is so I may discuss with him certain preliminary matters regarding the court activities.

Cordially,

Jay B. Marcus

JBM:chh
Encl.

Page 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JAY B. MARCUS, MARCUS FOR CONGRESS, THE NATURAL LAW PARTY OF IOWA, EDWARD T. RESK OF THE WORKING CLASS PARTY, EDWARD T. RESK FOR CONGRESS, MICHAEL CURRENE, MICHAEL DIRECK, ROGERS BARGETT, PETER LANDMEANS, FRED GRATZON, AND SUSAN MARCUS,

Plaintiffs,

vs. : Civil No. 4-96-cv-80690

IOWA PUBLIC TELEVISION, A STATE AGENCY, AND DANIEL K. MILLER IN HIS OFFICIAL CAPACITY,

Defendants.

TELEPHONIC DEPOSITION OF DANIEL K. MILLER,

taken by Plaintiffs before Ann T. Moyna, Certified Shorthand Reporter of the State of Iowa, at 6450 Corporate Drive, Johnston, Iowa, commencing at 11:35 a.m., Wednesday, September 25, 1996.

ANN T. MOYNA - CERTIFIED SHORTHAND REPORTER

Page 2

APPEARANCES:

For Plaintiffs Marcus (via telephone): JAY B. MARCUS, ESQ.
MARK A. THOMPSON, ESQ.
Marcus and Thompson
51 W. Washington, Suite 201
Fairfield, Iowa 52556

For the Plaintiffs: (via telephone) MARK SHERINIAN, ESQ.
Hanson, Bjork & Russell
1300 Des Moines Building
405 Sixth Avenue
Des Moines, Iowa 50309

For the Defendants: (via telephone) RICHARD MARKS, ESQ.
Dow, Lohnes & Albertson
1200 New Hampshire Ave. NW
Washington, D.C. 20036

Also present: Dave Bohrer

Page 3

INDEX

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Daniel K. Miller	4	34		

Page 4

PROCEEDINGS

DANIEL K. MILLER,

called as a witness by the Plaintiffs, being first duly sworn by the Certified Shorthand Reporter, was examined and testified as follows:

MR. SHERINIAN: First of all, I need to enter into a stipulation with counsel. Counsel, can we have the same stipulation that we had in the preceding deposition of Mr. Newell?

MR. MARKS: Mark, just recite to. I think that's fine. Which stipulation are you talking about?

MR. SHERINIAN: Well, first of all, the stipulation that this deposition is being taken pursuant to the Federal Rules of Civil Procedure, that all objections, except as to the form of the question and responsiveness of the answer, are reserved until time of trial. All defects in the notice of deposition are waived.

MR. MARKS: Yes.

DIRECT EXAMINATION

BY MR. SHERINIAN:

Q. Mr. Miller, would you give your full name and address for the record, please?

A. Daniel K. Miller.

Page 21

discussions here.
I guess what I am trying to say, you could have one discussion about Iowa Press and then some days later you could have a discussion about candidate forums, and some days later, or some hours later, or the next day, could have a discussion about both in one conversation.
Q. Why did– Strike that.
You said that Mr. Newell made the decision to only include the Democratic and Republican candidates.
A. He's the producer of the show. It is his decision. After, you know, he goes through all that, he goes through it trying to put together a show. It's essentially his responsibility. Because I'm the program director I am ultimately responsible for it. I mean, he made the decision and I affirmed it.
Q. And did you affirm that decision before the invitations went out?
A. That's the question that I'm not certain of because I don't remember. I mean, I don't know when the invitation went. I am not sure because I wasn't privy to that part. I wasn't privy to his timetable. I can't answer whether I affirmed it

Page 22

prior to or contemporaneous with those invitations. I just don't remember that.
Q. Why did you affirm his decision to only include the Democratic and Republican candidates on the Iowa Press show?
A. The program to me, as the program director, is a news program. As such, it seeks the most newsworthy, in this case, to your question, candidates, to have on program as guests where reporters can pursue lines of news inquiry. It seems to me that the candidates that were chosen to appear among the candidates that are on the ballot in this state have the most newsworthy campaigns. That's the short answer.
Q. Do you have any specific definition of newsworthiness?
A. There is a lot that goes into that assessment, which is extraordinarily subjective.
Q. Well, give me the best synopsis of your definition of newsworthiness.
A. As it applies to this matter, newsworthiness has a number of elements, I think. Is this candidate or this campaign, is it active in the region that it's running for? If it's a statewide campaign, for example, is it active in

Page 23

all of Iowa's 99 counties or in a majority of them? Does it have–my phrase, not a good one–an organization of volunteers, campaign organization beyond the campaign staff? If the candidate or campaign or party has had previous exposures to elective offices, how have they done? If they have done well, what is well? Are they growing? Is there growth in their success at the polls? Have they had previous exposure to elective office? Are they seeking the office actually to be elected to it or do they say that they are seeking it to bring ideas into the marketplace? How has their fund-raising been? Is it a broad base? Do they have a lot? Do they have little? Whatever.
How are they treated by other media organizations? Have their efforts generated news in other media organizations or if there are debates, have they been included in those debates by other news organizations?
What are we hearing? What are we hearing either from the public or what are we hearing from the campaigns themselves? Are people calling us and saying you know, "Such and such had a crowd of 550 last night," or are they calling us and

Page 24

saying, "Such and such had a crowd of five." The last part, are we hearing anything? What are we hearing from the campaigns themselves?
Politics is an enterprise that relies on the ability of its participants to sell themselves, to retail themselves. What are we hearing along that line? Do we hear a lot from the candidates themselves? Are they calling us? Are they faxing us? Are we getting encouraged by their supporters who happen to be people we know or people we don't know to pay attention to their campaigns? Do we see early indications of retail efforts in that regard in the media? Are they buying newspaper ads? Are they buying radio ads? Did they in their last campaign buy newspaper or radio ads?
There is a lot in what I answered, sir.
Those are some of the things that go into making a very subjective judgment.
Q. Would you describe your answer to include generally most of the criteria that you would use in determining a candidate's newsworthiness for determination of their participation on Iowa Press?
A. I am not trying to be obtuse, but I didn't understand the question, sir.
Q. Okay. The answer you just gave me, this

Page 25

listing of items that you consider in your definition of newsworthiness, are those the criteria that you use in making a decision about newsworthiness?

A. I think those are probably some of the things that are looked at. Criteria is a word that is a little too hard-edged, I think. But those are some of the things that are looked at. I think the notion of support and potential support, with regard to Iowa Press, is important because I think that the people involved in seeking the news on that program, and the producer of it, want to make sure that the people that are on it--and when they are asked about their campaign, that the voters have as much access to them as they can. One of these, in this case two, people are likely to represent them in whatever office they can. That likelihood of representation is probably something that you think about and talk about as well.

Q. Are these criteria that you described, the factors, I think was the term that you used, are they written down anywhere?

A. No. No, not really. No. I think that-- No, I don't remember them-- No, I don't think so.

Q. This is a set of criteria in order to

Page 26

determine whether a candidate is newsworthy enough to be called or invited to participate in the Iowa Press joint appearances; is that correct?

A. No, we don't. I want to go back to your other question, sir. We may have written some of this stuff down in the course of communicating with our attorney. I want the record to be as clear as I can. I'm not trying to duck you.

Q. I am trying to find out whether there is some written document at Iowa Public Television that's not protected by the attorney/client privilege that someone could go to and say, "These are the criteria that we use in making a decision about which candidates to call or invite for the Iowa Press joint appearance show"?

A. No, sir. The answer to your question is no, there is not.

Q. And you have said, I think, on two occasions so far that this is really a subjective judgment that you make in deciding what schedule to put together for these joint appearances; is that correct?

A. The subjective judgment is made by the producer initially in deciding how best to make the programs work. Then in this case it was affirmed

Page 27

by me. They are subjective judgments, yes, sir.

Q. What is generally the purpose of these joint appearances in terms of Iowa Public Television's overall mission?

A. Well, the purpose of the Iowa Press program that features candidates, in this case in joint appearances, is to provide information to the people of Iowa about the campaigns that are being--and the policies that are being waged, the campaigns that are being waged and the policies that are being articulated by the most newsworthy candidates competing for a given office.

Q. Going back to your discussion about the differences between a debate and a joint appearance, is there anything different in terms of the information that is provided to the public in terms of a joint appearance and a debate?

A. I think there is, sir, yes.

Q. What's the differences in information that is provided to the public between a debate and a joint appearance?

A. I think, sir, if I could define joint appearance to mean joint appearance on Iowa Press?

Q. Yes. That's what I intended it to include.

Page 28

A. I think a debate often is used by the campaigns-- Excuse me. Was that question for me? I couldn't hear.

Q. No. Continue please with your answer.

A. I believe that debates are often perceived by the campaigns of the people that are participating in them as ways to advance a cause, ways to advance a campaign. I think the reason that's perceived that way is because of the nature of the debate itself. That allows for candidates to have oftentimes extensive opening and closing statements, but for candidates really to help shape the dialogue that's to take place at that debate. There is no such shaping on a news interview program like Iowa Press. There is little room for the campaigns of the candidates to advance unfettered their cause because there are no rules. I think that the Iowa Press programs will tend to elicit information that is, I think, at least in my judgment, more newsworthy than the information that comes out in the debate.

That's, again, because of the nature of Iowa Press as a news interview program where reporters are free to go wherever they want to go and can pursue a line of questioning as long as

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JAY B. MARCUS, MARCUS FOR CONGRESS, THE NATURAL LAW PARTY OF IOWA, EDWARD T. RUSK OF THE WORKING CLASS PARTY, EDWARD T. RUSK FOR CONGRESS, MICHAEL CUDDEHE, MICHAEL DIMICK, ROGERS BADGETT, PETER LAMOUREUX, FRED GRATZON, AND SUSAN MARCUS,

PLAINTIFFS/APPELLANTS

vs.

IOWA PUBLIC TELEVISION, A STATE AGENCY, AND DANIEL K. MILLER IN HIS OFFICIAL CAPACITY

DEFENDANTS/APPELLEES

NO. 96-3645

APPEAL FROM THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

HON. CHARLES WOLLE

APPELLANTS' BRIEF

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This case is about whether the State, acting in the capacity of a television broadcaster, may discretionarily pick and choose which qualified candidates for Congress will be permitted to participate in public forum candidate debates sponsored and broadcast by the State. Appellants contend that by doing so, and excluding the appellant candidates from the Iowa Press debates at issue, the State of Iowa violated appellants' rights under the First and Fourteenth Amendments to the United States Constitution.

The District Court found that the State has a compelling interest in excluding from its broadcasts candidates deemed not "newsworthy" by the State's journalists. Appellants contend that newsworthiness is not a constitutionally permissible standard determining who shall be granted access to a limited public forum, such as the debates at issue here, and that even if newsworthiness *were* a proper standard, the evidence adduced at trial makes it plain that in the case of the appellant candidates, the State's decision makers based their decision largely on an evaluation of whether they had a reasonable chance of winning the election. Under the controlling case law of this circuit, such considerations are constitutionally unacceptable. Further, the State interests identified below are not *unrelated* to the suppression of speech and the means adopted to achieve them are content based, in direct contravention of appellants' First Amendment rights.

Appellants hereby request oral argument, which is necessary due to the important constitutional rights at stake and the variety of legal and factual issues involved.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

Federal Statutes and Rules

State Statutes

I. PRELIMINARY STATEMENT

Plaintiffs' (Appellants herein) Complaint alleges that defendants proposed to violate their rights under the First and Fourteenth Amendments to the U.S. Constitution by excluding the third party plaintiff candidates from debates sponsored by defendant IPTV, an agency of the State of Iowa. The plaintiffs brought this action seeking declaratory relief and a preliminary and permanent injunction on September 13, 1996. The five debates have now been held by the defendants without the participation of the plaintiff candidates.

Jurisdiction in the District Court was founded on the existence of a federal question arising under the First and Fourteenth Amendments to the U.S. Constitution and under 28 U.S.C. § 1331 (district courts have original jurisdiction of civil actions under the Constitution and laws of the United States), 28 U.S.C. § 1343 (district courts have original jurisdiction to redress a deprivation of rights under color of state law or any right or privilege under the U.S. Constitution), 28 U.S.C. § 2201 (providing that in a case within its jurisdiction, the district court may declare the rights and other legal relations of any interested party), 28 U.S.C. § 2202 (district court may grant necessary or proper relief based on a declaratory judgment), and 42 U.S.C. § 1983 (authorizing a civil action for deprivation of rights under color of any statute).

The basis for jurisdiction in the Court of Appeals is 28 U.S.C. § 1291, granting the courts of appeals jurisdiction from all final decisions of the district courts of the United States. The U.S. District Court for the Southern District of Iowa rendered judgment

October 9, 1996 in favor of defendants. A Notice of Appeal was filed by Plaintiffs with the Clerk of the District Court also on October 9, 1996, in accordance with FRAP Rule 4, and the fee was timely paid on such date.

II. STATEMENT OF ISSUES

ISSUE I.

Does a state television network which hosts a debate of Congressional candidates violate the civil rights of third party candidates when it excludes them from the debate on the grounds that those candidates do not have a reasonable chance of winning the election or are not "newsworthy"?

Forbes v. Arkansas Educational Television Network, 22 F.3d 1423 (8th Cir. 1994)

Forbes v. The Arkansas Educational Television Commission, 93 F.3d 497 (8th Cir. 1996)

ISSUE II.

Is "newsworthiness" an acceptable standard for the State to apply in excluding speakers from a limited public forum?

Forbes v. Arkansas Educational Television Network, 22 F.3d 1423 (8th Cir. 1994) *(en banc)*

Regan v. Time, Inc., 468 U.S. 641, 648 104 S. Ct. 3262, 3267, 82 Law Ed. 2d 487 (1984).

Forbes v. The Arkansas Educational Television Commission, 93 F.3d 497 (8th Cir. 1996)

ISSUE III.

Does the State have a compelling interest in maintaining the "editorial d to suppress speech deemed to be not newsworthy by the State's journalists whic the exclusion of would-be speakers from a limited public forum?

Procunier v. Martinez, 416 U.S. 396, 94 S. Ct. 1800, 1811, 40 L. Ed. 2d ; (1974).

United States v. O'Brien, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679, 20 L.E 672 (1968).

ISSUE IV.

Does the State violate the civil rights of would be speakers when it exclud from a limited public forum based on the discretionary and subjective application general principles, without specific guidelines?

Forbes v. The Arkansas Educational Television Commission, 93 F.3d 497 (Cir. 1996)

ISSUE V.

Whether the State made a determination of newsworthiness of the plaintiff/appellant candidates at or prior to the time it decided to exclude the plaintiff/appellant candidates from the Iowa Press debates.

III. STATEMENT OF THE CASE

A. Nature of the Case

Plaintiffs have filed a Joint Notice of Appeal from the decision of the United States District Court for the Southern District of Iowa, which entered judgment for defendants based on a determination that the debates between the Republicans and Democrats only were limited public forums, but that the State had a compelling state interest in granting Iowa Public Television ("IPTV") editorial discretion, in accordance with the *Principles of Editorial Integrity in Public Broadcasting*, to limit the debates to the Republican and Democratic candidates only (Add., p. 7). The Court further found that the exercise of discretion by the government journalists was a *bona fide* good faith editorial decision to limit participation to the most "newsworthy" candidates, and that the "newsworthiness" standard is a narrowly tailored means to accomplish the State's compelling interest (Add., p. 7-8).

B. Course of Proceedings and Disposition Below

The District Court denied plaintiffs' motion for a preliminary and permanent injunction on September 24, 1996, stating that (1) plaintiffs had not proved irreparable harm — that there was no showing in the record that the alternative appearances offered to the plaintiff candidates by defendant IPTV to appear with other third party candidates at the end of October, 1996, would be less valuable to the plaintiff candidates than the joint appearances with the Republican and Democratic candidates; and (2) that an injunction against defendant IPTV would do harm to the exercise of defendants'

journalistic discretion, outweighing any harm plaintiffs might suffer from not appearing on the planned shows. In its order denying the preliminary injunction, the court stated that there is a very strong public interest in allowing news broadcast journalists to exercise editorial discretion. The Court reasserted this finding in its judgment (Add., p. 6-7).

Trial was held beginning September 30, 1996. It was stipulated prior to trial that all of the plaintiff candidates are duly qualified candidates (Add., at 2-3). In answering the special verdict questions, the jury determined that the programs involving the Republican and Democratic candidates only were debates (Jt. App., p. 529). The jury also determined that the plaintiff candidates were not "newsworthy," as determined by the defendants in the exercise of their editorial discretion (Jt. App., p. 530). The District Court determined that the defendants had a compelling state interest, which was narrowly tailored, in permitting defendant IPTV to exercise journalistic discretion concerning who was newsworthy and should therefore appear in the debates (Add. at p. 6-8).

Subsequently, appellants filed their Notice of Appeal and an Emergency Motion for an Injunction During the Pendency of an Appeal ("Emergency Motion") which was denied by a divided panel of this court on October 11, 1996 (Add. at 11).

C. Statement of Facts

The individuals who are plaintiffs in this action are all duly qualified third party candidates for U.S. Representative in Iowa's five Congressional Districts, except that Fred Gratzon is a duly qualified third party candidate for U.S. Senate, and Susan Marcus

is a registered voter in Iowa who desires to hear the plaintiff candidates participate in forums with Republican and Democratic candidates and other legally qualified candidates. All the plaintiff candidates are representatives of the Natural Law Party, except Edward T. Rusk, who is a representative of the Working Class Party (Add. at 2-3).

The defendant, IPTV, is a state agency owned and controlled by the state of Iowa. The public broadcasting division ("Division") of the Iowa Department of Education exists pursuant to Section 256.81 of the Iowa Code, and IPTV is part of the Division under the direct supervision of the Iowa Public Broadcasting Board ("Board"). Iowa Code § 256.82. The Governor of Iowa directly or indirectly hand picks the Board and can change its membership. Iowa Code §256.82. The Board has nine members, four of whom are appointed directly by the Governor, and two of whom are appointed by the State Board of Regents and the State Board of Education (Id.), both of which are entities all of whose members are also appointed by the Governor, subject to Senate confirmation. Iowa Code §§ 256.3 and 262.2. Iowa law gives the Board the authority to acquire capital equipment and to provide services for education and telecommunications. Iowa Code § 256.84.

Control by the State of Iowa over IPTV extends, importantly, to compensation and funding matters. The compensation of the chief administrator of IPTV is set by the Governor, unless otherwise determined by the Iowa Legislature. Iowa Code § 256.81(1). Various minutes of the Board reflect the frequent interaction of the Board with the Governor and the Iowa Legislature on requests for government funding (Trial Ex. 10, p.

5, 38-39, 59-60; Jt. App. 228 to 232). The State of Iowa provides over 60% of IPTV's funding (Trial Tr., Vol. III at 129, lines 15-19; Jt. App. at 150).

The defendant Daniel K. Miller is the director of programming and production for IPTV and is a state employee. Michael Newell is an agent of IPTV who produces the Iowa Press television shows (Add. at 3), including the debates here at issue. Mr. Newell selected the candidates to appear in the debates (Trial Tr., Vol. II at 280, lines 1-8; Jt. App. at 30), and Mr. Miller affirmed that decision (Trial Tr., Vol. II at 470, lines 5-14; Jt. App. at 71).

Mr. Newell made his decision by mid to late July, 1996, that only Republicans and Democrats would appear in the five debates, each of which was promoted in IPTV's Program Guide and scheduled to air on two occasions on IPTV on consecutive Sundays between September 22 and October 20, 1996 (Trial Tr., Vol. II at 284, lines 7-11; Jt. App. at 34). One airing of each debate was on Sunday at noon and the other was on Sunday at 7:00 P.M. (Trial Ex. 18 at 3; Jt. App. at 239). Sunday evening is the most watched evening on television (Trial Tr., Vol. II, at p. 304 line 1 to p. 306 line 9; Jt. App. at 54 to 56).

Mr. Newell was in his seventh year as the producer of the Iowa Press shows on IPTV (Trial Tr., Vol. II at 279, lines 17 - 25), and in those years there was never a third party or independent candidate invited to appear on any of the weekly Iowa Press shows, including in any of the election year debates between Republican and Democratic Congressional candidates (Trial Tr., Vol. II at 285, lines 2 - 12; Jt. App. at 35).

On July 14, 1996, at or about the time Mr. Newell was making his decision, plaintiff Jay Marcus, a candidate for the Third District Congressional seat, sent Newell a letter stating that Marcus understood IPTV was organizing these debates, and requesting information about the criteria for inclusion in the Third District debate. Marcus' letter to Newell enclosed a press kit, including certain press releases, and other materials describing his candidacy (Trial Ex. 9, p. 23; Trial Tr., Vol. I, p. 202 line 9 to p. 205 line 4; Jt. App. at 19 to 22). When Marcus did not receive a response to that letter, he placed at least two follow-up telephone calls to Mr. Newell, which also went unanswered (Trial Tr., Vol. II, at p. 228, line 12 to 230 line 25; Jt. App. 26 to 28). Marcus finally heard from Mr. Newell approximately six weeks after his July 14 letter (Id.). Marcus was not informed of any criteria for inclusion in the debates. On October 28 Newell told Marcus he would not be in the debate between the Republican and Democratic candidates for the Third District (Id.). Instead, Marcus was offered an appearance on an IPTV program with other Natural Law Party candidates at the end of October (Trial Ex. 26, p. 5; Jt. App. at 268).

Prior to making his decision to exclude Marcus, Newell never asked Marcus for information regarding his candidacy, such as the amount of money he had raised or what he might himself spend on his campaign, how many volunteers or full-time employees he had, how many articles had appeared about him other than those previously sent to Newell some months before August 28, 1996, or how many public appearances he had made (Trial Tr., Vol. II at p. 285, line 22 to p. 287, line 24; Jt. App. at 35-37).

Mr. Newell had received information about Marcus several months prior to Marcus' July 14 letter. Marcus had sent Newell a copy of his new book, *The Crime Vaccine*—a book Marcus had written on crime, arising out of his 1994 race for attorney general of Iowa—and Marcus described the publicity and book reviews generated for the book (Trial Ex. 9 at 31, 34-48; Jt. App. at 210, 213-227). Newell's file on Marcus included Marcus' resume (Trial Ex. 9 at 43-44; Jt. App. at 222-223) showing, among other things, that from 1990 to 1993 he was chairman of an ethics committee of the Iowa State Bar Association; and that he was the author of three books and several professional articles; and that Mr. Marcus' crime book had been selected as the month's best new non-fiction book in the May issue of *Bookviews*.

As Newell's file shows, Mr. Marcus had received significant media coverage in Iowa and elsewhere in the months prior to mid-June, 1996, including 40 radio, television or newspaper accounts through June 12, 1996; and Marcus was beginning to gain national recognition for his book, including a June 1, 1996, appearance on a radio show syndicated to 250 stations around the country and carried simultaneously on radio stations covering most of the Third District where Marcus was running (Trial Ex. 9, p. 34-36; Jt. App. at 213-215).

By August 28, 1996, when Newell informed Marcus that he would not be permitted to participate in the debate involving the Republican and Democratic candidates for the Third District, Marcus had begun actively campaigning for the Third District Congressional seat, and had been featured in a total of 87 radio and television

programs and newspaper and magazine articles, since the initial article about Marcus appeared in *Redbook* magazine's February issue (Trial Ex. 16; Jt. App. at 233-236).

IPTV's Program Guide for September, 1996, was prepared and sent to the printer well before the beginning of September (Trial Tr., Vol. II, at 303 lines 17 to 25, and Trial Ex. 18; Jt. App. at 53, and 237-255). The Program Guide covers programs through Sunday, October 20, and states that the Iowa Press show will feature "co-appearances by the *major candidates* seeking to represent Iowa's five Congressional districts (emphasis added)," referring to the Republican and Democratic candidates by name. The typical Iowa Press show is not advertised up to two months in advance in the Program Guide, as the debates in question were; in the typical case, news decisions are made shortly before the airing of the show (Trial Tr. at p. 301, line 6 to p. 303, line 25; Jt. App. at 51-53; and Trial Exs. 13 and 14).

IPTV claims that it excluded the plaintiff candidates from the joint appearances involving Republicans and Democrats because none of the plaintiff candidates were "newsworthy." Defendant Miller testified that defining newsworthiness is "extraordinarily subjective" (Trial Ex. 20, Miller Depo., at 22, lines 15-18; Jt. App. at 6). He testified that among the elements he ascribed to newsworthiness were (a) whether a campaign had an organization of volunteers beyond the campaign staff, (b) if the candidate has run for office before, how has he done, (c) what are we (IPTV) hearing from the campaign, (d) what are we hearing from their supporters, (e) how their fundraising has been, and whether they have a lot of money, (f) how they are treated by

other media organizations, (g) have they been included in other debates, (h) are they buying newspaper or radio ads, and did they do so in prior elections, and (I) whether crowds are coming to their gatherings. Miller testified that those are just "some of the things that go into making a very subjective judgment" (Trial Ex. 20, Miller Depo. at p. 22, line 21 to p. 24 line 18; Jt. App. at p. 6).

As stated, Mr. Newell, who made the decision about which candidates to include in the debates, never inquired as to any of the foregoing information regarding any of the plaintiff candidates. (Trial Tr., Vol. II, at p. 286, line 1 to p. 287, line 23; Jt. App. at 36-37). Mr. Newell's definition of newsworthiness was more general than Miller's and, in large measure, was based on the candidate's chance of winning the election. Newell said that in evaluating newsworthiness he considered "whether he or she is likely to make news at the Iowa Press table during the telecast and also whether he or she has a reasonable chance of winning" (Trial Tr., Vol. II, at 289, lines 14 - 23; Jt. App. at 39). Mr. Newell also agreed that the determination of newsworthiness was subjective (Trial Tr., Vol II, at 295, lines 13-16; Jt. App. at 45).

In its Trial Brief, IPTV stated that its intention was to "invite only those candidates who would be the most interesting to viewers, that is, *only those candidates with a realistic chance of winning* as judged by the editorial staff based on the information available to them." Mr. Newell conceded at trial that this statement was correct (Trial Tr., Vol. II, at 294 lines 5-14; Jt. App. at 44) (Emphasis added).

Mr. Newell's considerations of what makes a candidate newsworthy *as applied to the Democratic and Republican candidates* also ignored the factors identified by Mr. Miller. With respect to the Democrats and Republicans, Mike Newell had little or no information about certain of those Congressional candidates who were invited to be in their debates, other than their party affiliation. Newell states in his deposition that he included Macdonald Smith, the Democratic candidate for the Fifth District Congressional seat, because he is well known and is a Democratic activist with a realistic chance of winning (Trial Ex. 19, Newell Depo. at 33 lines 4 to 18; Jt. App. at 4), but that there were "no attributes to newsworthiness that Mr. Smith has that did not derive from his Democratic party contacts or affiliation" (Trial Ex. 19, at 35 lines 3-7; Jt. App. at 4). At trial, Mr. Newell concluded that "I think I made the decision [regarding Mr. Smith] because he has a better chance of winning than most of the conventional wisdom will allow" (Trial Tr., Vol. II, at p. 316, lines 1-5; Jt. App. at 63).

Another Democrat, Donna Smith, was running in the Second Congressional District, and Mr. Newell's file contained only two of her press releases, which, at his deposition, is all Mr. Newell said he relied on in inviting her to be in the Second District debate (Trial Ex. 19, Newell Depo. at p. 27, line 21 to p. 28, line 24; Jt. App. at 2; and Trial Ex. 3, Jt. App. at 169 - 175). At trial, Newell further stated that his decision as to whether she was newsworthy was based on "her nomination and affiliation with the Democratic party." (Trial Tr., Vol. II, at 293 lines 6-10; Jt App. at 43).

Professor Barbara Mack, IPTV's expert witness, also defined newsworthiness in a way that is virtually indistinguishable from viability or having the ability to influence or win an election. Professor Mack testified that in assessing "newsworthiness" among the legally qualified candidates on the ballot, a journalist has to ask, among other factors, "Who has the ability to influence an election?" and "Which of the candidates is showing public support that will make him or her a factor in the election?" (Trial Tr., Vol. II, 370 lines 8-24; Jt. App. at 402).

Not until after the commencement of the lawsuit, in an interrogatory posed by defendants' counsel on September 24, 1996, did IPTV ask the plaintiff candidates for information of the kind Mr. Miller said was important to a decision about a candidate's newsworthiness. Counsel for the defendants asked, for example, about the funds raised by the plaintiff candidates in their campaign, the number of employees and volunteers working for them, their public appearances and money spent in the campaign (Trial Tr., Vol. I, at p. 208 line 19 to p. 209 line 24; Jt. App. at 23-24). Marcus and the other plaintiff candidates responded by providing the information set forth in defendant's trial exhibits DD, EE, and FF. As the exhibits indicate, only Mr. Marcus at that time had filed any financial data, and it was filed after the lawsuit commenced and after the decision on which plaintiffs to include in the debates had already been made. The supposedly important financial factor in determining viability or newsworthiness was not something IPTV could have known when the decision to exclude the plaintiff candidates was made.

IPTV has no written list of the criteria to be used in evaluating whether a candidate is newsworthy and should appear on the Iowa Press show or in a debate (Trial Tr., Vol. III, at 8, lines 5-12; Jt. App. at 73), other than the broad guidelines in the *Statement of Principles of Editorial Integrity in Public Broadcasting* (Trial Ex. B; Jt. App. at 270-283), and a document described as "Programming Policy" from an unidentified IPTV manual, which states that IPTV should maintain "maximum objectivity and fairness" in its programming (Trial Ex. GG, Jt. App. at 311-312). The Programming Policy was not included in the exhibits furnished by defendants prior to trial, since it was only discovered during the trial, according to defendants. The lack of any guidance from the *Programming Policy and the Statement of Principles of Editorial Integrity in Public Broadcasting* to the State's decision makers was underscored by the testimony of Mr. Newell, who testified that he did not know of any written guidelines for selecting candidates (Trial Tr., Vol. II, at p. 287 line 24 to p. 288 line 24; Jt. App. at 37-38), and thus could not have been guided by them in making his decision.

Professor Mack Clayton Shelley II, a professor of political science at Iowa State University, was plaintiffs' expert witness. He teaches courses on election behavior, election public opinion, and research methods in political science, among others. Professor Shelley reviewed the Iowa Press joint appearance involving Congressman Latham and MacDonald Smith, which was aired by defendant IPTV on September 22, 1996 (Trial Ex. 6). The same format used in the joint appearance involving Latham and Smith (i.e. reporters asking for an informal opening statement then questioning the two

candidates on the issues) was to be used for all the debates at issue in this case, according to defendant Miller (Trial Tr., Vol. III, at 20 lines 10 to 17; Jt. App. At 74). Professor Shelley's opinion was that the program was a debate because it involved candidates exchanging views directly at each other and being asked more or less comparable questions by interviewers, and because it was a face-to-face affair (Trial Tr., Vol. III, at p. 69 line 7 to p. 71 line 16; Jt. App. at 90-92). He further testified that the actual format in terms of whether there is a stiff or formal set of rules (as would be required by the defendant's expert witness), or a more free flowing exchange, as in other debates, does not make a difference as to whether the event is a debate (Trial Tr., Vol. III, at p. 69 line 7 to p. 71 line 16; Jt. App. at 90-92). Professor Shelley's opinions are described at greater length in a later portion of this Brief.

IPTV's expert witness, Professor Barbara Mack, testified that certain formalities would be necessary in what she would describe as a debate; that usually there is a formal protocol that is agreed upon in advance, negotiations with the candidates over the format, and formal time limits (Trial Tr., Vol. II, at 361-364; Jt. App. at 393-396).

After viewing three videotapes of different styles of debates and hearing the experts, the jury made a finding pursuant to a special verdict that the joint appearances of Republican and Democratic candidates scheduled for airing on IPTV from September 22, 1996, to October 20, 1996, were debates, and the trial Judge agreed (Add. at 5).

Instead of being in the debates with the Republicans and Democrats, the five Plaintiff Natural Law Party Congressional candidates (Cuddehe, Lamoureux, Marcus,

Badgett and Dimick) were scheduled by IPTV to appear all together in a candidate forum that would be a half-hour show to air Tuesday, October 29, 1996 at 6:30 P.M. The remaining plaintiff Congressional candidate, Edward T. Rusk, a candidate for Congress in the Third District, was scheduled to appear in a forum with five other third party Congressional candidates from various districts on an IPTV show to air for a half hour Wednesday, October 30, 1996, at 6:30 P.M. (Trial Ex. 26 at 5; Jt. App. at 268). IPTV did not sponsor a senate debate.

The plaintiff candidates requested to be included in the debates scheduled between September 22 and October 20, 1996, but IPTV denied their request (Trial Exs. 22 -25).

IV. SUMMARY OF ARGUMENT

This case is indistinguishable from the recent eighth circuit case Forbes v. The Arkansas Educational Television Commission, 93 F.3d 497 (8th Cir. 1996) (hereinafter "Forbes II"). The pivotal issue is whether a decision to exclude a candidate from a debate based on a government employee's opinion that the candidate is not "viable," is distinguishable from a decision to exclude a candidate because he is not "newsworthy," when both decisions turn on a subjective evaluation of whether the candidate has a reasonable chance of winning or influencing the election.

Forbes II arose out of a debate staged in 1992 by the Arkansas Educational Television Commission, an agency of the State of Arkansas, between the Democratic and Republican candidates for Congress in the third district of Arkansas. Forbes was a legally qualified candidate in that race who asked to be included in the debate but was

refused. He claimed, among other things, that his exclusion violated the First Amendment as made applicable to the states by the Fourteenth Amendment.

The first time the case came before the Court of Appeals, the court held that Forbes had stated a First Amendment claim and that the defendants were not free to exclude Forbes without a reason sufficient under the First Amendment. Forbes v. Arkansas Educational Television Network, 22 F.3d 1423 (8th Cir. 1994) (*en banc*) (hereinafter "Forbes I") cert. denied. 115 S.Ct. 500 (1994) (petition of AETN), 115 S.Ct. 1962 (1995) (petition of Forbes). The Court of Appeals, in making this determination, concluded that its prior opinion in DeYoung v. Patten, 898 F.2d 628 (8th Cir. 1990) was wrongly decided.

After remand, a jury found (as in the present case) that the decision to exclude the plaintiff Forbes from the debate was not the result of political pressure, and that it was not based on opposition toward plaintiffs' political opinions. In addition, the district court had instructed the jury that the Congressional debate, as set up by the defendant television network, was a "non-public" forum. Judgment was then entered for defendants by the district court.

On appeal again, Mr. Forbes argued that the debate was a "limited public forum," and that the reason given for excluding him — that he was not a "viable" candidate, *meaning that he did not have a realistic chance of winning* ("AETN's point is that Mr. Forbes, in the opinion of the network, had no chance to win." Forbes II, 93 F. 3d at 504)—even if it was the true reason, was legally insufficient. The Eighth Circuit Court

of Appeals agreed, holding that a governmentally owned and controlled television station may not exclude a candidate, legally qualified under state law, from a debate organized by it on grounds that in the opinion of the network he had no chance to win, stating that the public television stations' opinion "on such a debatable matter as the political viability of a candidate more than two months before the election [cannot] be a sufficient basis for narrowing the channels of public discourse." Forbes II at 93 F.3d 497, 504 (8th Cir. 1996).

In this case, the government journalists excluded the plaintiff candidates, based on their admittedly subjective belief that the plaintiffs were not "newsworthy," which was based primarily on their assessment that the plaintiff candidates did not have a reasonable chance of winning the election. A distinction between a subjective opinion to whether a candidate is "viable," and whether he is "newsworthy," was also made by the split decision of a three judge panel of this Court in denying plaintiffs' Emergency Motion (Add. at 19). This is the pivotal issue in this case.

Appellants maintain that there is little, if any, difference between a decision as to whether a candidate is "newsworthy," as that term was applied to plaintiffs by IPTV, or is "viable," as that term was used in Forbes II, since both standards focus on whether the candidate could influence or win the election. This is discussed more fully below.

As in Forbes II, the programs at issue here were debates. The jury and the District Court both found that the five "joint appearances" scheduled by IPTV were debates after

evaluating the credibility of the expert witnesses of the parties, and after viewing all or a portion of three different forums or debates utilizing different formats.

But the District court, and this Court (in deciding plaintiffs' Emergency Motion) determined, unlike the holding in Forbes II, that the State of Iowa had a compelling state interest in allowing its government journalists the discretion to determine who should be in government sponsored debates based on the newsworthiness of the candidates. Neither the District Court nor the three judge panel considered that the state interest was not *unrelated* to the suppression of speech. See e.g., Procunier v. Martinez, 416 U.S. 396, 94 S. Ct. 1800, 1811, 40 L. Ed. 2d 224, 413 (1974). A state interest in granting government employees the power to decide who can speak at debates cannot override the First Amendment right of political speech. The state interest must be unrelated to speech, such as an interest in protecting public health, welfare, or morals. (Id.) Moreover, any compelling state interest must be narrowly tailored. A state interest in giving journalists the editorial *discretion* to make evaluations about a candidate's newsworthiness is the opposite of *narrow tailoring*, and since plaintiff candidates did not have an opportunity to be heard equivalent to their participation in the debates, the First Amendment rights of the plaintiffs were violated.

V. ARGUMENT

A. The Standard of Review

IPTV is an arm of the State of Iowa, and the scheduled broadcasts were properly determined to be limited public forums. The District Court, however, evaluated the

sufficiency of the reasons for the exclusion of plaintiff candidates from the forums and found that the State had a compelling interest that outweighed the plaintiffs' First and Fourteenth Amendment rights. These issues were recently considered by the Eighth Circuit Court of Appeals in Forbes II, which also considered the standard for review. Citing Bose Corp. V. Consumer's Union, 466 U.S. 485, 508, 104 S. Ct. 1949, 1963, 80 L. Ed. 2d 502 (1984), Forbes II concluded the standard of review is de novo on dispositive constitutional issues. Forbes II at 93 F. 3d 497, 503 (8th Cir. 1996).

B. Like Arkansas Educational Television, IPTV is a Governmentally Owned and Controlled Television Station

IPTV has stipulated that it is a state agency (Add. at 3), and it is owned and controlled by the State of Iowa. The public broadcasting division derives its creation from the Iowa Code, the Governor directly or indirectly appoints a majority of the IPTV Board (Iowa Code §§ 256.3, 256.82 and 262.2), the Governor or Legislature sets the salary of the chief administrator of IPTV (Iowa Code § 256.81(1)), and the minutes of IPTV reflect frequent interactions between IPTV and Governor or the Iowa Legislature on money matters (Trial Ex. 10 p. 5, 38-39, 59-60, Jt. App. at 228-232), resulting in approximately 60% of IPTV's funding coming from the State of Iowa (Trial Tr., Vol. III at 129 lines 15-19; Jt. App. at 150).

Defendants argue that the State of Iowa has established IPTV as an institution of the press to serve Iowans free from political pressure within or without the state government. The District Court found that Iowa law expressed a compelling

governmental purpose in having the defendant network operate according to the Communications Act of 1934 and the policies of the Federal Communications Commission, and that IPTV's exercise of journalistic discretion meets generally accepted industry broadcasting standards. (Add. at 7). But these arguments and findings fail to account for what is expressly recognized in Forbes II: government journalists are in a different category from ordinary journalists.

While IPTV may be insulated to a degree from the Iowa Legislature, that insulation essentially consists of a statutory provision that the IPTV Board is to appoint an advisory committee on editorial integrity and that the Public Broadcasting Division is to be governed by the national principles of editorial integrity. (Iowa Code ¶ 256.82 (3)). These are broad principles that do not narrow the journalist's discretion. Forbes II recognizes that journalistic judgments and the editorial discretion exercised by government employees at IPTV have to be viewed differently from those of private sector journalists. As the court in Forbes II stated:

> We have no doubt that the decision as to political viability is exactly the kind of journalistic judgment routinely made by newspeople. We also believe that the judgment in this case was made in good faith. But a crucial fact here is that the people making this judgment were not ordinary journalists: they were employees of government. The First Amendment exists to protect individuals, not government.

Forbes II at 93 F.3d 505. Even if IPTV were protected from the Legislature by statutory provisions, IPTV is itself the government, and the voters and the plaintiff candidates are entitled to be protected by the First Amendment from IPTV's subjective decisions.

Obviously, a government employee knows the Republicans and Democrats control the IPTV purse strings, and as David Bolender, the executive director of IPTV (the chief administrator) acknowledged, if IPTV decides its "going to only allow Democratic and Republicans on these candidate forums or the Iowa Press show, it's probably not going to make anybody mad at the statehouse." (Trial Tr., Vol. III at 130 lines 11-17; Jt. App. at 151). Of course, if IPTV were to make somebody "mad at the statehouse," the statutes that supposedly insulate IPTV from other parts of Iowa's state government could simply be repealed or amended by the legislature, or funding could be denied. This ever present threat renders IPTV's much vaunted "insulation" illusory.

C. The Joint Appearances are Debates

In this case, defendant IPTV did not characterize its planned sessions involving only the Republican and Democratic candidates as debates. Instead, it referred to them as "joint appearances"; it argued that it was just reporting the "news," and that it should be able to make journalistic judgments about its shows. But regardless of whether the programs are "news"(and certainly every debate between Republicans and Democrats running for political office is newsworthy), they are also debates and limited public forums.

Professor Shelley testified that the forums involving the joint appearances by Republican and Democratic candidates scheduled for consecutive Sundays between September 22, 1996 and October 20, 1996 were be debates even though they occurred on the Iowa Press show, which is a regularly scheduled news program (Trial Tr., Vol. III, at

81 line 17 to 82, line 11; Jt. App. at 102-103). Professor Shelley's opinion was that the program he viewed involving Congressman Latham and Democratic candidate MacDonald Smith (which aired September 22, 1996) was a debate because it involved candidates exchanging views directly and being asked comparable questions, and because it was a face-to-face affair. (Trial Tr., Vol. III, at p. 69 line 7 to p. 71 line 16; Jt. App. at 90-92). Professor Shelley said his opinion would not change regardless of whether the candidates made informal or formal opening statements, or whether the introductory statement is delivered from a podium or while sitting down, whether there is a specific length of time for an opening statement, or whether there is a specific agreement between sponsors of the program and candidates as to the length of time they will have for answers. He further stated that his opinion represents a consensus among his colleagues to whom he speaks at conferences and through publications. (Trial Tr., Vol. III, at 82 line 12 to 84, line 15; Jt. App. at 103-105).

Professor Shelley disagreed with the defendants' expert, Professor Mack, who testified that debates usually require formalities, including set time limits for answers or formal rebuttals (Trial Tr., Vol. II, at 361-364; Jt. App. at 393-396). Professor Shelley testified there has been an evaluation in our understanding of what constitutes a political debate from the famous Abraham Lincoln/Stephen Douglas debates to more conversational-type styles, and even the town hall or "Oprah Winfrey" kind of approach used in the second presidential debate in 1992. (Trial Tr., Vol. II, p. 111 line 1 to p. 114, line 15; Jt. App. at 132-135).

Plaintiff Marcus testified that the essential value of a debate to him was its face-to-face opportunity to appear with opposing candidates, allowing the voters to hear him respond to the same questions as the other candidates and to hear Marcus challenge his opponents, if able to do so, on the campaign issues. Marcus testified that being a talking head in some show that is segregated from the opposing candidates, or being in a "Greek chorus" with four others from the Natural Law Party, did not have the same value to his campaign (Trial Tr., Vol. I at p. 164, line 6 to p. 165, line 8; Jt. App. at 17-18).

The jury and the Court found that the joint appearances were debates (Add. at 5) after hearing and observing three video taped debates and Professor Shelley's comments thereon, those debates being: (1) the entire debate involving Republican Congressman Latham and Democrat MacDonald Smith, which aired September 22, 1996; (2) the entire debate involving plaintiff Marcus and the Republican and Democratic candidates for U.S. attorney general in 1994; and (3) a portion of the PBS debates aired on IPTV September 29, 1996 involving Republicans Newt Gingrich and Trent Lott and Democrats Richard Gephardt and Tom Daschle (Trial Exs. 6 and 8; Trial Tr. 84 line 24 to 86 line 4 and Trial Tr. 110 line to 114 line 14; Jt. App. 105-107 and 131-135).

D. The Debates are Limited Public Forums and All Qualified Candidates Are Entitled to Participate.

Each debate here, like the debate in Forbes II, is a particular program on a particular show (Iowa Press), among the numerous programs broadcast by the television station each day. The plaintiffs in this case sought access only to the joint appearances

involving the Republicans and Democrats and scheduled for consecutive Sundays beginning September 22 (Trial Exs. 22, 24 and 25; Jt. App. at 256-263). The candidates were not seeking general access to the Iowa Press shows, and whether the Iowa Press programs are regularly scheduled "bona fide news interview programs" is irrelevant to the determination of whether the programs in question were limited public forums or debates.

Although the jury found that the Iowa Press programs were bona fide news interview programs, this does not change the fact that they are also debates. Notably, these particular programs are different from typical news shows. They are scheduled months in advance and advertised in the Program Guide, whereas typical Iowa Press shows are not advertised and have their guests determined only shortly before the shows air (Trial Tr., Vol. II, p. 301 line 6 to p. 303, line 25 and Trial Exs. 13 and 14; Jt. App. at 51-53). News typically is not scheduled in advance and these debates could just as well be shown on IPTV without being part of the Iowa Press news programs.

In all events, as the court in Forbes II held, it is the *particularized* forum (the debate programs), which is the focus of analysis, not IPTV or the Iowa Press shows generally. Forbes II at 93 F.3d 497, 503. Here, the plaintiff candidates were not seeking access to just any Iowa Press program. The sole forum at issue are the pre-election congressional candidate debates held on IPTV.

It does not matter what Iowa Press does on its shows at other times of the year, nor would it matter if the particular programs at issue could be distinguished from a debate in some respect. If IPTV, for example, were to insert a debate into a regularly scheduled

news show that generally did not have debates, that would not change the nature of the forum or turn it into something else; the key is whether the forum in question, regardless of whether it is a debate, is a limited public forum. Even if the programs at issue were not debates, any forums which are so similar to debates that both the jury and the District Court concluded they were or would be perceived as debates, should be treated like the debates in Forbes II (Add. at 5). In August, 1996, Forbes II said, *"without reservation,"* that the debate in that case was a limited public forum, similar to situations where a University opens meeting facilities for use by registered student groups, or where advertising space is made available on a public bus. Forbes II, at 503, citing Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981) and Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S. Ct. 2714, 41 L.Ed. 2d 770 (1974), among other cases. The debates in the instant case are no different, and the District Court determined that the debates in the instant case are limited public forums (Add. at 6).

The jury here found that the defendants intended to open the debate to the Republican and Democratic candidates (Jt. App. at 531). Forbes II concluded that under such circumstances, Arkansas Educational Television had to open its facilities to *all* candidates on the ballot. Forbes II states that:

> The debate was surely a place opened by the government for a limited class of speakers. Who was that class? Was it all candidates for Congress legally qualified to appear on the ballot, or was it simply the Republican and Democratic candidates? Surely government cannot, simply by its own *ipse dixit* define a class of speakers so as to exclude a person who would naturally be expected to be a member of the class on no basis other than party affiliation. It must be emphasized that we are dealing here with

political speech by legally qualified candidates, a subject at the very core of the First Amendment, and that exclusion of one such speaker has the effect of a prior restraint — it keeps his views from the public on the occasion in question.

Forbes II, 93 F.3d 497, at 504.

E. As in Forbes II, the Decision of IPTV Was Made Months in Advance of the Election, Was Based in Whole or in Part on Whether Plaintiffs Had a Reasonable Chance of Winning the Election, and Was a Subjective Decision.

1. The decision to exclude third party candidates was made and affirmed in July or August, 1996, months before the election.

The parties stipulated that Michael Newell, who produced the Iowa Press television shows, including the debates here at issue, is an agent of IPTV (Add. at 3). He initially selected the candidates to appear (Trial Tr., Vol. II at 280 line 24 to p. 283 line 25; Jt. App. at 30-33), and defendant Miller affirmed that decision (Trial Tr., Vol. II at 470 lines 5-14; Jt. App. at 71). The decision was made by Newell in mid to late July, 1996 (Trial Tr., Vol. II at 284 lines 1-11; Jt. App. at 34), months in advance of the election, and the Program Guide stating that only Republicans and Democrats would appear was printed in August. (Trial Ex. 18, p. 3; Jt. App. at 239).

The defendants may claim that they attempted to update their decision continuously or at a later time, but Mr. Newell knew Marcus stood ready to supply necessary information since Marcus asked about the criteria, sent certain information to Newell, and repeatedly phoned Newell to try to find out what he had to do to get into the debates (Trial Tr., Vol II at p. 228 line 12 to p. 230 line 17; Jt. App. a 26-28). IPTV was not interested in giving Marcus or the others a chance to provide more information,

however, and Newell never responded to Mr. Marcus' request for information about the criteria for inclusion in the debates or requested further information about his candidacy or those of the other plaintiff candidates (Trial Tr., Vol. II, p. 285 line 18 to p. 287 line 24; Jt. App. at 35-36). No information was requested of any plaintiff candidate about their candidacies until September 24, 1996, *after* the litigation had commenced Id.; and Trial Tr., Vol. 1 at p. 208 line 19 to p. 209 line 29; Jt. App. 23-24). Moreover, IPTV made it clear in Mr. Miller's letter to Mr. Marcus of September 10, 1996, that rather than being interested in additional information about candidates on which to base its decision, if Marcus prevailed in litigation "[IPTV] would cancel the third district candidate appearances on that program rather than [include Marcus]" (Trial Ex. 23; Jt. App. at 260).

2. The decision to exclude the plaintiff candidates was based in whole or in part on IPTV's opinion that they did not have a reasonable chance to win the election.

In a two-to-one decision, this Court denied plaintiffs' Emergency Motion, drawing a distinction between a government decision of political "viability" (whether the candidates had a realistic chance of winning), which the Court of Appeals said in Forbes II is ultimately for the voters to decide, and "newsworthiness," which, this Court held in ruling on the Emergency Motion, is a decision within the discretion of government journalists. (Add. at 19).

First, the testimony of IPTV's journalists makes it clear that, at least in the instant case, the decision as to whether the plaintiff candidates were "newsworthy" was, in whole or in large part, a decision as to whether or not they could win or influence the

election. As set forth earlier in the Statement of Facts, Mr. Newell, who selected the candidates, testified that his definition of a candidate's newsworthiness involved "whether he or she has a reasonable chance of winning" (Trial Tr., Vol. II at 289, lines 14-23; Jt. App. at 39). Newell specifically agreed with the statement in defendants' Trial Brief that IPTV "decided to invite *only* those candidates that would be the most interesting to viewers, that is, *only those candidates with a realistic chance of winning* as judged by the editorial staff, based on the information available to them" (Trial Tr. at 294 lines 5-14; Jt. App. at 44) (Emphasis added.). Newell also concluded that with respect to Democrat MacDonald Smith's inclusion in the Fifth District debate, "I think I made the decision [regarding Mr. Smith] because he has a better chance of winning than most of the conventional wisdom will allow" (Trial Tr., Vol. II at p. 315 line 21 to p. 316 line 5; Jt. App. at 62 to 63).

Moreover, Professor Barbara Mack, Iowa Public Television's expert witness, defined newsworthiness in a way that makes it virtually indistinguishable from viability, or having the ability to influence or win an election. Professor Mack testified that in assessing newsworthiness among the legally qualified candidates on the ballot, a journalist has to ask:

> [W]ho has the ability to influence an election? Who has demonstrated that he has attracted or she has attracted support? Which of the candidates is conducting rallies where people attend? Which of the candidates has been door knocking and getting people to sign his or her petition? Which of the candidates is raising money? Which of the candidates is having successful fundraisers? Which of the candidates is showing that he has a snowball of public support that will make him or her a factor in the election? (Trial Tr.,

"extraordinarily" subjective decisions.

As in Forbes II, while to some extent the criteria employed here may be considered objective, whether the plaintiff candidates were "viable" or "newsworthy" is essentially subjective. Both Mr. Newell, who made the decision, and Mr. Miller, who confirmed it, admitted as much; Mr. Newell testified that newsworthiness was a concept that was "subjective" and defendant Miller testified that it was "*extraordinarily* subjective" (Trial Tr., Vol. II, p. 295 lines 13-14; Trial Ex. 20, Miller Depo., p. 22 lines 17-18; Jt. App. at 6 and 45). For example, Mr. Miller said that whether the candidate has a lot of money is important, but in order to be deemed "newsworthy," precisely how much money must a candidate raise, and when public appearances are important, how many public appearances must he make, how many ads must he purchase and in which publications? Certainly the decision to exclude Marcus and to include only Democrat and Republican candidates was made despite the fact that Marcus had issued many more press releases and had received more media coverage than certain of the Republican or Democratic candidates (compare Trial Ex. 9 to Trial Ex. 1-4; Jt. App. 179-227 to 162-178). By August 28, 1996, when Newell had failed to provide Marcus with any criteria for inclusion in the debates, Marcus' media coverage in Iowa and elsewhere included 87 radio or television broadcasts or print articles since February, 1996, (Trial Ex. 16; Jt. App. at 233-236).

If IPTV made a real decision based on newsworthiness, it made it without seeking information from Marcus or any of the plaintiff candidates about the money they had raised, the volunteers they had, the number of their full-time employees, whether they

had been included in other debates, whether they were buying newspaper or radio ads, whether crowds were coming to their gatherings, or other factors (Trial Tr., Vol. II at p. 286, line 1 to p. 287, line 23; Jt. App. 36-37) This information was asked of Marcus and the other plaintiff candidates only *after* this lawsuit was filed, and there is no way that Newell or anyone else but Marcus or the other plaintiff candidates would have known the financial information since no financial data was filed with any regulatory body until September 19, 1996, when Marcus first filed financial reports (Trial E, DD, EE, and FF; Jt. App. at 284-310). Factors such as the number of employees or volunteers, whether the candidates were buying ads, how many people were coming to their public appearances, and what the reaction was of those attending the candidate appearances are also all factors that could hardly be known to anyone but the candidates and their staffs.

One of the problems with subjective evaluations of this nature is that they provide for no accountability because they are so dependent on personal opinion and are so arguable. They therefore provide government employees with virtually unlimited discretion to exclude candidates as they wish, thus giving the public no confidence in the decisions of those involved in public broadcasting. Forbes II addressed these same concerns. Forbes II, 93 F.3d at 505. Forbes II considered whether a state owned television network could constitutionally invite to a state sponsored debate only those candidates whom it deemed to have a reasonable chance of winning the election based on a *subjective* analysis. This Court stated:

"AETN's point is that Mr. Forbes in the opinion of the network, had no

chance to win. It therefore decided that its viewers should not hear Mr. Forbes' opinions as part of the debate involving the other candidates qualified to appear on the ballot.

We do not think AETN's opinion on such a debatable matter as the political viability of a candidate for Congress more than two months in advance of the election can be a sufficient basis for narrowing the channels of public discourse. AETN itself characterizes the criteria it used as follows: 'While these criteria can to some extent be considered objective, ultimately their use is essentially subjective.' Brief for Appellees 30. In a sense, the State of Arkansas had already, by statute, defined political viability. Mr. Forbes had gathered enough signatures to appear on the ballot. So far as the law was concerned, he had equal status with the Republican nominee and the Democratic nominee. Whether he was viable was, ultimately, a judgment to be made by the people of the third congressional district, not by officials of the government in charge of the channels of communication. . . . *The question of political viability is, indeed, so subjective, so arguable, so susceptible of variation in individual opinion, as to provide no secure basis for the exercise of governmental power consistent with the First Amendment*" (emphasis added).

Id. At 504-505.

Here, the question of "newsworthiness" is no less subjective, no less arguable, and no less susceptible of variation in individual opinion than was the question of viability in Forbes II; indeed, it is virtually the same question. If anything, "newsworthiness" is the more subjective and arguable standard (it is, after all, "extraordinarily subjective") (Trial Tr., Vol. II, p. 295 lines 13-14, Trial Ex. 20, Miller Depo., p. 22 lines 17-18, Jt. App. at 6 and 45). Here the decision involved was made approximately the same amount of time prior to the election as was the decision in Forbes II—more than two months. To purport to meaningfully distinguish this case from the situation in Forbes II, is to "distinguish the indistinguishable," as Judge Beam wrote in his dissent from the Order denying

appellants' Emergency Motion (Add at 24).

F. The State Has Identified No Legitimate Compelling State Interests to Support its Policies.

1. The state interests identified are not unrelated to the suppression of speech.

The State has identified two potential interests which it claims justify its exclusion of the plaintiff candidates from the debates. The first is a need on the part of the State to exercise editorial discretion over IPTV's programs. The other, related, interest is the need to maintain licensee responsibility under the Federal Communications Act.

In deciding for defendants, the District Court determined that the State had a compelling interest in presenting newsworthy programs that could override the First Amendment rights of plaintiffs. The District court stated:

> It is profoundly important that the network and its news editors be allowed to exercise independent journalistic and editorial judgment based on newsworthiness. If the defendant network may not exercise editorial discretion in determining the content of its programming the network would be fundamentally bland and of little value to the public it serves.

(Add. at 7). This reasoning ignores the constitutional requirement that the state interest must be *unrelated* to the suppression of speech. See e.g. Procunier v. Martinez, 416 U.S. 396, 414 94 S. Ct. 1800, 1811, 40 Law. Ed. 2d 224 (1974); United States v. O'Brien, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679, 20 L.Ed. 2d 672 (1968). This principle was argued to the District Court and to the Court of Appeals in connection with plaintiffs' Emergency Motion, but was not addressed in either court's decision.

Here, of course, the defendants' asserted interest is the right to pick and choose which candidates will be permitted to speak in its debates — in other words, the right to edit. Obviously, the power to edit includes, and consists primarily of, the right to suppress expression. As stated by the U.S. Supreme Court, in speaking of *commercial* broadcasters,

> for better or worse, editing is what editors are for; and editing is selection and choice of material. That editors — newspaper or broadcast — can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values.

Columbia Broadcasting System v. Democratic National Comm., 412 U.S. 94, 124-25. Of course, this court has previously stated unequivocally that state-owned broadcasters face constraints *not* faced by commercial broadcasters. Forbes I, 22 F. 3d at 1428.

The interest in exercising editorial discretion asserted by the State violates the First Amendment due to the fact that it is irrefutably "related to the suppression of free expression," and is not related to some other objective, such as protecting public health, safety, or morals. See Day v. Holahan, 34 Fd. 1356, 1362 (1994); O'Brien, 391 U.S. at 377. If a state interest in the suppression of free expression could override the First Amendment, statutes authorizing general censorship would be permissible.

It is important to note that appellants are not challenging the state's ability to exercise independent journalistic and editorial judgment in contexts outside public forums. It is only when the state opens a public forum that appellants contend its editorial discretion must give way to the First Amendment rights of its citizens. IPTV's

responsibilities and prerogatives with respect to its programming in general would not be affected by the relief appellants seek.

It must also be kept in mind that on the other side of the equation, as in Forbes II, "we are dealing here with political speech by legally qualified candidates, *a subject matter at the very core of the First Amendment*, and that exclusion of one speaker has the effect of a *prior restraint*—it keeps his views from the public on the occasion in question." Forbes II, 93 F.3d at 504. (Emphasis added).

The other interest asserted by the State and adopted by the District Court to justify the State's exclusion of the Plaintiff candidates is an asserted need to maintain programming discretion under the Federal Communications Act (Add. at 7). The import of this claim, however, is that by passing the Federal Communications Act, Congress manufactured a state interest which justifies the suppression of speech, which suppression would otherwise be impermissible under the First and Fourteenth Amendments. Congress does not have the power to relieve the states of their obligations under the First and Fourteenth Amendments short of an outright amendment to the Constitution. In other words, Congress cannot make it permissible for the State of Iowa to do what it otherwise could not do under the First Amendment simply by passing the Federal Communications Act. As a matter of law and logic, this asserted state interest cannot be a compelling state interest for the purposes of this analysis.

Moreover, both Communications Act concerns and the interest of the State in furthering public broadcasting decisions would also have been factors in the Forbes II

case,[2] yet this court held that the First and Fourteenth Amendment compelled the state to include Mr. Forbes in the debate.

2. Subjective types of oppressive government conduct are what the First Amendment is designed to prevent.

This Court stated that "professional broadcasters are generally better aware of what constitutes appropriate programming than a group of federal judges; it is clearly in the public interest in having a state-operated public television free of unnecessary interference by a federal court" (Add. at 24). The difficulty with this analysis is that IPTV *is* the government, and the federal courts cannot abdicate their duty under our system of checks and balances to prevent "extraordinarily subjective" decisions that favor only certain political parties regarding access to a public forum of expression. IPTV can exercise all the discretion it wants in *covering* debates sponsored by others or in its broadcasting in general, but *the sponsorship of* public forum debates with public revenues is different, and the courts cannot simply defer to the subjective decisions of government journalists.

Forbes II points out that government journalists are prohibited from making the kind of journalistic judgments routinely made by private sector news people, because "the First Amendment exists to protect individuals, not government." Forbes II at 93 F.3d at 505. A court's limited involvement in IPTV's decisions about access to public forums is

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2/ The Arkansas Educational Television Commission is a signatory to the *Statement of Principles of Editorial Integrity in Public Broadcasting* as shown on Trial Ex. B, p. 7; Jt. App. at 275).

a small matter compared to the abuses designed to be guarded against by the First Amendment. History tells us that the First Amendment grew out of the tyranny of England over the colonies, when the British government practiced censorship to prevent criticism of its rule. The threat to be feared is *government censorship*, which means silencing voices. This case simply involves a request for *additional voices* to be heard in a public forum, which is the opposite of censorship, and which poses *no* threat to a democracy. The greater evil is clearly the tyranny of suppression rather than the addition of voices to the political dialogue. As Chief Justice Earl Warren recognized, a diversity of political viewpoints should be encouraged. Warren said:

> All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, which innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. . . . The absence of such voices would be a symptom of grave illness in our society.

Williams v. Rhodes, 393 U.S. 23, 39 (1968) (Douglas, J., concurring) quoting Sweezy v. New Hampshire, 354 U.S. 234, 250-251 (1957) (opinion of Warren, C.J.).

IPTV has argued that its offer to the third party candidates of the opportunity to appear in "candidate forums" at the end of the campaign, and the right shared by all federal candidates to "reasonable access" to the airwaves under the Federal Communications Act provide an adequate opportunity for third party candidates to air their views on the station. But Forbes II says that it is the *particularized* forum that the candidate is seeking which is the focus of analysis, and suggests it is the *only* relevant

forum. Moreover, these candidate forums are not equivalent forums as discussed below (see section V. G. 2).

3. "Newsworthiness" is not a Constitutionally permissible standard.

As stated above, the District Court found that IPTV's decision to exclude the plaintiff candidates from the debates was based on a good faith determination that the plaintiff candidates are not "newsworthy." The United States Supreme Court has determined that "newsworthiness" is an unconstitutional content-based criterion which "cannot be tolerated under the First Amendment." Regan v. Time, Inc., 468 U.S. 641, 648, 104 S. Ct. 3262, 3267, 82 L.Ed. 2d 487 (1984). In Regan, which involved the publication of photographs of money, the court stated:

> [U]nder the statute [(18 U.S.C. § 504(1)], one photographic reproduction will be allowed and another disallowed solely because the Government determines that the message being conveyed in the one is newsworthy or educational while the message imparted by the other is not. The permissibility of the photograph is therefore often 'dependent solely on the nature of the message being conveyed.' *Regulations which permit the government to discriminate on the basis of the message cannot be tolerated under the First Amendment.*

Id. (Citations omitted.) (Emphasis added.)

Any determination by IPTV of the "newsworthiness" of the plaintiff candidates is similarly a determination that the content of the Iowa Press debates will be more or less "newsworthy" without these candidates than with them. Although Regan arose in the criminal context (the key distinction made by this Court in deciding plaintiffs' Emergency Motion; Add. at 20) there is no reason to believe that its condemnation of content-based

suppression of speech applies only in criminal matters. The Court in Regan held that the regulations were impermissible due to the First Amendment, *not* because the defendant was accused of a crime. A qualified candidate for Congress, seeking to engage in political speech, an activity "at the very core of the First Amendment" (Forbes II, 93 F.3d at 504), is entitled to as much protection under the Constitution as a criminal defendant accused of using a photograph of currency, as in Regan.

The conclusion that an analysis is based on "newsworthiness" is virtually determinative of the unconstitutionality of the state's policies. Indeed, in Regan, once the Court determined that the "newsworthiness" standard was content based, it simply stated that it could not be tolerated under the First Amendment, and that it was "constitutionally infirm." Regan, 468 U.S. at 648, 104 S.Ct. at 3267, 82 L.Ed. 2d 487 (1984). The Court engaged in no further substantive analysis of the constitutionality of the statute to justify its holding.[2] By discretionarily determining whether third party candidates are sufficiently "newsworthy" to be permitted on public television, IPTV is engaging in an unconstitutional, subjective, content-based evaluation of expression. Such conduct by the

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2/ Other government interests that the Supreme Court has found lacking as justification for content-based regulations include the prevention of the use of military uniforms without authorization (Schacht v. United States, 398 U.S. 58, 62-3, 26 Law. Ed. 2d 44, 90 S. Ct. 1555 (1970)), and the preservation of the flag as a "symbol of nationhood and national unity." Texas v. Johnson, 91 U.S. 397, 407, 105 Ed. 2d 342, 109 S. Ct. 2533 (1989). Here the State has advanced no interests which can be said to be more compelling than those proffered in Regan, Schacht, and Johnson, particularly when it is remembered that the First Amendment does not protect the government, it protects individuals. Forbes II, 93 F.3d at 505.

government contravenes the First and Fourteenth Amendments.

G. The Means Adopted by the State Are Not Narrowly Tailored.

1. Vesting subjective editorial discretion in government journalists is the opposite of narrow tailoring.

Even if the State can establish that it has a compelling interest that is unrelated to the suppression of free expression and is not content-based, it must still show that the means it has adopted to achieve its compelling state interest is "narrowly tailored." Forbes, at 93 F.3d 497, 505.

The *Statement of Principles of Editorial Integrity in Public Broadcasting*, relied on by the state, does not purport to be "narrow" in any respect. As stated on page 11 thereof, "no statement of principles can do more than give *general guidance* to the trustees charged with overseeing its public broadcasting service," and "amid the pressures of great events, general principle gives no help (Emphasis added)." (Trial Ex. B; Jt. App. at 277). It cannot reasonably be argued that these general broad principles, which do not purport to do more than "give general guidance" (which is admittedly "no help"), are "narrowly tailored" to do anything. Discretion is discretion, and is the opposite of narrow tailoring.[3]

3/ In fact, the Statement of Principles could easily be read to require the *inclusion* of the plaintiff candidates in the debates. The first sentence of the first principle in the mission statement of public broadcasting states:

> "I. We are Trustees of a Public Service.
> Public broadcasting was created to provide a *wide range of programming services* of the highest professionalism in quality which can educate, enlighten and entertain the American public, its audience and

Similarly, IPTV Programming Policy 2.1 (Trial Ex. GG; Joint App. at 311-312) could hardly be broader. The Policy is merely aspirational in character and provides no guidance of a concrete nature to programmers or others within IPTV. The relevant section (Public Affairs) states that programming decisions "should maintain maximum objectivity and fairness." Indeed, defendants have not seriously attempted to argue that their decisions on whom to invite to the debates were based on any type of systematic or even conscious application of criteria set forth in any documents. Mr. Newell, who made the decision, even at the time of trial did not know there *were* written guidelines (Trial Tr., Vol. II at p. 287 line 24 to p. 288 line 24; Jt. App. at 37-38), and he and Miller based their decisions on *subjective* or *extraordinarily subjective* elements that evaluated the plaintiff candidates' ability to win or impact the election, not on *maximally objective*

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source of support."

The first sentence of the second principle in the mission statement is:

> "II. Our Service Is Programming.
> The purpose of public broadcasting is to offer its audiences public and educational programming which provides *alternatives in quality, type and scheduling.*"

The first sentence of the third principle is:

> "III. Credibility Is the Currency of our Programming.
> As surely as programming is our purpose, and the pride by which our audiences judge our value, that judgment will depend upon their confidence that our programming is free from *undue or improper influence.*"
>
> (Trial Ex., p. 4) (emphasis added.)"

standards. Thus, even if there were narrowly tailored means, they were not used by appellees in the circumstances of this case.

As stated by the Supreme Court in Shuttlesworth v. City of Birmingham, 394 U.S. 149, 89 S.Ct. 935 (1969), "a law subjecting the exercise of First Amendment freedoms to . . . prior restraint . . . without narrow, objective, and definite standards . . . is unconstitutional." Id. 394 U.S. at 150-51. Here the standards are neither narrow nor objective nor definite, and constitute a prior restraint. Forbes II, 93 F.3d at 504.

2. The availability of other opportunities to appear on IPTV does not compel a finding of narrow tailoring.

The District Court held that the State's policies are "narrowly tailored" because, in part, the plaintiff candidates were offered an opportunity to present their views on other programs. The availability of other forums, however, does not affect whether the plaintiff candidates have been unconstitutionally excluded from the particular public forums at issue or whether the defendants' policies leading to that exclusion are narrowly tailored. This is much like a situation where a candidate wants to appear with other candidates on a soap box in the town square, but the government refuses on the grounds he is not sufficiently interesting, telling him he has plenty of opportunities to speak a few blocks south of the square at some other time.

Moreover, the candidate forums offered by IPTV do not provide an equivalent opportunity. Defendant Miller told Marcus that "these programs [the *separate* candidate forum involving five Natural Law party candidates] would air during the final days of the

campaign, when viewer interest in election activities is very high," (Trial Ex. 23; Joint App. at 260). Professor Shelley's well-reasoned analysis, however, demonstrates that *separate is not equal and later is not better.*

Shelley testified that when all the Natural Law Party candidates appear together, rather than having an opportunity to appear with the major party candidates, the third party candidates do not have the opportunity to draw the contrast that is necessary to make it easier for voters to decide to vote for them (Trial Tr., vol. III at p. 73 line 9 to 75 line 24; Jt. App. at 93-96). He further testified that segregating the third party candidates creates the impression that there is a political "major league" and a "minor league" and that when a forum is held close to the election, this exposure is not very useful since voters are a lot less likely to consider new alternatives then as they are earlier in the campaign when their minds are more open. (Trial Tr., Vol. III at p. 72 line 9 to 75 line 24; Jt. App. at 93-96). Professor Shelley explained how voters narrow their choices as they get closer to an election as a result of the "selective perception" process, and that voters are a lot less likely to consider all the possible alternatives later in an election. (Trial Tr., Vol. III, at p. 62, line 17 to p. 66, line 22; Jt. App. at 83-87).

Professor Shelley further testified that the effect of excluding the third party candidates from the Iowa Press show is that it "relegates them to a second or third level importance in politics," and "it just tends to reinforce the idea that these are parties that in some ways shouldn't be taken very seriously because they do not get the same media play that the two major parties do; so it certainly hurts in terms of fundraising." (Trial Tr.

Vol. III at 77, lines 6-11; Joint App. at 98). Professor Shelley testified it was "fundamentally unfair" to exclude third party candidates from the debates from the perspective of the candidates or the perspective of the voters because it doesn't give voters a basis on which to decide who is best to vote for, and it unfairly assumes that voters can make a comparison of candidates seen at different times as mere talking heads. (Trial Tr., Vol. III at p. 97, line 25 to p. 99, line 7; Jt. App. at 118-120). The state should not have the power to relegate certain political parties to second class status.

Moreover, the candidate forums offered to the third party candidates aired only once for a half hour during the week (Trial Ex. 26; Jt.. App. at 268), whereas the debates between the Republican and Democratic candidates aired twice for a half hour each time (Trial Tr., Vol. II at 284 lines 7-11; Jt. App. at 34) and included an airing Sunday evening, the most watched night on television. (Trial Tr., Vol. II at p. 304 line 1 to p. 306 line 9; Jt. App. at 54-56).

Thus, in terms of the length of time the candidates would appear on IPTV, the Republicans and Democrats share a total of one hour of programming time, resulting in approximately 30 minutes of questions and answers by *each* of the major party candidates. The five Natural Law Party candidates were scheduled at a less advantageous time, and five candidates shared a 30-minute program, aired only once, resulting in approximately *six* minutes of questions and answers for each third party candidate.

All federal candidates also have reasonable access rights under the Communications Act to appear on IPTV, but the candidates have to pay for and produce

their own shows at a substantial cost for studio time and technical personnel, and the Republicans and Democrats are unlikely to appear with the third party candidates. Moreover, this is a right that *all* federal candidates have, including Republicans and Democrats. Therefore, reasonable access cannot be an equalizer that would somehow place the third party candidates on an equal footing with the Republicans and Democrats in terms of IPTV exposure.

H. The Statement in the IPTV Program Guide that the Democratic and Republican Candidates were the "Major Candidates" Seeking Federal Office Constitutes an Impermissible Governmental Endorsement of Those Candidates.

The Program Guide of IPTV advertised the "co-appearances by the *major candidates* seeking to represent Iowa's five Congressional districts (emphasis added)," referring to the Democratic and Republican candidates by name. (Tr. Ex. 18 at 3; Joint App. at 239). Professor Shelley testified that whether or not this was intended to be an endorsement, the average viewer or voter would see it as stating that the choice is for either a Democrat or Republican. Shelley testified that this reinforces the message that there are only two parties worth considering and harms the fundraising and other efforts of third party candidates. (Tr. Tr. Vol. III at p. 78 line 2 to p. 79 line 9; Joint App. at 99-100). This is simply not a proper message for the state to communicate to its citizens and voters.

I. The Court Should Give No Weight to the Government's Threat That It Will Cancel Debates Rather than Include Third Party Candidates.

When public broadcasting takes the position that it will cancel the debates if the

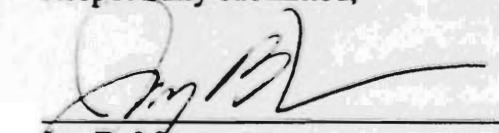
court requires it to include third party voices, as IPTV has done, that is not an argument that should be given weight. This argument is akin to a public school board arguing that it should not be compelled to desegregate because if it is ordered to do so it will simply shut down the school. The court should not be persuaded by threats of capricious and obdurate behavior.

VI.

CONCLUSION

For all of the foregoing reasons, declaratory relief was improperly denied by the District Court. Appellants respectfully request that this Court reverse the District Court and remand with instructions to enter declaratory and other appropriate relief in appellants' favor.

Respectfully submitted,



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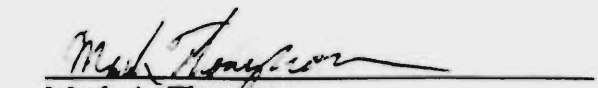

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ADDENDUM

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JAY B. MARCUS, MARCUS FOR CONGRESS, THE NATURAL LAW PARTY OF IOWA, EDWARD T. RUSK OF THE WORKING CLASS PARTY, EDWARD T. RUSK FOR CONGRESS, MICHAEL CUDDEHE, MICHAEL DIMICK, ROGERS BADGETT, PETER LAMOUREUX, FRED GRATZON, and SUSAN MARCUS,	)	NO. 4-96-CV-80690
Plaintiffs,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT DISMISSING COMPLAINT
vs.	)	
IOWA PUBLIC TELEVISION, A STATE AGENCY, and DANIEL K. MILLER in his official capacity,	)	
Defendants.	)	

The plaintiffs filed this action on September 13, 1996, alleging that the defendant public television network and its director of programming and production had infringed their constitutional rights arising under the First Amendment. The plaintiffs sought to have the seven plaintiffs who are qualified candidates for election to the Congress (hereafter the plaintiff candidates) included in programs scheduled to be aired on the six weekends leading up to the November 1996 general election. The plaintiffs also sought injunctive relief requiring the network to retract or correct its statement in a program guide referring to Republican and Democratic party candidates as "the major candidates."

Recognizing that the case might soon become moot, the court promptly held a hearing but then denied the plaintiffs' request for preliminary injunctive relief. The court then scheduled trial to begin on September 30, 1996. On September 27, plaintiffs filed a jury demand. Without deciding whether the case presented issues properly triable to a jury, the court commenced trial by impaneling a jury on September 30. The court informed the parties that the jury's verdicts would at least be considered advisory and might be deemed binding on all fact issues if the court concluded the Seventh Amendment gave the parties a right to trial by jury.

I. The Facts.

The parties stipulated many background facts, here repeated in the form set forth in the court's instructions to the jury:

> The plaintiff, Jay B. Marcus, is a duly qualified candidate of the Natural Law Party for U.S. Representative in Iowa's Third Congressional District.
>
> Michael Cuddehe, Peter Lamourex, Rogers Badgett, and Michael Demick are the duly qualified candidates of the Natural Law Party for U.S. Representative in Iowa's First, Second, Fourth, and Fifth Congressional Districts, respectively.
>
> Marcus for Congress is a political committee formed in 1996 to promote the election of Jay B. Marcus for U.S. Representative. The Natural Law Party of Iowa is a political committee formed to bring a scientific perspective into government and to promote the election of Natural Law Party candidates for public office.

Edward T. Rusk is a duly qualified candidate of the Working Class Party for U.S. Representative in Iowa's Third Congressional District. Edward T. Rusk for Congress is a political committee formed to promote the election of Edward T. Rusk for U.S. Representative.

Fred Gratzon is a duly qualified candidate of the Natural Law Party for U.S. Senate in Iowa.

Susan Marcus is a registered voter in Iowa who desires to hear the candidates who are parties to this action participate in forums with the Republican and Democratic candidates and all other legally qualified candidates on the Iowa Press show.

The defendant, Iowa Public Television, is a state agency. Daniel K. Miller is the Director of Programming and Production for Iowa Public Television and is a state employee. Dave Bolender is the Executive Director of Iowa Public Television and is a state employee. Michael Newell is an agent of Iowa Public Television who produces the television show Iowa Press.

The court submitted eight special verdict questions to the jury, and the jury answered each as follows:

1. Have the plaintiffs proved that the Iowa Press programs involving Iowa Congressional candidates [hereinafter "the Iowa Press programs"] are "debates"? Ans: Yes

2. Have the defendants proved that the Iowa Press programs are bona fide news interview programs? Ans: Yes

3. Have the plaintiffs proved that the defendants did not act in accordance with a predetermined policy in deciding whom to invite to participate on the Iowa Press programs? Ans: No

4. Have the plaintiffs proved that the defendants based their decisions on whom they would invite to participate on the Iowa Press

programs solely on whether the candidates had been nominated by the Republican or Democratic parties? Ans: No

5. Have any of the plaintiff candidates proved that the plaintiff candidates' appearance on an Iowa Press program would be newsworthy?

Jay B. Marcus	Ans: No
Edward T. Rusk	Ans: No
Michael Cuddehe	Ans: No
Michael Demick	Ans: No
Rogers Badgett	Ans: No
Peter Lamourex	Ans: No
Fred Gratzon	Ans: No

6. Have the plaintiffs proved that the defendants excluded the plaintiff candidates from the Iowa Press programs because defendants disagreed with their opinions on political issues? Ans: No

7. Have the defendants proved that the defendants excluded the plaintiff candidates from the Iowa Press programs on the basis of independent journalistic and editorial judgments the defendants made based on newsworthiness? Ans: Yes

8. Have the defendants proved that the defendants intended to open the Iowa Press programs only to those Congressional candidates whom the defendants invited to appear? Ans: Yes

The court need not decide whether the jury's findings were advisory only. Each of the jury's answers to the special verdict questions was fully supported by evidence in the record. The court makes the same findings based on its independent consideration of the evidence, including its assessment of the credibility of the parties who testified, the expert witnesses, and other witnesses. The court finds defendant Miller's testimony credible concerning the reasons the plaintiff candidates were not included in the Iowa Press programs.

With hindsight, the court would have asked the jury one additional question concerning the defendants' intent in selecting persons for the Iowa Press program. I believe that I should have asked the jury, as a follow-up question to special verdict question No. 1:

> Have the plaintiffs proved that the defendants intended the Iowa Press programs to be "debates"?

I find the defendants did not intend the programs to be debates. The defendant network has been airing weekly Iowa Press appearances of public figures for over twenty years. The typical programs are not debates but simply journalists' interviews of persons in the news generally. This is consistent with the jury's answers to special verdict questions 2 and 8, finding that the Iowa Press candidate interviews are bona fide news interview programs and that defendants opened these programs only to those congressional candidates defendants invited to appear.

Nevertheless, I conclude that reasonable persons viewing the programs would have found the joint appearances of candidates on the Iowa Press programs to be "debates," using the definition in jury instruction No. 13. Iowa Press interviews of the candidates were staged to give the public the opportunity to receive the views of the candidates interviewed on the programs, and the programs were regulated by the moderator and journalists asking questions. So the Iowa Press programs were debates.

II. Conclusions of Law.

1. The Iowa Press programs constituted limited public forums, because they were political debates staged by a public television network. See Forbes v. Arkansas Educational Television Communication Network, ____ F.2d _____ (8th Cir. 1996) (slip opinion p. 12) [hereafter Forbes II]; cf. Cornelius v. NAACP Legal Defense & Education Fund, Inc., 473 U.S. 788, 804-06 (1985) (whether government created limited public forum turns on its intent).

2. Plaintiffs have not established their First Amendment rights were violated. Persons presenting political viewpoints on a public television network may be excluded from staged debates if the exclusion is narrowly tailored and will serve compelling state interests. Forbes II at p. 15.

3. Defendants excluded the plaintiff candidates for principled reasons based on a sufficient state interest. See Forbes v. Arkansas Educational Television Commission, 22 F.3d 1423, 1429 (8th Cir. 1994), cert. denied, 115 S. Ct. 500 & 1962 (1995). The jury's findings and the court's findings of fact support this conclusion. Defendants did not exclude the plaintiff candidates arbitrarily but based the decision on a pre-determined policy. Defendants did not base their selection on whether persons to appear on the Iowa Press programs had been nominated by the Republican or Democratic parties, nor whether defendants disagreed with the candidates' opinions on political issues. The decision was based on the defendants' reasoned determination that the Iowa

Press programs are bona fide news interview programs; and in defendant Miller's professional editorial judgment not one of the plaintiff candidates was newsworthy. It is profoundly important that the defendant network and its news editors be allowed to exercise independent journalistic and editorial judgments based on newsworthiness. If the defendant network may not exercise editorial discretion in determining the content of its programs, the network would be fundamentally bland and of little value to the public it serves. So defendants proved they were serving a compelling state interest in excluding the plaintiff candidates from the Iowa Press programs. See FCC v. League of Women Voters, 468 U.S. 363, 367 (1984); Barnard v. Chamberlain, 897 F.2d 1059 (10th Cir. 1990); Muir v. Alabama Ed. Television Comm., 688 F.2d 1033, 1040 (5th Cir. 1982), cert. denied, 460 U.S. 1023 (1983).

4. Iowa statutes, received in evidence as exhibits, created the defendant network to be and operate as an institution of the press to serve the people of Iowa, free from political pressure from within or from without state government. Applicable Iowa law expresses a compelling governmental purpose in having the defendant network operate according to the Communications Act of 1934 and the rules and policies of the Federal Communications Commission adopted under that federal statute. See FCC v. League of Women Voters, 468 U.S. 363, 378 (1984).

5. Defendants' exclusion of the plaintiff candidates was narrowly tailored. The plaintiff candidates were

granted the opportunity to present their views on other programs presented by the network, based on Federal Communications Act equal access rules, and they are scheduled to appear on an upcoming Iowa Press program presenting views of congressional candidates not invited to the Iowa Press programs here at issue. Defendants proved by credible expert testimony that the defendant network's exercise of journalistic discretion meets generally accepted broadcast industry standards for making judgments about newsworthiness, as required by the "Statement of Principles of Editorial Integrity in Public Broadcasting," a document received in evidence in this case.

6. The court disagrees with plaintiffs' contention that Forbes II is dispositive of this case. Forbes II is distinguishable. There the court held that the Arkansas public television network excluded the plaintiff Forbes, a congressional candidate, solely because network personnel deemed him not a viable political candidate. Here, in contrast, the court and the jury have found credible the defendant Miller's explanation that lack of newsworthiness and not lack of viability of the plaintiff congressional candidates was the basis for the defendants' decision not to invite the plaintiff candidates. Defendants acknowledged that the plaintiff candidates were qualified to have their names on the ballot and therefore were viable candidates. Defendants properly took into account in determining newsworthiness, however, their study of the feeble efforts of the plaintiff candidates to raise funds or express efforts in their campaigns to generate

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public support for their candidacies. In Forbes II the court held that the defendant network did not have a compelling and narrowly tailored reason for excluding the plaintiff from a debate when it simply deemed the plaintiff Forbes a person who was not a "viable candidate." Id. at p. 14. Forbes II is therefore inapposite.

III. Judgment.

The clerk of court shall enter judgment in favor of the defendants and against the plaintiffs, dismissing this action at plaintiffs' costs.

IT IS SO ORDERED.

Dated this 9th day of October, 1996.

Charles R Wolle

CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-3645SIDM

Jay B. Marcus, et al,

Appellants,

v.

Iowa Public Television, etc., et al

Appellees.

Appeal from the United States District Court for the District of Southern Iowa

Appellees' motion requesting oral argument in the referenced appeal has been considered by the court and is hereby denied.

October 11, 1996

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 96-3645

Jay B. Marcus; Marcus For Congress, a political committee; The Natural Law Party of Iowa, a political committee; Edward T. Rusk, of the Working Class Party; Michael Cuddehe; Michael Dimick; Rogers Badgett; Peter Lamoureux; Fred Gratzon; Susan Marcus, Appellants, v. Iowa Public Television, a state agency; Daniel K. Miller, in official capacity, Appellees.	*	Appeal from the United States District Court for the Southern District of Iowa.

ORDER

Filed: October 11, 1996

Before FAGG, MAGILL, and BEAM, Circuit Judges.

MAGILL, Circuit Judge.

Jay B. Marcus, Marcus for Congress; The Natural Law Party of Iowa, Edward T. Rusk, of the Working Class Party; Michael Cuddehe; Michael Dimick; Rogers Badgett; Peter Lamoureux; Fred Gratzon; and

Susan Marcus (Movants)[1] sought equitable relief against Iowa Public Television and one of its officials (IPTV) in the district court.[2] IPTV had scheduled "joint appearances" of Democratic and Republican candidates for United States Representative for each of Iowa's five congressional districts on its program Iowa Press. Movants sought injunctive relief requiring IPTV to "include all legally qualified candidates in the joint appearances," Compl. at 10, as well as other injunctive and declaratory relief. The district court denied a preliminary injunction and, following a trial before the court and an advisory jury,[3] denied permanent injunctive relief. Movants' appeal of this denial of injunctive relief is pending before this Court.

IPTV has two scheduled joint appearances still to be broadcast. On Sunday, October 13, 1996, the Democratic and Republican candidates for United States Representative for Iowa's First Congressional District will appear on Iowa Press, and on

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[1]Jay B. Marcus is the Natural Law Party of Iowa (NLP) candidate for United States Representative in Iowa's Third Congressional District; Rusk is the Working Class Party candidate for United States Representative in Iowa's Third Congressional District; Cuddehe is the NLP candidate for United States Representative in Iowa's First Congressional District; Dimick is the NLP candidate for United States Representative in Iowa's Fifth Congressional District; Badgett in the NLP candidate for United States Representative in Iowa's Fourth Congressional District; Lamoureux is the NLP candidate for United States Representative in Iowa's Second Congressional District; Gratzon is the NLP candidate for the United States Senate in Iowa; and Susan Marcus is a registered voter in Iowa who wishes to see these aforementioned political candidates debate with Democratic, Republican, and other qualified congressional candidates on the Iowa ballot.

[2]The Honorable Charles R. Wolle, United States District Judge for the Southern District of Iowa.

[3]Although seeking only equitable relief, the Movants filed a jury demand with the district court on September 27, 1996. The district court impaneled a jury "[w]ithout deciding whether the case presented issues properly triable to a jury," Mem. Op. at 2, and the district court made "the same findings [as the jury] based on its independent consideration of the evidence." Id. at 4.

Sunday, October 20, 1996, the Democratic and Republican candidates for United States Representative for Iowa's Fourth Congressional District will appear on Iowa Press. Movants have brought this motion for emergency injunctive relief before this Court, requesting that IPTV be enjoined from broadcasting these joint appearances "unless all legally qualified candidates are permitted to participate on an equal basis." Emergency Mot. at 1. Because we conclude that injunctive relief is not warranted at this point in this case, we deny the motion.

I.

IPTV is an Iowa state actor, and is governed under the provisions of Iowa Code § 256.80-256.90. IPTV produces and broadcasts Iowa Press, a "30-minute news and public affairs program [which] airs twice each Sunday at noon and 7:00 p.m." Movants' App. at 14. Beginning on September 22 and running for a total of five weeks, Iowa Press scheduled "co-appearances by the major candidates seeking to represent Iowa's five congressional districts in the Iowa delegation in Washington D.C." Id. The major candidates were all Democrats or Republicans. Under the program's format, a host and a team of political reporters ask questions of the candidates, who would have an opportunity to present their views to the audience.

Movants made repeated requests to IPTV that they be allowed to participate in the joint appearances. IPTV declined to allow other candidates to participate in the scheduled joint appearances, concluding that they were not newsworthy. IPTV did offer to include Movants and other candidates to present their views on other programs presented by the network. Dissatisfied with this offer, Movants brought suit against IPTV for injunctive and declaratory relief on September 13, 1996. The district court denied Movants' motion for preliminary injunctive relief on September 24, 1996, holding that they had failed to demonstrate

irreparable harm and that they did not establish a likelihood of success on the merits.[4] Trial was set for September 30, 1996, and a jury was impaneled.

After the presentation of evidence, including witness and expert witness testimony, the jury returned a special verdict with a series of interrogatories. Based on an independent review of the evidence, the district court adopted the jury's findings, and made additional findings. The district court found that, although not intended by IPTV to be "debates," the scheduled joint appearances

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[4]The district court found that:

> Plaintiffs have not proved irreparable harm or that on balance the harm they would suffer would outweigh the harm caused by granting an injunction. There is no showing in this record that their scheduled appearances on Iowa Public Television programs other than "Iowa press" would be less valuable to them. Voter attention given to a program aired closer to the time of the elections may well have a more favorable impact on voters than a presentation on the Iowa Press programs now planned. On balance, an injunction's harm to the exercise of defendants' journalistic discretion would outweigh any harm plaintiffs might suffer from not appearing on the planned Iowa Press shows.
>
> Plaintiffs have not established a likelihood of success on the merits. The question of whether or not the planned Iowa Press programs featuring political candidates will constitute a debate under Forbes v. Arkansas Education Television Commission, [93 F.3d 497 (8th Cir. 1996) (Forbes II)], is a very close one.
>
> The public has an interest in hearing the views of all legally qualified candidates. But the record here is that all candidates' views can adequately be presented on Iowa Public Television programs without requiring the requested appearances with other candidates on the scheduled Iowa Press programs. Moreover, there is a very strong public interest in allowing news broadcast journalists to exercise editorial discretion.

Order at 1-2.

would be interpreted by reasonable persons viewing Iowa Press to be debates.

The district court also found that the Iowa Press programs were "bona fide news interview programs." Mem. Op. at 3. The district court noted that

> defendant network has been airing weekly Iowa Press appearances of public figures for over twenty years. The typical programs are not debates but simply journalists' interviews of persons in the news generally.

Id. at 5. The district court found that Movants had been excluded from the joint appearances "on the basis of independent journalistic and editorial judgments" by IPTV that the Movants were not newsworthy, id. at 4, and specifically held that Movants had failed to prove that their appearance on Iowa Press would be newsworthy. Id. The district court also held that IPTV did not base its decision to include certain candidates in the joint appearances based on the candidates' political affiliation, and that Movants were not excluded from the joint appearances based on their political affiliation or on the basis of their political views.

Based on these findings, the district court concluded that the Iowa Press programs constituted a limited public forum, but that Movants' exclusion from the programs did not violate the First Amendment. IPTV served a compelling state interest, defined by IPTV's policies, by limiting the joint appearances to newsworthy candidates. The district court further held that the exclusion was narrowly tailored because, although not invited to appear on Iowa Press, Movants did have access to other programs presented by IPTV. The district court denied all relief, and Movants appealed. During the pendency of the appeal, Movants brought this motion before us.

> Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

We address each of these issues in turn.

A.

The two remaining joint appearances scheduled on Iowa Press concern the First and Fourth Congressional District races. Only Movants Cuddehe and Badgett, the candidates for those races, would be directly affected by the grant of the requested injunctive relief. We therefore direct our inquiry into irreparable harm to these two Movants.

We agree with the district court that the access offered to these Movants on other IPTV programs will be of significant value to the Movants, and might well have a more favorable impact on voters than the earlier airing of Iowa Press. See Order at 2. But see Trial Tr. at 73, reprinted in Movants' App. at Ex. G (expert testimony of Professor Mack Shelley that appearance in a debate is more valuable than a postdebate appearance). We disagree, however, that these Movants have failed to show irreparable harm.

Movants in this motion argue that their First Amendment right to express themselves in a limited public forum has been offended by their exclusion from the joint appearances on Iowa Press. If they are correct and their First Amendment rights have been violated, this constitutes an irreparable harm. See, e.g., Elrod v. Burns, 427 U.S. 347, 373 (1973) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). This element of the Dataphase analysis is therefore satisfied.

B.

We agree with the district court, however, that the balance of harms in this case weighs against issuing an injunction. Although a state actor, IPTV is a media organization, which necessarily must make editorial decisions regarding the content of its programming. Interference with that editorial discretion constitutes a significant injury to the editorial integrity of IPTV, which interferes with their primary mission of serving the public. See Mem. Op. at 7.

In addition, IPTV has represented that, if required to include other candidates in the Iowa Press joint appearances, it will cancel the scheduled joint appearances entirely "rather than impair its journalistic integrity and its credibility with its viewers." Mem. in Opposition to Emergency Mot. at 3. We note that this is precisely the step taken by the Nebraska Education Television Network in August 1996, when it cancelled a scheduled debate between certain senatorial candidates rather than include uninvited candidates or face litigation. We find that the threat of possible harm to IPTV is substantial if the requested injunction were to issue, and is greater than the harms faced by Movants.

C.

We also do not believe that Movants have demonstrated a likelihood of success on the merits. In this case, "success on the merits" means that we would reverse the district court on appeal. We do not lightly assume district court error, particularly where, as in the appeal pending before this Court, the district court's judgment shall be reviewed for abuse of discretion. See Pottgen v. Missouri State High Sch. Activities Ass'n, 40 F.3d 926, 929 (8th Cir. 1994).

Accepting for the purposes of this motion that the joint appearances are debates and that IPTV has opened Iowa Press as a limited public forum to qualified congressional candidates, see Mem. Op. at 5-6, IPTV's regulation of speaker access "survive[s] only if [it is] narrowly drawn to achieve a compelling state interest." International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992).

IPTV presented evidence, and the district court found, that IPTV limited speaker access to the joint appearances on Iowa Press on the basis of the newsworthiness of the candidates. The district court held that IPTV had a compelling interest in presenting newsworthy programs, stating that:

> It is profoundly important that the defendant network and its new editors be allowed to exercise independent journalistic and editorial judgments based on newsworthiness. If the defendant network may not exercise editorial discretion in determining the content of its programs, the network would be fundamentally bland and of little value to the public it serves.

Mem. Op. at 7.

Movants argue that IPTV has no compelling interest in limiting speaker access, and rely heavily on our decision in Forbes v. Arkansas Educational Television Commission, 93 F.3d 497 (8th Cir. 1996) (Forbes II). In Forbes II, we held that an independent candidate could not be excluded from a debate broadcast on a state-operated public television station because he was not a "viable" candidate. See id. at 504-05. Reasoning that Arkansas law itself defined "viability" as being qualified as a candidate, we determined that the independent candidate had been excluded from the debate only because "in the opinion of the network, he could not win." Id. at 504. Relying on Families Achieving Independence and Respect v. Nebraska Department of Social Services, 91 F.3d 1076

(8th Cir. 1996), a decision which has recently been vacated pending rehearing by the Court en banc, the Forbes II Court stated that:

> We have no doubt that the decision as to political viability is exactly the kind of journalistic judgment routinely made by newspeople. We also believe that the judgment in this case was made in good faith. But a crucial fact here is that the people making this judgment were not ordinary journalists: they were employees of government. The First Amendment exists to protect individuals, not government. The question of political viability is, indeed, so subjective, so arguable, so susceptible of variation in individual opinion, as to provide no secure basis for the exercise of governmental power consistent with the First Amendment.

93 F.3d at 505. Movants reason that, because this case also involves the exclusion of a candidate based on a "subjective" determination of newsworthiness, see Trial Tr. at 296 (testimony of Mike Newell, Producer for Iowa Press), it must also be an improper exercise of governmental authority. We disagree.

Forbes II cannot be read to mandate the inclusion of every candidate on the ballot for any debate sponsored by a public television station. Nor does Forbes II suggest that public television station administrators, because they are government actors, have no discretion whatsoever in making broadcast determinations. Rather, Forbes II held that there was no compelling interest in excluding statutorily-defined viable candidates from a debate based on the viability of the candidate. Unlike "viability," which is ultimately for the voters to decide, "newsworthiness" is peculiarly a decision within the domain of journalists.

Relying on Regan v. Time, Inc., 468 U.S. 641 (1984), Movants assert that "newsworthiness" is an inherently improper basis for

> In order to assure that programs meet the standards of editorial integrity the public has a right to expect, the following five principles and guidelines establish a foundation for trustee action. . . . The ultimate goal of the principles and guidelines is to assist public broadcasting trustees in fulfilling their vital role in this important public service.

Id. These five principles are: (I) We are Trustees of a Public Service; (II) Our Service is Programming; (III) Credibility is the Currency of our Programming; (IV) Many of our Responsibilities are Grounded in Constitutional or Statutory Law; and (V) We Have a Fiduciary Responsibility for Public Funds. Id. The guideline to Principle III, Credibility is the Currency of our Programming, instructs that:

> The process of developing programs to meet the audience's needs must function under clear policies adopted and regularly reviewed by the trustees. This process must be managed by the professional staff according to generally accepted broadcasting industry standards, so that the programming service is free from pressure from political or financial supporters. The station's chief executive officer is responsible for assuring that the program decisions are based on editorial criteria, such as fairness, objectivity, balance and community needs; not on funding considerations.

Id. In adhering to these guidelines, IPTV has created a programming policy, which provides that:

> In the presentation of public affairs programming, Iowa Public Television should maintain maximum objectivity and fairness. Iowa Public Television should strive for a better informed citizenry of the state of Iowa, through the presentation of important and significant issues.

Resp't's App. at Ex. 3 (emphasis added).

In meeting these policies, IPTV has limited access to the Iowa Press joint appearances to newsworthy candidates. Although a

determination of newsworthiness is based on journalistic discretion, and is therefore somewhat subjective, there are clearly objective elements of newsworthiness. Daniel K. Miller, the Director of Programming and Production for IPTV, testified at length in his deposition to the elements which inform a professional editorial judgment that a candidate's appearance is "newsworthy":

> [N]ewsworthiness has a number of elements, I think. Is this candidate or this campaign, is it active in the region that it's running for? If it's a statewide campaign, for example, is it active in all of Iowa's 99 counties or in a majority of them? Does it have--my phrase, not a good one--an organization of volunteers, campaign organization beyond the campaign staff? If the candidate or campaign or party has had previous exposures to elective offices, how have they done? If they have done well, what is well? Are they growing? Is there growth in their success at the polls? Have they had previous exposure to elective office? Are they seeking the office actually to be elected to it or do they say that they are seeking it to bring ideas into the marketplace? How has their fund-raising been? Is it a broad base? Do they have a lot? Do they have little? Whatever. How are they treated by other media organizations? Have their efforts generated news in other media organizations or if there are debates, have they been included in those debates by other news organizations? What are we hearing? What are we hearing either from the public or what are we hearing from the campaigns themselves? Are people calling us and saying you know, "Such and such had a crowd of 550 last night," or are they calling us and saying, "Such and such had a crowd of five." The last part, are we hearing anything? What are we hearing from the campaigns themselves? Politics is an enterprise that relies on the ability of its participants to sell themselves, to retail themselves. What are we hearing along that line? Do we hear a lot from the candidates themselves? Are they calling us? Are they faxing us? Are we getting encouraged by their supporters who happen to be people we know or people we don't know to pay attention to their campaigns? Do we see early indications of retail efforts in that regard in the media? Are they buying newspaper or radio ads?

Dep. at 22-24, reprinted in Movants' App. at Ex. C. Professor Barbara Mack, an expert witness for IPTV, testified regarding journalistic standards of newsworthiness:

> When I teach freshmen journalists about what is meant by newsworthiness, what makes someone newsworthy, you talk about the--the quality that that person or that news event has.
>
> Is that news event going to have an impact on the people who read your newspaper or who watch your television station? Is it going to change their lives? Does it have the potential to change their lives? Is it something which is a public conflict? Conflict is one of our classic new values. Impact is a classic news value.
>
> We talk about the news--the news value of locality. As strange as it may seem, a bus accident that occurs in India will get very little coverage in the Des Moines Register, but a bus accident that occurs in downtown Des Moines at rush hour, even though it may injure fewer people, will get more new coverage. Why? Because it's local, and local news has importance.
>
> We talk about the value of human interest, and many of the stories that most people think of as feature stories are human interest stories. They appeal to the characteristics of the human spirit.
>
> So when a journalist is making a decision about what is or is not news, there is always a very careful evaluation of each of those factors.

Trial Tr. at 355-56.

As found by the district court, IPTV properly determined that none of the Movants were newsworthy, see Mem. Op. at 4. The district court found that:

> Defendants properly took into account in determining newsworthiness . . . their study of the feeble efforts of the plaintiff candidates to raise funds or express efforts in their campaigns to generate public support for their candidacies.

Id. at 8-9.

We agree that IPTV has a compelling interest, in meeting its public service goals, of limiting access to newsworthy candidates. We further agree that its methods were narrowly suited to achieving this goal, and left substantial access to other fora offered by IPTV. We therefore do not believe that Movants have demonstrated a likelihood of success on the merits.

D.

We agree with the district court that there is a public interest in hearing all qualified candidates present their views. However, there is also a public interest in having a debate between some candidates rather than having no debate whatsoever. In addition, we believe that IPTV's professional broadcasters are generally better aware of what constitutes appropriate programming than a group of federal judges; it is clearly in the public interest in having a state-operated public television free of unnecessary interference by a federal court. On balance, therefore, we believe that the public interest supports denying this injunction.

III.

For the reasons stated above, we deny the emergency motion for injunctive relief.

BEAM, Circuit Judge, dissenting.

The court (and the district court as well) seeks to distinguish the indistinguishable. Thus, I dissent.

The binding precedent at work in this case is found in Forbes v. Arkansas Educ. Television Comm'n, 93 F.3d 497 (8th Cir. 1996).

s are the plaintiffs in this case) was a legally qualified
for Congress from the Third District of Arkansas. Also,
he was shut out of a debate between the Republican and
c candidates for the Third District seat televised on
Educational Television. The basis for the exclusion was
as was not a "viable" candidate.

Judge Richard S. Arnold, for a unanimous panel,
as unconstitutional, this governmental action, saying:

> We have no doubt that the decision as to political
> lity is exactly the kind of journalistic judgment
> nely made by newspeople. We also believe that the
> ent in this case was made in good faith. But a
> al fact here is that the people making this judgment
> not ordinary journalists: they were employees of
> ment. The First Amendment exists to protect
> iduals, not government. The question of political
> ity is, indeed, so subjective, so arguable, so
> tible of variation in individual opinion, as to
> e no secure basis for the exercise of governmental
> consistent with the First Amendment.

view, there can be no realistic argument advanced that
e opinion by a government employee that a candidate is
newsworthy" is different from a subjective conclusion
she is or is not "politically viable." The inquiry
peas from the same analytical pod. Forbes requires us
emergency injunction requested in this case.

copy.

test:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

CERTIFICATE OF SERVICE

I, Jay B. Marcus, attorney for apellants, hereby certify that on November 14, 1996, I mailed two copies of the foregoing Brief of Appellant by United States mail to counsel for appellees at the following addresses:

Richard Marks
Dow, Lohnes & Albertson
1200 New Hampshire Ave., NW, Suite 800
Washington, D.C. 20036

Gordon Allen
Iowa Attorney General's Office
2nd Floor, Hoover Building
Des Moines, Iowa 50319

Dated: November 14, 1996

Jay B. Marcus
Marcus & Thompson, P.C.
51 West Washington, Suite 201
Fairfield, Iowa 52556

ADDENDUM

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JAY B. MARCUS, MARCUS FOR CONGRESS, THE NATURAL LAW PARTY OF IOWA, EDWARD T. RUSK OF THE WORKING CLASS PARTY, EDWARD T. RUSK FOR CONGRESS, MICHAEL CUDDEHE, MICHAEL DIMICK, ROGERS BADGETT, PETER LAMOUREUX, FRED GRATZON, and SUSAN MARCUS,	)	NO. 4-96-CV-80690
Plaintiffs,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT DISMISSING COMPLAINT
vs.	)	
IOWA PUBLIC TELEVISION, A STATE AGENCY, and DANIEL K. MILLER in his official capacity,	)	
Defendants.	)	

The plaintiffs filed this action on September 13, 1996, alleging that the defendant public television network and its director of programming and production had infringed their constitutional rights arising under the First Amendment. The plaintiffs sought to have the seven plaintiffs who are qualified candidates for election to the Congress (hereafter the plaintiff candidates) included in programs scheduled to be aired on the six weekends leading up to the November 1996 general election. The plaintiffs also sought injunctive relief requiring the network to retract or correct its statement in a program guide referring to Republican and Democratic party candidates as "the major candidates."

1

Recognizing that the case might soon become moot, the court promptly held a hearing but then denied the plaintiffs' request for preliminary injunctive relief. The court then scheduled trial to begin on September 30, 1996. On September 27, plaintiffs filed a jury demand. Without deciding whether the case presented issues properly triable to a jury, the court commenced trial by impaneling a jury on September 30. The court informed the parties that the jury's verdicts would at least be considered advisory and might be deemed binding on all fact issues if the court concluded the Seventh Amendment gave the parties a right to trial by jury.

I. The Facts.

The parties stipulated many background facts, here repeated in the form set forth in the court's instructions to the jury:

> The plaintiff, Jay B. Marcus, is a duly qualified candidate of the Natural Law Party for U.S. Representative in Iowa's Third Congressional District.
>
> Michael Cuddehe, Peter Lamourex, Rogers Badgett, and Michael Demick are the duly qualified candidates of the Natural Law Party for U.S. Representative in Iowa's First, Second, Fourth, and Fifth Congressional Districts, respectively.
>
> Marcus for Congress is a political committee formed in 1996 to promote the election of Jay B. Marcus for U.S. Representative. The Natural Law Party of Iowa is a political committee formed to bring a scientific perspective into government and to promote the election of Natural Law Party candidates for public office.

Edward T. Rusk is a duly qualified candidate of the Working Class Party for U.S. Representative in Iowa's Third Congressional District. Edward T. Rusk for Congress is a political committee formed to promote the election of Edward T. Rusk for U.S. Representative.

Fred Gratzon is a duly qualified candidate of the Natural Law Party for U.S. Senate in Iowa.

Susan Marcus is a registered voter in Iowa who desires to hear the candidates who are parties to this action participate in forums with the Republican and Democratic candidates and all other legally qualified candidates on the Iowa Press show.

The defendant, Iowa Public Television, is a state agency. Daniel K. Miller is the Director of Programming and Production for Iowa Public Television and is a state employee. Dave Bolender is the Executive Director of Iowa Public Television and is a state employee. Michael Newell is an agent of Iowa Public Television who produces the television show Iowa Press.

The court submitted eight special verdict questions to the jury, and the jury answered each as follows:

1. Have the plaintiffs proved that the Iowa Press programs involving Iowa Congressional candidates [hereinafter "the Iowa Press programs"] are "debates"? Ans: Yes

2. Have the defendants proved that the Iowa Press programs are bona fide news interview programs? Ans: Yes

3. Have the plaintiffs proved that the defendants did not act in accordance with a predetermined policy in deciding whom to invite to participate on the Iowa Press programs? Ans: No

4. Have the plaintiffs proved that the defendants based their decisions on whom they would invite to participate on the Iowa Press

programs solely on whether the candidates had been nominated by the Republican or Democratic parties? Ans: No

5. Have any of the plaintiff candidates proved that the plaintiff candidates' appearance on an Iowa Press program would be newsworthy?

Jay B. Marcus	Ans: No
Edward T. Rusk	Ans: No
Michael Cuddehe	Ans: No
Michael Demick	Ans: No
Rogers Badgett	Ans: No
Peter Lamourex	Ans: No
Fred Gratzon	Ans: No

6. Have the plaintiffs proved that the defendants excluded the plaintiff candidates from the Iowa Press programs because defendants disagreed with their opinions on political issues? Ans: No

7. Have the defendants proved that the defendants excluded the plaintiff candidates from the Iowa Press programs on the basis of independent journalistic and editorial judgments the defendants made based on newsworthiness? Ans: Yes

8. Have the defendants proved that the defendants intended to open the Iowa Press programs only to those Congressional candidates whom the defendants invited to appear? Ans: Yes

The court need not decide whether the jury's findings were advisory only. Each of the jury's answers to the special verdict questions was fully supported by evidence in the record. The court makes the same findings based on its independent consideration of the evidence, including its assessment of the credibility of the parties who testified, the expert witnesses, and other witnesses. The court finds defendant Miller's testimony credible concerning the reasons the plaintiff candidates were not included in the Iowa Press programs.

With hindsight, the court would have asked the jury one additional question concerning the defendants' intent in selecting persons for the Iowa Press program. I believe that I should have asked the jury, as a follow-up question to special verdict question No. 1:

> Have the plaintiffs proved that the defendants intended the Iowa Press programs to be "debates"?

I find the defendants did not intend the programs to be debates. The defendant network has been airing weekly Iowa Press appearances of public figures for over twenty years. The typical programs are not debates but simply journalists' interviews of persons in the news generally. This is consistent with the jury's answers to special verdict questions 2 and 8, finding that the Iowa Press candidate interviews are bona fide news interview programs and that defendants opened these programs only to those congressional candidates defendants invited to appear.

Nevertheless, I conclude that reasonable persons viewing the programs would have found the joint appearances of candidates on the Iowa Press programs to be "debates," using the definition in jury instruction No. 13. Iowa Press interviews of the candidates were staged to give the public the opportunity to receive the views of the candidates interviewed on the programs, and the programs were regulated by the moderator and journalists asking questions. So the Iowa Press programs were debates.

II. Conclusions of Law.

1. The Iowa Press programs constituted limited public forums, because they were political debates staged by a public television network. See Forbes v. Arkansas Educational Television Communication Network, ____ F.2d _____ (8th Cir. 1996) (slip opinion p. 12) [hereafter Forbes II]; cf. Cornelius v. NAACP Legal Defense & Education Fund, Inc., 473 U.S. 788, 804-06 (1985) (whether government created limited public forum turns on its intent).

2. Plaintiffs have not established their First Amendment rights were violated. Persons presenting political viewpoints on a public television network may be excluded from staged debates if the exclusion is narrowly tailored and will serve compelling state interests. Forbes II at p. 15.

3. Defendants excluded the plaintiff candidates for principled reasons based on a sufficient state interest. See Forbes v. Arkansas Educational Television Commission, 22 F.3d 1423, 1429 (8th Cir. 1994), cert. denied, 115 S. Ct. 500 & 1962 (1995). The jury's findings and the court's findings of fact support this conclusion. Defendants did not exclude the plaintiff candidates arbitrarily but based the decision on a pre-determined policy. Defendants did not base their selection on whether persons to appear on the Iowa Press programs had been nominated by the Republican or Democratic parties, nor whether defendants disagreed with the candidates' opinions on political issues. The decision was based on the defendants' reasoned determination that the Iowa

Press programs are bona fide news interview programs; and in defendant Miller's professional editorial judgment not one of the plaintiff candidates was newsworthy. It is profoundly important that the defendant network and its news editors be allowed to exercise independent journalistic and editorial judgments based on newsworthiness. If the defendant network may not exercise editorial discretion in determining the content of its programs, the network would be fundamentally bland and of little value to the public it serves. So defendants proved they were serving a compelling state interest in excluding the plaintiff candidates from the Iowa Press programs. See FCC v. League of Women Voters, 468 U.S. 363, 367 (1984); Barnard v. Chamberlain, 897 F.2d 1059 (10th Cir. 1990); Muir v. Alabama Ed. Television Comm., 688 F.2d 1033, 1040 (5th Cir. 1982), cert. denied, 460 U.S. 1023 (1983).

4. Iowa statutes, received in evidence as exhibits, created the defendant network to be and operate as an institution of the press to serve the people of Iowa, free from political pressure from within or from without state government. Applicable Iowa law expresses a compelling governmental purpose in having the defendant network operate according to the Communications Act of 1934 and the rules and policies of the Federal Communications Commission adopted under that federal statute. See FCC v. League of Women Voters, 468 U.S. 363, 378 (1984).

5. Defendants' exclusion of the plaintiff candidates was narrowly tailored. The plaintiff candidates were

granted the opportunity to present their views on other programs presented by the network, based on Federal Communications Act equal access rules, and they are scheduled to appear on an upcoming Iowa Press program presenting views of congressional candidates not invited to the Iowa Press programs here at issue. Defendants proved by credible expert testimony that the defendant network's exercise of journalistic discretion meets generally accepted broadcast industry standards for making judgments about newsworthiness, as required by the "Statement of Principles of Editorial Integrity in Public Broadcasting," a document received in evidence in this case.

6. The court disagrees with plaintiffs' contention that Forbes II is dispositive of this case. Forbes II is distinguishable. There the court held that the Arkansas public television network excluded the plaintiff Forbes, a congressional candidate, solely because network personnel deemed him not a viable political candidate. Here, in contrast, the court and the jury have found credible the defendant Miller's explanation that lack of newsworthiness and not lack of viability of the plaintiff congressional candidates was the basis for the defendants' decision not to invite the plaintiff candidates. Defendants acknowledged that the plaintiff candidates were qualified to have their names on the ballot and therefore were viable candidates. Defendants properly took into account in determining newsworthiness, however, their study of the feeble efforts of the plaintiff candidates to raise funds or express efforts in their campaigns to generate

public support for their candidacies. In Forbes II the court held that the defendant network did not have a compelling and narrowly tailored reason for excluding the plaintiff from a debate when it simply deemed the plaintiff Forbes a person who was not a "viable candidate." Id. at p. 14. Forbes II is therefore inapposite.

III. Judgment.

The clerk of court shall enter judgment in favor of the defendants and against the plaintiffs, dismissing this action at plaintiffs' costs.

IT IS SO ORDERED.

Dated this 9th day of October, 1996.

Charles R. Wolle

CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 96-3645SIDM

Jay B. Marcus, et al,

Appellants,

v.

Iowa Public Television, etc., et al

Appellees.

Appeal from the United States District Court for the District of Southern Iowa

Appellees' motion requesting oral argument in the referenced appeal has been considered by the court and is hereby denied.

October 11, 1996

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 96-3645

Jay B. Marcus; Marcus For Congress, a political committee; The Natural Law Party of Iowa, a political committee; Edward T. Rusk, of the Working Class Party; Michael Cuddehe; Michael Dimick; Rogers Badgett; Peter Lamoureux; Fred Gratzon; Susan Marcus, Appellants, v. Iowa Public Television, a state agency; Daniel K. Miller, in official capacity, Appellees.	Appeal from the United States District Court for the Southern District of Iowa.

ORDER

Filed: October 11, 1996

Before FAGG, MAGILL, and BEAM, Circuit Judges.

MAGILL, Circuit Judge.

Jay B. Marcus, Marcus for Congress; The Natural Law Party of Iowa, Edward T. Rusk, of the Working Class Party; Michael Cuddehe; Michael Dimick; Rogers Badgett; Peter Lamoureux; Fred Gratzon; and

Susan Marcus (Movants)[1] sought equitable relief against Iowa Public Television and one of its officials (IPTV) in the district court.[2] IPTV had scheduled "joint appearances" of Democratic and Republican candidates for United States Representative for each of Iowa's five congressional districts on its program Iowa Press. Movants sought injunctive relief requiring IPTV to "include all legally qualified candidates in the joint appearances," Compl. at 10, as well as other injunctive and declaratory relief. The district court denied a preliminary injunction and, following a trial before the court and an advisory jury,[3] denied permanent injunctive relief. Movants' appeal of this denial of injunctive relief is pending before this Court.

IPTV has two scheduled joint appearances still to be broadcast. On Sunday, October 13, 1996, the Democratic and Republican candidates for United States Representative for Iowa's First Congressional District will appear on Iowa Press, and on

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[1]Jay B. Marcus is the Natural Law Party of Iowa (NLP) candidate for United States Representative in Iowa's Third Congressional District; Rusk is the Working Class Party candidate for United States Representative in Iowa's Third Congressional District; Cuddehe is the NLP candidate for United States Representative in Iowa's First Congressional District; Dimick is the NLP candidate for United States Representative in Iowa's Fifth Congressional District; Badgett in the NLP candidate for United States Representative in Iowa's Fourth Congressional District; Lamoureux is the NLP candidate for United States Representative in Iowa's Second Congressional District; Gratzon is the NLP candidate for the United States Senate in Iowa; and Susan Marcus is a registered voter in Iowa who wishes to see these aforementioned political candidates debate with Democratic, Republican, and other qualified congressional candidates on the Iowa ballot.

[2]The Honorable Charles R. Wolle, United States District Judge for the Southern District of Iowa.

[3]Although seeking only equitable relief, the Movants filed a jury demand with the district court on September 27, 1996. The district court impaneled a jury "[w]ithout deciding whether the case presented issues properly triable to a jury," Mem. Op. at 2, and the district court made "the same findings [as the jury] based on its independent consideration of the evidence." Id. at 4.

Sunday, October 20, 1996, the Democratic and Republican candidates for United States Representative for Iowa's Fourth Congressional District will appear on Iowa Press. Movants have brought this motion for emergency injunctive relief before this Court, requesting that IPTV be enjoined from broadcasting these joint appearances "unless all legally qualified candidates are permitted to participate on an equal basis." Emergency Mot. at 1. Because we conclude that injunctive relief is not warranted at this point in this case, we deny the motion.

I.

IPTV is an Iowa state actor, and is governed under the provisions of Iowa Code § 256.80-256.90. IPTV produces and broadcasts Iowa Press, a "30-minute news and public affairs program [which] airs twice each Sunday at noon and 7:00 p.m." Movants' App. at 14. Beginning on September 22 and running for a total of five weeks, Iowa Press scheduled "co-appearances by the major candidates seeking to represent Iowa's five congressional districts in the Iowa delegation in Washington D.C." Id. The major candidates were all Democrats or Republicans. Under the program's format, a host and a team of political reporters ask questions of the candidates, who would have an opportunity to present their views to the audience.

Movants made repeated requests to IPTV that they be allowed to participate in the joint appearances. IPTV declined to allow other candidates to participate in the scheduled joint appearances, concluding that they were not newsworthy. IPTV did offer to include Movants and other candidates to present their views on other programs presented by the network. Dissatisfied with this offer, Movants brought suit against IPTV for injunctive and declaratory relief on September 13, 1996. The district court denied Movants' motion for preliminary injunctive relief on September 24, 1996, holding that they had failed to demonstrate

irreparable harm and that they did not establish a likelihood of success on the merits.[4] Trial was set for September 30, 1996, and a jury was impaneled.

After the presentation of evidence, including witness and expert witness testimony, the jury returned a special verdict with a series of interrogatories. Based on an independent review of the evidence, the district court adopted the jury's findings, and made additional findings. The district court found that, although not intended by IPTV to be "debates," the scheduled joint appearances

---

[4]The district court found that:

> Plaintiffs have not proved irreparable harm or that on balance the harm they would suffer would outweigh the harm caused by granting an injunction. There is no showing in this record that their scheduled appearances on Iowa Public Television programs other than "Iowa press" would be less valuable to them. Voter attention given to a program aired closer to the time of the elections may well have a more favorable impact on voters than a presentation on the Iowa Press programs now planned. On balance, an injunction's harm to the exercise of defendants' journalistic discretion would outweigh any harm plaintiffs might suffer from not appearing on the planned Iowa Press shows.
>
> Plaintiffs have not established a likelihood of success on the merits. The question of whether or not the planned Iowa Press programs featuring political candidates will constitute a debate under Forbes v. Arkansas Education Television Commission, [93 F.3d 497 (8th Cir. 1996) (Forbes II)], is a very close one.
>
> The public has an interest in hearing the views of all legally qualified candidates. But the record here is that all candidates' views can adequately be presented on Iowa Public Television programs without requiring the requested appearances with other candidates on the scheduled Iowa Press programs. Moreover, there is a very strong public interest in allowing news broadcast journalists to exercise editorial discretion.

Order at 1-2.

would be interpreted by reasonable persons viewing Iowa Press to be debates.

The district court also found that the Iowa Press programs were "bona fide news interview programs." Mem. Op. at 3. The district court noted that

> defendant network has been airing weekly Iowa Press appearances of public figures for over twenty years. The typical programs are not debates but simply journalists' interviews of persons in the news generally.

Id. at 5. The district court found that Movants had been excluded from the joint appearances "on the basis of independent journalistic and editorial judgments" by IPTV that the Movants were not newsworthy, id. at 4, and specifically held that Movants had failed to prove that their appearance on Iowa Press would be newsworthy. Id. The district court also held that IPTV did not base its decision to include certain candidates in the joint appearances based on the candidates' political affiliation, and that Movants were not excluded from the joint appearances based on their political affiliation or on the basis of their political views.

Based on these findings, the district court concluded that the Iowa Press programs constituted a limited public forum, but that Movants' exclusion from the programs did not violate the First Amendment. IPTV served a compelling state interest, defined by IPTV's policies, by limiting the joint appearances to newsworthy candidates. The district court further held that the exclusion was narrowly tailored because, although not invited to appear on Iowa Press, Movants did have access to other programs presented by IPTV. The district court denied all relief, and Movants appealed. During the pendency of the appeal, Movants brought this motion before us.

> Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

We address each of these issues in turn.

A.

The two remaining joint appearances scheduled on Iowa Press concern the First and Fourth Congressional District races. Only Movants Cuddehe and Badgett, the candidates for those races, would be directly affected by the grant of the requested injunctive relief. We therefore direct our inquiry into irreparable harm to these two Movants.

We agree with the district court that the access offered to these Movants on other IPTV programs will be of significant value to the Movants, and might well have a more favorable impact on voters than the earlier airing of Iowa Press. See Order at 2. But see Trial Tr. at 73, reprinted in Movants' App. at Ex. G (expert testimony of Professor Mack Shelley that appearance in a debate is more valuable than a postdebate appearance). We disagree, however, that these Movants have failed to show irreparable harm.

Movants in this motion argue that their First Amendment right to express themselves in a limited public forum has been offended by their exclusion from the joint appearances on Iowa Press. If they are correct and their First Amendment rights have been violated, this constitutes an irreparable harm. See, e.g., Elrod v. Burns, 427 U.S. 347, 373 (1973) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). This element of the Dataphase analysis is therefore satisfied.

B.

We agree with the district court, however, that the balance of harms in this case weighs against issuing an injunction. Although a state actor, IPTV is a media organization, which necessarily must make editorial decisions regarding the content of its programming. Interference with that editorial discretion constitutes a significant injury to the editorial integrity of IPTV, which interferes with their primary mission of serving the public. See Mem. Op. at 7.

In addition, IPTV has represented that, if required to include other candidates in the Iowa Press joint appearances, it will cancel the scheduled joint appearances entirely "rather than impair its journalistic integrity and its credibility with its viewers." Mem. in Opposition to Emergency Mot. at 3. We note that this is precisely the step taken by the Nebraska Education Television Network in August 1996, when it cancelled a scheduled debate between certain senatorial candidates rather than include uninvited candidates or face litigation. We find that the threat of possible harm to IPTV is substantial if the requested injunction were to issue, and is greater than the harms faced by Movants.

C.

We also do not believe that Movants have demonstrated a likelihood of success on the merits. In this case, "success on the merits" means that we would reverse the district court on appeal. We do not lightly assume district court error, particularly where, as in the appeal pending before this Court, the district court's judgment shall be reviewed for abuse of discretion. See Pottgen v. Missouri State High Sch. Activities Ass'n, 40 F.3d 926, 929 (8th Cir. 1994).

Accepting for the purposes of this motion that the joint appearances are debates and that IPTV has opened Iowa Press as a limited public forum to qualified congressional candidates, see Mem. Op. at 5-6, IPTV's regulation of speaker access "survive[s] only if [it is] narrowly drawn to achieve a compelling state interest." International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992).

IPTV presented evidence, and the district court found, that IPTV limited speaker access to the joint appearances on Iowa Press on the basis of the newsworthiness of the candidates. The district court held that IPTV had a compelling interest in presenting newsworthy programs, stating that:

> It is profoundly important that the defendant network and its new editors be allowed to exercise independent journalistic and editorial judgments based on newsworthiness. If the defendant network may not exercise editorial discretion in determining the content of its programs, the network would be fundamentally bland and of little value to the public it serves.

Mem. Op. at 7.

Movants argue that IPTV has no compelling interest in limiting speaker access, and rely heavily on our decision in Forbes v. Arkansas Educational Television Commission, 93 F.3d 497 (8th Cir. 1996) (Forbes II). In Forbes II, we held that an independent candidate could not be excluded from a debate broadcast on a state-operated public television station because he was not a "viable" candidate. See id. at 504-05. Reasoning that Arkansas law itself defined "viability" as being qualified as a candidate, we determined that the independent candidate had been excluded from the debate only because "in the opinion of the network, he could not win." Id. at 504. Relying on Families Achieving Independence and Respect v. Nebraska Department of Social Services, 91 F.3d 1076

(8th Cir. 1996), a decision which has recently been vacated pending rehearing by the Court en banc, the Forbes II Court stated that:

> We have no doubt that the decision as to political viability is exactly the kind of journalistic judgment routinely made by newspeople. We also believe that the judgment in this case was made in good faith. But a crucial fact here is that the people making this judgment were not ordinary journalists: they were employees of government. The First Amendment exists to protect individuals, not government. The question of political viability is, indeed, so subjective, so arguable, so susceptible of variation in individual opinion, as to provide no secure basis for the exercise of governmental power consistent with the First Amendment.

93 F.3d at 505. Movants reason that, because this case also involves the exclusion of a candidate based on a "subjective" determination of newsworthiness, see Trial Tr. at 296 (testimony of Mike Newell, Producer for Iowa Press), it must also be an improper exercise of governmental authority. We disagree.

Forbes II cannot be read to mandate the inclusion of every candidate on the ballot for any debate sponsored by a public television station. Nor does Forbes II suggest that public television station administrators, because they are government actors, have no discretion whatsoever in making broadcast determinations. Rather, Forbes II held that there was no compelling interest in excluding statutorily-defined viable candidates from a debate based on the viability of the candidate. Unlike "viability," which is ultimately for the voters to decide, "newsworthiness" is peculiarly a decision within the domain of journalists.

Relying on Regan v. Time, Inc., 468 U.S. 641 (1984), Movants assert that "newsworthiness" is an inherently improper basis for

determining access.[5] Regan involved criminal statutes for photographing obligations or securities of the United States, see id. at 643, and we agree that the "newsworthiness" of a message could not be a proper basis for determining whether a speaker should be criminally liable for speech. In the instant case, however, we deal with a government agency which is also a media organ. By its very nature and under controlling policies, IPTV must be concerned with the newsworthiness of the issues and speakers included in its programming. Pursuant to Iowa Code § 256.82(3), IPTV's advisory committee on journalistic and editorial integrity is "governed by the national principles of editorial integrity developed by the editorial integrity project." Id. "Editorial integrity in public broadcasting programming means the responsible application by professional practitioners of a free and independent decision-making process which is ultimately accountable to the needs and interests of all citizens." Statement of Principle of Editorial Integrity in Public Broadcasting, the Editorial Integrity Project, reprinted in Respondents' App. at Ex. 4 (Statement of Principles). The Statement of Principles provides that:

---

[5]The Regan Court stated:

> A determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers. Under [18 U.S.C. §§ 474, 504(1)], one photographic reproduction will be allowed and another disallowed solely because the Government determines that the message being conveyed in the one is newsworthy or educational while the message imparted by the other is not. The permissibility of the photograph is therefore often dependent solely on the nature of the message being conveyed. Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.

468 U.S. at 648-49 (quotations and citation omitted).

> In order to assure that programs meet the standards of editorial integrity the public has a right to expect, the following five principles and guidelines establish a foundation for trustee action. . . . The ultimate goal of the principles and guidelines is to assist public broadcasting trustees in fulfilling their vital role in this important public service.

Id. These five principles are: (I) We are Trustees of a Public Service; (II) Our Service is Programming; (III) Credibility is the Currency of our Programming; (IV) Many of our Responsibilities are Grounded in Constitutional or Statutory Law; and (V) We Have a Fiduciary Responsibility for Public Funds. Id. The guideline to Principle III, Credibility is the Currency of our Programming, instructs that:

> The process of developing programs to meet the audience's needs must function under clear policies adopted and regularly reviewed by the trustees. This process must be managed by the professional staff according to generally accepted broadcasting industry standards, so that the programming service is free from pressure from political or financial supporters. The station's chief executive officer is responsible for assuring that the program decisions are based on editorial criteria, such as fairness, objectivity, balance and community needs; not on funding considerations.

Id. In adhering to these guidelines, IPTV has created a programming policy, which provides that:

> In the presentation of public affairs programming, Iowa Public Television should maintain maximum objectivity and fairness. Iowa Public Television should strive for a better informed citizenry of the state of Iowa, through the presentation of <u>important and significant</u> issues.

Resp't's App. at Ex. 3 (emphasis added).

In meeting these policies, IPTV has limited access to the <u>Iowa Press</u> joint appearances to newsworthy candidates. Although a

determination of newsworthiness is based on journalistic discretion, and is therefore somewhat subjective, there are clearly objective elements of newsworthiness. Daniel K. Miller, the Director of Programming and Production for IPTV, testified at length in his deposition to the elements which inform a professional editorial judgment that a candidate's appearance is "newsworthy":

> [N]ewsworthiness has a number of elements, I think. Is this candidate or this campaign, is it active in the region that it's running for? If it's a statewide campaign, for example, is it active in all of Iowa's 99 counties or in a majority of them? Does it have--my phrase, not a good one--an organization of volunteers, campaign organization beyond the campaign staff? If the candidate or campaign or party has had previous exposures to elective offices, how have they done? If they have done well, what is well? Are they growing? Is there growth in their success at the polls? Have they had previous exposure to elective office? Are they seeking the office actually to be elected to it or do they say that they are seeking it to bring ideas into the marketplace? How has their fund-raising been? Is it a broad base? Do they have a lot? Do they have little? Whatever. How are they treated by other media organizations? Have their efforts generated news in other media organizations or if there are debates, have they been included in those debates by other news organizations? What are we hearing? What are we hearing either from the public or what are we hearing from the campaigns themselves? Are people calling us and saying you know, "Such and such had a crowd of 550 last night," or are they calling us and saying, "Such and such had a crowd of five." The last part, are we hearing anything? What are we hearing from the campaigns themselves? Politics is an enterprise that relies on the ability of its participants to sell themselves, to retail themselves. What are we hearing along that line? Do we hear a lot from the candidates themselves? Are they calling us? Are they faxing us? Are we getting encouraged by their supporters who happen to be people we know or people we don't know to pay attention to their campaigns? Do we see early indications of retail efforts in that regard in the media? Are they buying newspaper or radio ads?

Dep. at 22-24, reprinted in Movants' App. at Ex. C. Professor Barbara Mack, an expert witness for IPTV, testified regarding journalistic standards of newsworthiness:

> When I teach freshmen journalists about what is meant by newsworthiness, what makes someone newsworthy, you talk about the--the quality that that person or that news event has.
>
> Is that news event going to have an impact on the people who read your newspaper or who watch your television station? Is it going to change their lives? Does it have the potential to change their lives? Is it something which is a public conflict? Conflict is one of our classic new values. Impact is a classic news value.
>
> We talk about the news--the news value of locality. As strange as it may seem, a bus accident that occurs in India will get very little coverage in the Des Moines Register, but a bus accident that occurs in downtown Des Moines at rush hour, even though it may injure fewer people, will get more new coverage. Why? Because it's local, and local news has importance.
>
> We talk about the value of human interest, and many of the stories that most people think of as feature stories are human interest stories. They appeal to the characteristics of the human spirit.
>
> So when a journalist is making a decision about what is or is not news, there is always a very careful evaluation of each of those factors.

Trial Tr. at 355-56.

As found by the district court, IPTV properly determined that none of the Movants were newsworthy, see Mem. Op. at 4. The district court found that:

> Defendants properly took into account in determining newsworthiness . . . their study of the feeble efforts of the plaintiff candidates to raise funds or express efforts in their campaigns to generate public support for their candidacies.

Id. at 8-9.

We agree that IPTV has a compelling interest, in meeting its public service goals, of limiting access to newsworthy candidates. We further agree that its methods were narrowly suited to achieving this goal, and left substantial access to other fora offered by IPTV. We therefore do not believe that Movants have demonstrated a likelihood of success on the merits.

D.

We agree with the district court that there is a public interest in hearing all qualified candidates present their views. However, there is also a public interest in having a debate between some candidates rather than having no debate whatsoever. In addition, we believe that IPTV's professional broadcasters are generally better aware of what constitutes appropriate programming than a group of federal judges; it is clearly in the public interest in having a state-operated public television free of unnecessary interference by a federal court. On balance, therefore, we believe that the public interest supports denying this injunction.

III.

For the reasons stated above, we deny the emergency motion for injunctive relief.

BEAM, Circuit Judge, dissenting.

The court (and the district court as well) seeks to distinguish the indistinguishable. Thus, I dissent.

The binding precedent at work in this case is found in Forbes v. Arkansas Educ. Television Comm'n, 93 F.3d 497 (8th Cir. 1996).

Forbes (as are the plaintiffs in this case) was a legally qualified candidate for Congress from the Third District of Arkansas. Also, as here, he was shut out of a debate between the Republican and Democratic candidates for the Third District seat televised on Arkansas Educational Television. The basis for the exclusion was that Forbes was not a "viable" candidate.

Chief Judge Richard S. Arnold, for a unanimous panel, rejected, as unconstitutional, this governmental action, saying:

> We have no doubt that the decision as to political viability is exactly the kind of journalistic judgment routinely made by newspeople. We also believe that the judgment in this case was made in good faith. But a crucial fact here is that the people making this judgment were not ordinary journalists: they were employees of government. The First Amendment exists to protect individuals, not government. The question of political viability is, indeed, so subjective, so arguable, so susceptible of variation in individual opinion, as to provide no secure basis for the exercise of governmental power consistent with the First Amendment.

Id. at 505.

In my view, there can be no realistic argument advanced that a subjective opinion by a government employee that a candidate is or is not "newsworthy" is different from a subjective conclusion that he or she is or is not "politically viable." The inquiry involves two peas from the same analytical pod. Forbes requires us to grant the emergency injunction requested in this case.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 11, 1996

Jay B. Marcus, Esq.
Marcus & Thompson
Suite 201
51 West Washington
Fairfield, IA 52556

RE: MUR 4592

Dear Mr. Marcus:

This letter acknowledges receipt on December 9, 1996, of the complaint you filed alleging possible violations of the Federal Election Campaign Act of 1971, as amended ("the Act"). The respondent(s) will be notified of this complaint within five days.

You will be notified as soon as the Federal Election Commission takes final action on your complaint. Should you receive any additional information in this matter, please forward it to the Office of the General Counsel. Such information must be sworn to in the same manner as the original complaint. We have numbered this matter MUR 4592. Please refer to this number in all future communications. For your information, we have attached a brief description of the Commission's procedures for handling complaints.

Sincerely,

F. Andrew Turley

F. Andrew Turley
Supervisory Attorney
Central Enforcement Docket

Enclosure
Procedures

FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 11, 1996

Daniel K. Miller, Director
Iowa Public Television
6450 Corporate Drive
Johnston, Iowa 50131

RE: MUR 4592

Dear Mr. Miller:

The Federal Election Commission received a complaint which indicates that Iowa Public Television may have violated the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint is enclosed. We have numbered this matter MUR 4592. Please refer to this number in all future correspondence.

Under the Act, you have the opportunity to demonstrate in writing that no action should be taken against Iowa Public Television in this matter. Please submit any factual or legal materials which you believe are relevant to the Commission's analysis of this matter. Where appropriate, statements should be submitted under oath. Your response, which should be addressed to the General Counsel's Office, must be submitted within 15 days of receipt of this letter. If no response is received within 15 days, the Commission may take further action based on the available information.

This matter will remain confidential in accordance with 2 U.S.C. § 437g(a)(4)(B) and § 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

If you have any questions, please contact Alva E. Smith at (202) 219-3400. For your information, we have enclosed a brief description of the Commission's procedures for handling complaints.

Sincerely,

F. Andrew Turley

F. Andrew Turley
Supervisory Attorney
Central Enforcement Docket

Enclosures
1. Complaint
2. Procedures
3. Designation of Counsel Statement

Iowa Public Television

December 18, 1996

Mr. F. Andrew Turley
Supervisory Attorney
Central Enforcement Docket
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

RE: MUR 4592

Dear Mr. Turley:

In response to your letter of December 11, 1996, I am enclosing the Designation of Counsel Statement, which identifies Richard Marks of Dow, Lohnes and Albertson, as the attorney representing Iowa Public Television in the above-referenced matter before the Commission.

Sincerely,

Daniel K. Miller
Director of Programming
and Production

cc: Richard Marks

P. O. Box 6450 • 6450 Corporate Drive Johnston, Iowa 50131-6450 • 515-242-3100
11 Des Moines 12 Iowa City 21 Fort Dodge 24 Mason City 27 Sioux City 32 Waterloo 32 Council Bluffs 36 Red Oak

STATEMENT OF DESIGNATION OF COUNSEL

MUR 4592

NAME OF COUNSEL: Richard Marks

FIRM: Dow, Lohnes & Albertson

ADDRESS: Suite 800

1200 New Hampshire Avenue NW

Washington, DC 20036-6802

TELEPHONE: (202) 776-2565

FAX: (202) 776-2222

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
DEC 23 2 33 PM '96

The above-named individual is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

12/18/96
Date

Daniel K. Miller
Signature

RESPONDENT'S NAME: Iowa Public Television

ADDRESS: Attn: Daniel K. Miller, Director of Programming &Production

P. O. Box 6450, 6450 Corporate Drive

Johnston, Iowa 50131

TELEPHONE: HOME( )

BUSINESS(515) 242-3123

9304338625371

DOW, LOHNES & ALBERTSON, PLLC
ATTORNEYS AT LAW

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TELEPHONE 770-901-8800
FACSIMILE 770-901-8874

December 26, 1996

Mr. F. Andrew Turley
Supervisory Attorney
Central Enforcement Docket
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 4592

Dear Mr. Turley:

I represent Iowa Public Television in connection with the complaint filed on December 11, 1996 by Jay D. Marcus. In view of the holiday season and of the substantial amount of material filed by Mr. Marcus, I request an extension to and including January 21, 1997 to reply to Mr. Marcus' complaint.

Very truly yours,

Richard D. Marks

RDM:rdt

cc: Mr. Daniel K. Miller
J. B. Marcus, Esq.

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

December 30, 1996

Richard D. Marks, Esq.
DOW, LOHNES & ALBERTON
1200 New Hampshire Avenue, NW
Suite 800
Washington, D.C. 20036-6802

RE: MUR 4592
Iowa Public Television

Dear Mr. Marks:

This is in response to your letter dated December 26, 1996, which we received on December 30, 1996, requesting an extension January 21, 1997, to respond to the complaint filed in the above-noted matter. After considering the circumstances presented in your letter, the Office of the General Counsel has granted the requested extension. Accordingly, your response is due by the close of business on January 21, 1996.

If you have any questions, please contact me at (202) 219-3400.

Sincerely,

Alva E. Smith

Alva E. Smith, Paralegal
Central Enforcement Docket

9804338626373

AM STEREO 1490 FM STEREO 107.3
am KBUR fm KGRS
1411 N. ROOSEVELT AVE. • P.O. BOX 70
BURLINGTON, IOWA 52601 • (319) 752-2701

December 26, 1996

4592

F. Andrew Turley
Supervisory Attorney
Central Enforcement Docket
Federal Election Commission
Washington, DC 20463

Dear Mr. Turley,

Please accept this as a response to your letter received 16 December 1996, and as a request to dismiss the complaint filed against us by Jay Marcus. Mr. Marcus has told you selected facts of the situation which favor his position. The whole truth establishes that there was no violation of CFR 110.13(c), that we acted in good faith and extended every courtesy to Marcus, and that in return he is engaging in "sour grapes" and harassing us with this paperwork and drain on our time.

Prior to our proposed debate, Marcus tried to get himself included in a debate between Mr. Mahaffey and Mr. Boswell, the two principal candidates (they ultimately received 97% of the votes cast in the general election) that was sponsored by Iowa Public Television. They also chose not to include the candidates from the Libertarian, Natural Law, and Workers Parties. Mr. Marcus sought a temporary restraining order in U.S. District Court. He was denied. He brought his case to court. He lost. He appealed to a special three-judge panel of the 8th Circuit Court of Appeals. They affirmed the District Court Opinion.

Mr. Marcus was not invited to participate, nor were several other third party candidates for the Congressional District Seat, because their parties have only carried very small percentages of the voting electorate.

Consequently, our station and the Public Interest Institute made a good faith judgment to invite only the candidates known statewide, State Senate President Leonard Boswell and Former Iowa Republican Party Chairman Mike Mahaffey. This decision was in keeping with the guidelines set forth by the Federal Communications Commission.

Prior to the forum, an interview with Mr. Marcus had aired on our station's talk show and several news stories had been aired about his candidacy.

Then on the day of the debate, Mr. Marcus contacted our station and representatives of the Public Interest Institute demanding he be allowed to participate. He had made no previous request for inclusion. His eleventh hour request was denied. However, our station agreed to provide him yet more free air time the following week, though not required by the F.C.C. Mr. Marcus did accept that offer.

Our station and the Public Interest Institute stand by our decision and believe that the criteria used to set up the debate satisfies the pre-established objective criteria set forth by the Federal Election Commission.

If you require any additional information, please do not hesitate to contact us.

J.K. Martin
News Director

DOW, LOHNES & ALBERTSON, PLLC
ATTORNEYS AT LAW

RICHARD D. MARKS
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rmarks@dlalaw.com

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FACSIMILE 770-901-8874

January 21, 1997

Via Courier

F. Andrew Turley, Esq.
Federal Election Commission
Room 657
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 4592

Dear Mr. Turley:

On behalf of Iowa Public Television ("IPTV"), this responds to your letter of December 11, 1976 to Daniel K. Miller, IPTV's Director of Programming and Production. By letter dated December 30, 1996 from Alva E. Smith of your office, IPTV was given until January 21, 1997 to respond to your inquiry.

In your December 11 letter, you asked IPTV to submit any factual or legal materials relevant to the Commission's analysis of the December 3, 1996 letter of complaint filed by Jay B. Marcus of Marcus & Thompson in Fairfield, Iowa. Mr. Marcus complains that IPTV violated 11 CFR §110.13(c) by failing to use "pre-established, objective criteria for candidate selection for debates" (Marcus letter at 2).

IPTV believes that its selection of participants for the programs in question did not violate 11 CFR § 110.13(c). Moreover, the factual and legal material that the Commission needs to determine that Mr. Marcus's complaint is wholly meritless is found in two federal court decisions, *Marcus v. Iowa Public Television*, No. 4-96-CV-80690 (S.D. Iowa October 9, 1996), and *Marcus v. Iowa Public Television*, 97 F.3d 1137, 1144 (8th Cir. 1996) (*en banc appeal pending*). I understand that Mr. Marcus has furnished you with slip opinions of these two decisions.

BACKGROUND

Mr. Marcus's complaint involves the news interview program, *Iowa Press*, which has been regularly scheduled on IPTV for over 24 years. The format of the program is that reporters ask questions of guests who are selected to appear because they are newsworthy. As you already know from Mr. Marcus's letter, he and a number of other fringe candidates filed suit in federal district court in Des Moines, seeking a court order that they be included in a number of *Iowa Press* broadcasts that, during five successive Sundays from September 22 to October 20, 1996, featured joint appearances of the most newsworthy candidates, as selected by IPTV, for Congress in Iowa's five congressional districts. All the candidates invited were Democrats or Republicans.

The question, then, is whether IPTV selected the invitees to these editions of *Iowa Press* in conformity with 11 CFR §110.13(c)'s requirement that:

> For all debates, staging organization(s) must use pre-established objective criteria to determine which candidates may participate in a debate. For general election debates, staging organization(s) shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate.

(For purposes of this response, IPTV will assume that the *Iowa Press* broadcasts at issue are "debates" under 11 CFR §110.13, although that is one of the points still being litigated before the Eighth Circuit in *Marcus*.)

IPTV will show that its decisions not to invite Mr. Marcus and other fringe candidates to *Iowa Press* were based on the journalistic standard of "newsworthiness." IPTV concluded that Mr. Marcus and the other peripheral candidates were not sufficiently newsworthy to merit appearances on *Iowa Press*. In turn, newsworthiness as a standard includes objective criteria that are well understood throughout the news business generally and in broadcast news operations in particular. Consequently, IPTV satisfies the first part of the regulation requiring pre-established objective criteria. Further, IPTV will refer to the recent trial in U.S. District Court to show that the candidates who were invited to *Iowa Press* were not selected solely because of their nomination by a particular political party. Therefore, IPTV meets 11 CFR §110.13(c) in all respects.

IOWA PUBLIC TELEVISION
AND
ITS USE OF JOURNALISTIC CRITERIA

IPTV is an agency of the state of Iowa. Iowa Code §§ 256.81-256.84. IPTV is under the jurisdiction of the Iowa Public Broadcasting Board. Iowa Code § 256.82. The Board plans, establishes, and operates educational radio and television facilities and other telecommunications services to serve the educational needs of the state. *Id.* The Board is licensed by the Federal Communications Commission ("FCC") to operate radio and television facilities. Iowa Code § 256.84.2.

IPTV has been established by the Iowa legislature as an institution of the press. IPTV's programming operations are to be independent of political or administrative control of any kind by any other part of state government. The Iowa legislature intended to allow IPTV to exercise independent editorial judgment, free from government influence. Section 256.82.3 creates an Advisory Committee on Journalistic and Editorial Integrity for IPTV, and specifically states that IPTV is to be governed by a document entitled, *Statement of Principles of Editorial Integrity in Public Broadcasting*, developed by the Editorial Integrity Project.

The *Statement of Principles of Editorial Integrity in Public Broadcasting*, found at Tab 1, was developed at a conference "convened so that public broadcasting station managers and representatives of state licensee boards and commissions could explore the First Amendment position of public broadcasting licensees in light of past legal decisions and legislative actions." The conferees, including representatives of IPTV, were concerned about constitutional issues that can arise when state-owned broadcasting stations exercise editorial judgment. The conferees drafted the *Principles of Editorial Integrity* to "help to guarantee public broadcasting's editorial integrity in the future."

The *Principles of Editorial Integrity* define editorial integrity in public broadcast programming as "the responsible application by professional practitioners of a free and independent decision-making process which is ultimately accountable to the needs and interests of all citizens." *Id.* at 3. Because the State of Iowa adopted the *Principles of Editorial Integrity* in the Iowa Code, Section 256.82.3, IPTV partitions its journalistic processes so that they are editorially independent of the state's political and administrative apparatus.

The *Statement of Principles of Editorial Integrity* declares:

> The process of developing programs . . . must be managed by the professional staff *according to generally accepted broadcast industry standards*, so that the programming service is free from pressure from political or financial supporters.

> The station's chief executive officer is responsible for assuring that the program decisions are based on editorial criteria, such as fairness, objectivity, balance and community needs, not on funding considerations.

Id. at 14. (emphasis added)

In addition to the *Principles of Editorial Integrity*, IPTV's Board adopted a Programming Policy, found at Tab 2, to set forth the goals of IPTV's programming and to give journalists at IPTV guidance in making programming decisions. In that policy, the Board grants the Executive Director and his designees, such as the Director of Programming and Production, the responsibility for making programming decisions at IPTV. *Id.* at 1. The Programming Policy instructs that IPTV "should not avoid issues of controversy, but in presenting such topics must provide a fair and balanced program schedule to provide that the views of the citizenry are adequately represented." *Id.* at 2.

NEWSWORTHINESS AS THE STANDARD FOR IPTV'S EDITORIAL DECISIONS REGARDING *IOWA PRESS*

"Newsworthiness" as a standard for decision-making among journalists generally, and among broadcast editors specifically, has been recognized by the Supreme Court. *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 119 (1973) ("Obviously, the licensee's evaluation is based on its own journalistic judgment of priorities and newsworthiness.").

This is also the standard used by the Federal Communications Commission ("FCC") in deciding whether certain appearances by legally qualified candidates are exempt from the "equal opportunities" requirements of Section 315(a) of the Communications Act, 47 U.S.C. § 315(a). A candidate not invited to an exempt news interview or debate may complain to the FCC to challenge the program's exempt status only by adducing evidence of bad faith -- that the licensee intended to advance a particular candidacy instead of basing its broadcast decision on a bona fide editorial judgment. The candidate satisfies this burden by providing "extrinsic evidence" that the licensee "acted in bad faith or that its motive . . . was to advance [a particular] candidacy." *Brown for President Comm.*, 75 F.C.C. 2d 609, 613-14 (1980). If the candidate meets the burden, the broadcast is non-exempt, and the candidate is entitled to equal opportunities on the station or network. *Andrew J. Watson*, 26 F.C.C. 2d 236 (1970); *Constitutional Party and Frank W. Gavdosh*, 14 F.C.C. 2d 255 (1968), *rev. denied*, 14 F.C.C. 2d 861 (1968); *Conservative Party*, 40 F.C.C. 1086 (1962).

The FCC consistently resolves candidates' complaints under Section 315 (a) by analyzing whether the broadcaster exercised good faith news judgment. This is true whether the

broadcaster is commercial or noncommercial and, if the latter, whether a state-related or a community licensee. *Johnson v. FCC*, 829 F.2d 157, 160-63 (D.C. Cir. 1987) (Citizens Party candidates' request to be included in broadcast political debate held "a demand for broadcast access," and is inconsistent with Congress' decision to promote coverage of political news and First Amendment interest in preserving broadcasters' journalistic discretion); *King Broadcasting Co. v. FCC*, 860 F.2d 465 (D.C. Cir. 1988), *on remand*, 6 FCC Rcd 4998 (1991); *Jim Trinity*, Letter, 7 FCC Rcd 3199 (1992) (state university licensee); *Arthur R. Block*, Letter, 7 FCC Rcd 1784 (1992) (community licensee and state university licensee). Protection of broadcast licensees' news judgment -- the good-faith exercise of editorial discretion -- is, therefore, maintained.

At trial before the District Court in Des Moines, IPTV's expert witness, Professor Barbara Mack, testified that the phrase "generally accepted broadcast industry standards" has a meaning in the news business that is understood and applied by practicing journalists. App. at 386-87, Tr. Trans. Vol. II at 354-55 ("App." references are to the parties' Joint Appendix filed with the Court of Appeals in *Marcus*, and "Tr. Trans." to the trial transcript in the District Court). Professor Mack testified that:

> When I teach freshmen journalists about what is meant by newsworthiness, what makes someone newsworthy, you talk about the -- the quality that that person or news event has.
>
> Is that news event going to have an impact on the people who read your newspaper or who watch your television station? Is it going to change their lives? Does it have the potential to change their lives? Is it something which is a public conflict? Conflict is one of our classic news values. Impact is a classic news value.
>
> We talk about the news -- the news value of locality. As strange as it may seem, a bus accident that occurs in India will get very little coverage in the *Des Moines Register*, but a bus accident that occurs in downtown Des Moines at rush hour, even though it may injure fewer people, will get more news coverage. Why? Because it's local, and local news has importance.
>
> We talk about the value of human interest, and many of the stories that most people think of as feature stories are human interest stories. They appeal to the characteristics of the human spirit.
>
> So when a journalist is making a decision about what is or is not news, there is always a very careful evaluation of each of those factors.

App. at 387-88, Tr. Trans. Vol. II at 355-56.

Furthermore, Professor Mack testified that IPTV followed these journalistic standards, as dictated by the *Principles of Editorial Integrity*, when making its newsworthiness determinations about the Appellant Candidates. App. at 388, Tr. Trans. Vol. II at 356. The District Court specifically held that Professor Mack's testimony was credible, and that it demonstrated how IPTV's exercise of editorial judgement complied with these standards. *Marcus* (District Court), slip op. at 8.

Professor Mack also explained that IPTV's conclusions were based on identifiable criteria and, therefore, not arbitrary. App. at 491-92, Tr. Trans. Vol. II at 459-60. These conclusions were subjective because the decision-making process required Mr. Miller and the journalists at IPTV to use their professional judgement in applying the standards of journalism to the situation at hand. However, as Professor Mack testified, the exercise of that judgment was narrowly tailored because it followed by the rules of journalism. These were rules that IPTV's editors had learned in journalism courses, in their years of practice in the profession, and through materials produced by their professional organizations. App. at 492, Tr. Trans. Vol. II at 460.

Thus, while IPTV's ultimate editorial judgment about whom to invite to *Iowa Press* was a subjective synthesis, the elements of that synthesis included pre-established objective criteria. Thus, IPTV met the requirements of 11 CFR 110.13(c).

This conclusion is confirmed by Mr. Miller's testimony before the District Court, where he noted that, while the ultimate journalistic decision was subjective, the criteria included objective elements. Mr. Miller stated that "[e]very judgment you make as a news judgement has relativity to it . . . every judgment you make is subjective." App. at 333, Tr. Trans. Vol. III at 13. Nevertheless, as the Court of Appeals pointed out in its denial of Mr. Marcus's emergency motion for an injunction pending appeal, "there are clearly objective elements of newsworthiness." *Marcus*, 97 F.3d at 1143. Mr. Miller listed the objective elements forming the basis of an editorial judgement about newsworthiness:

> [N]ewsworthiness has a number of elements, I think. Is this candidate or this campaign, is it active in the region that it's running for? If it's a statewide campaign, for example, is it active in all of Iowa's 99 counties or in a majority of them? Does it have -- my phrase, not a good one -- an organization of volunteers, campaign organization beyond the campaign staff? If the candidate or campaign or party has had previous exposures to elective offices, how have they done? If they have done well, what is well? Are they growing? Is there growth in their success at the polls? Have they had previous exposure to elective office? Are they seeking the office actually to be elected to it or do they say that they are

> seeking it to bring ideas into the marketplace? How has their fundraising been? Is it broad based? Do they have a lot? Do they have little? Whatever. How are they treated by other media organizations? Have their efforts generated news in other media organizations or if there are debates, have they been included in those debates by other news organizations? What are we hearing? What are we hearing from the campaigns themselves? Are people calling us and saying you know, "Such and such had a crowd of 550 last night," or are they calling us and saying, "Such and such had a crowd of five." The last part, are we hearing anything? What are we hearing from the campaigns themselves? Politics is an enterprise that relies on the ability of its participants to sell themselves, to retail themselves. What are we hearing along that line? Do we hear a lot from the candidates themselves? Are they calling us? Are they faxing us? Are we getting encouraged by their supporters who happen to be people we know or people we don't know to pay attention to their campaigns? Do we see early indications of retail efforts in that regard in the media? Are they buying newspaper ads? Are they buying radio ads? Did they in their last campaign buy newspaper or radio ads?

App. at 6. As the testimony of Mr. Miller and Professor Mack illustrate, IPTV's editorial decisions conformed with specific professional standards of journalism as mandated by IPTV's written policies and were based on synthesis of objective elements.

TRIAL COURT FINDINGS

Please note that, in the decision of the trial court, the jury found, and the Court confirmed, that the plaintiff candidates:

> failed to prove that IPTV had not acted in accordance with a predetermined policy in deciding whom to invite to *Iowa Press*;
>
> failed to prove that IPTV decided whom to invite to *Iowa Press* based solely on whether the invitees had been nominated by the Republican or Democratic parties; and
>
> failed to prove that an appearance on *Iowa Press* by *any* of the fringe candidates involved would have been newsworthy.

Marcus (District Court), slip op. at 3-4. Conversely, IPTV proved that these peripheral candidates were excluded from *Iowa Press* by virtue of editorial judgments based on newsworthiness. *Id.* at 4. These findings of fact confirm the integrity of IPTV's journalistic decision-making processes.

PUBLIC RELEASE OF INFORMATION

IPTV requests that this matter *not* be kept confidential under 2 USC §437g(a)(4)(B) and §437g(a)(12)(A), but rather that it be opened to the public.

CONCLUSION

For the foregoing reasons, Iowa Public Television submits that its editorial decisions to exclude Mr. Marcus and other peripheral candidates from *Iowa Press* were consistent in all respects with 11 CFR §110.13(a). Therefore, IPTV requests that the Commission deny Mr. Marcus's complaint.

Very truly yours,

Richard D. Marks
Counsel for Iowa Public Television

RDM:rdt

cc w/encl. (via U.S. Mail): Jay B. Marcus, Esq.

Statement of Principles of Editorial Integrity in Public Broadcasting

Developed by
The Editorial Integrity Project

Jolly Ann Davidson, Chair
O. Leonard Press, Vice-chair

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The Corporation for Public Broadcasting

CONTENTS

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Statement of Principles of Editorial Integrity in Public Broadcasting

The mission of public broadcasting is to bring to Americans the highest accomplishments of our society and civilization in all of its rich diversity, to permit American talent to fulfill the potential of the electronic media to educate and inform, and to provide opportunities for the diverse groupings of the American people to benefit from a pattern of programming unavailable from other sources.*

No one is more important to the fulfillment of public broadcasting's mission than the men and women of the boards of trustees of the licensee stations. They are custodians of their institutions' fiscal reputation, a currency necessary to acquire support from those whose taxes and donations make public broadcasting possible. They are also the final guardians of public broadcasting's editorial integrity and its reputation in the marketplace of ideas, where reputation is legal tender.

Editorial integrity in public broadcasting programming means the responsible application by professional practitioners of a free and independent decision-making process which is ultimately accountable to the needs and interests of all citizens.

In order to assure that programs meet the standards of editorial integrity the public has a right to expect, the following five principles and guidelines establish a foundation for trustee action. The principles and guidelines also form a basic standard by which the services of a public broadcasting licensee can be judged. At the same time, they form a basis for evaluating all aspects of a public broadcasting station's governance, from enabling legislation to the policy positions of the licensee board. The ultimate goal of the principles and guidelines is to assist public broadcasting trustees in fulfilling their vital role in this important public service.

*_A Public Trust: The Report of the Carnegie Commission on the Future of Public Broadcasting_, Bantam: New York, 1979.

I. We Are Trustees of a Public Service.

Public broadcasting was created to provide a wide range of programming services of the highest professionalism and quality which can educate, enlighten and entertain the American public, its audience and source of support. It is a noncommercial enterprise, reflecting the worthy purpose of the federal and state governments to provide education and cultural enrichment to their citizens.

As trustees of this public service, part of our job is to educate all citizens and public policymakers to our function, and to assure that we can certify to all citizens that station management responsibly exercises the editorial freedom necessary to achieve public broadcasting's mission effectively.

II. Our Service Is Programming.

The purpose of public broadcasting is to offer its audiences public and educational programming which provides alternatives in quality, type and scheduling. All activities of a public broadcasting licensee exist solely to enhance and support excellent programs. No matter how well other activities are performed, public broadcasting will be judged by its programming service and the value of that service to its audiences.

As trustees, we must create the climate, the policies and the sense of direction which assure that the mission of providing high quality programming remains paramount.

III. Credibility Is the Currency of our Programming.

As surely as programming is our purpose, and the product by which our audiences judge our value, that judgment will depend upon their confidence that our programming is free from undue or improper influence. Our role as trustees includes educating both citizens and public policymakers to the importance of this fact and to assuring that our stations meet this challenge in a responsible and efficient way.

As trustees, we must adopt policies and procedures which enable professional management to operate in a way which will give the public full confidence in the editorial integrity of our programming.

IV. Many of our Responsibilities Are Grounded In Constitutional or Statutory Law.

Public broadcasting stations are subject to a variety of statutory and regulatory requirements and restrictions. These include the federal statute under which licensees must operate, as well as other applicable federal and state laws. Public broadcasting is also cloaked with the mantle of First Amendment protection of a free press and freedom of speech.

As trustees we must be sure that these responsibilities are met. To do so requires us to understand the legal and constitutional framework within which our stations operate, and to inform and educate those whose position or influence may affect the operation of our licensee.

V. We Have a Fiduciary Responsibility for Public Funds.

Public broadcasting depends upon funds provided by individual and corporate contributions; and by local, state and federal taxes. Trustees must therefore develop and implement policies which can assure the public and their chosen public officials alike that this money is well spent.

As trustees, we must assure conformance to sound fiscal and management practices. We must also assure that the legal requirements placed on us by funding sources are met. At the same time, we must resist the inappropriate use of otherwise legitimate oversight procedures to distort the programming process which such funding supports.

We the undersigned subscribe to this Statement of Principles

Robert L. Allen*
Executive Director
Oklahoma Educational Television Authority

Gerard L. Appy
Executive Director
Oregon Commission on Public Broadcasting

Philip I. Berman
Chair
Pennsylvania Public Television Network Commission

Kathryn Boe
Chair
Oregon Commission on Public Broadcasting

Henry J. Cauthen
President
South Carolina Educational Television Commission

Beth Courtney
Executive Director
Louisiana Educational Television Authority

JollyAnn Davidson‡
Chair
Iowa Public Broadcasting Board

Dave L. Fornshell
Executive Director
Ohio Educational Broadcasting Network Commission

Jerold A. Garber
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Idaho Educational Public Broadcasting System

Philip Heckman
Member
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Stephen H. Kimatian
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Hawaii Public Broadcasting Authority

H. Sheldon Parker
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James B. Young‡
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Rhode Island Public Telecommunications Authority

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† *Chair,* Steering Committee
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Guidelines to the Principles of Editorial Integrity in Public Broadcasting

Amid the pressures of great events,
general principle gives no help.
– Hegel.

No statement of principles can do more than give general guidance to the trustees charged with overseeing a public broadcasting service. It is only through practical experience, a thorough knowledge of the policies and purposes which guide the institution, and a commitment to preserving its values that those facing difficult choices can make the judgments which best serve the institution.

I. We Are Trustees of a Public Service.

Board members have an absolute responsibility to serve as the public's stees of a service providing educational, cultural and informational pro ms; and to protect the credibility of that public trust. Because of public adcasting's broad and serious responsibilities, the structure and autono of its licensee boards is vitally important. The board can carry out these ponsibilities effectively only if it is structured or convened solely to govern public broadcasting enterprise.

The trustees are also responsible for protecting editorial integrity inst undue influence from any source. Undue influence is any direct or irect influence that seeks to leave the person with the assigned responsi ty for programming decisions no alternative but to comply.

In order to serve the public by protecting editorial integrity, the trustees ed to understand their vital role in this important enterprise. Dallin Oaks, ir of the PBS Board, defined it very clearly:

> First, boards must educate the public, public officials and policy makers in their chain of command so that they understand the need for editorial freedom. Second, we need to assure and certify to public officials and to the public that editorial freedom is being exercised responsibly.*

To do this, trustees must be sufficiently involved with their institutions set policies responsive to the public need, yet sufficiently detached from erations to evaluate the service objectively.

Trustees are responsible for assuring that their enterprise provides serv s at a high level of quality and responsiveness to the public. To be responsive the citizens they serve, the trustees must assure that there is a protocol to nsider diverse views and opinions from the public. The station's chief ex utive officer is responsible for creating and maintaining open and effective mmunication channels with the public.

roceedings of the Wingspread Conference on Editorial Integrity in Public oadcasting Southern Educational Communications Association, Colum i, S.C., 1985.

II. Our Service Is Programming.

The purpose of public broadcasting is to provide its audiences with programming of a quality, variety and type not readily available elsewhere. All other activities of a public broadcasting licensee should be defined by and secondary to that purpose, for the ultimate measure of its effectiveness is the success of its programming.

Audiences of all ages identify public broadcasting by the programs they use. To them, public broadcasting is not an institutional structure. It is the excellent national and local programs which provide them with educational, informational and cultural opportunities. Policies, procedures, goals, objectives and activities within a station should be defined by their contribution to the programming mission.

To ensure the best environment for good program decision making, and to ensure fundamental security for editorial integrity, the station's chief executive officer should report directly to the licensee board, and should be responsible for developing and implementing objectives based upon service goals developed by the trustees.

III. Credibility Is the Currency of our Programming.

Programming is the purpose of public broadcasting and the product by vhich audiences judge its value. Audiences hold public broadcasting pro grams to a high standard of excellence and judge their public broadcasting operations by rigorous credibility criteria. Public broadcasters therefore nust operate above suspicion of vulnerability to undue influence. Trustees re ultimately responsible for assuring the reality and the perception of redibility.

The process of developing programs to meet the audience's needs ust function under clear policies adopted and regularly reviewed by the ustees. This process must be managed by the professional staff according to enerally accepted broadcasting industry standards, so that the program ing service is free from pressure from political or financial supporters. The ation's chief executive officer is responsible for assuring that the program ecisions are based on editorial criteria, such as fairness, objectivity, balance id community needs, not on funding considerations.

To best assure that the trustees have the necessary authority to imple ent their responsibility in this area, the trustees should have the authority to re, fire, and set compensation for the station's chief executive officer, with fiscal realities of the times and the market. The chief executive officer, in n, should have authority to set qualifications for staff, to hire, fire, assign, d set compensation for staff, all within guidelines established by the trus s. The chief executive officer should also have the established authority to t in the absence of stated policies.

IV. Many of our Responsibilities Are Grounded in Constitutional or Statutory Law.

All broadcast licensees, public and commercial, operate under strict legal guidelines and restrictions. The license under which all stations operate is granted by the Federal Communications Commission according to federal statutory terms of the Communications Act of 1934 and subsequent amend ments.

Certain provisions of the Communications Act, the Facilities Act of 1962, and the Public Broadcasting Act of 1967 as amended, apply specifically to public broadcasting. These provisions affect public broadcasting licen sees' operations by restricting the use of federally funded facilities for reve nue generating purposes, bans on advertising, and bans on endorsement or support of candidates for political office.

Public broadcasting licensees are scrutinized rigorously as recipients of direct and indirect governmental aid. Many licensees exist on the basis of various state and local statutes containing a variety of operational responsibil ities and regulations. In addition, public broadcasters often operate chari table foundations, endowments or corporations for fund raising, program production, etc., which are subject to state and federal regulation as tax exempt entities.

Public broadcasting licensees also have the responsibility of operating within the areas of free press and free speech protected by the First Amend ment. As such they are held to the same public scrutiny and expectations as the largest and most prestigious journals and networks in the country.

However burdensome or intimidating the complex labyrinth of statu tory and regulatory responsibilities of public broadcasting licensees may be, they are far outweighed by the unlimited opportunities for service to the public. Trustees and station managers must master the intricacies of their legal circumstances and be prepared to seek remedy or exemption to any local or state regulation(s) which impair their ability to assure fidelity to the public trust which their broadcasting license represents. In no arena is the responsibility of the trustee to educate public policymakers more important.

V. We Have a Fiduciary Responsibility for Public Funds.

Public broadcasting operations use millions of dollars of individual and porate contributions; and federal, state, and local taxes. Neither good ictural design nor strict operational procedures will preserve the overall dibility of the system unless the public and its representatives perceive they are getting good value for their money.

Trustees are responsible for assuring continued public support for and ding of the public broadcasting station, and should have total control over unds and resources regardless of source, whether appropriated, earned given. Yet state laws, regulations and operating practices often prevent this. ile such management controls are necessary for usual state government rations, they can seriously hamper public broadcasting's ability to func efficiently and economically because its process and its product are so erent from most state services and because it operates within deadline ssures unknown in most areas of government. It is often impossible to vide the high quality broadcasting service the public expects with many he restrictions imposed by state operating systems.

While trustees of institutional licensees may not have ultimate control r the allocation of funds, they are nevertheless responsible for insuring such funds are used effectively and efficiently. They must certify to the olic and to all funders that they have spent public broadcasting funds wisely l well.

It is therefore necessary that trustees and station managers seek exemp from procedures and policies which may prevent the cost effective and cient operation of their licensee. Sound financial management of a public adcasting station is crucial to its credibility.

Why the Principles of Editorial Integrity in Public Broadcasting Were Developed

"...the goal we seek is an instrument for the free communication of ideas in a free society."[1]

"An effective national educational television system must consist in its very essence of vigorous and independent local stations."[2]

"...as state instrumentalities, these public licensees are without the protection of the First Amendment."[3]

The Wingspread Conference on Editorial Integrity in Public Broadcasting was convened so that public broadcasting station managers and representatives of state licensee boards and commissions could explore the First Amendment position of public broadcasting licensees in the light of past legal decisions and legislative actions. The managers and trustees also drafted policies and practices which would help to guarantee public broadcasting's editorial integrity in the future.

Editorial integrity is rooted in the traditional American values of freedom of speech and of the press. Tenaciously and courageously fought for by Revolutionary editors and pamphleteers, these values are codified in the First Amendment to the Constitution: "Congress shall make no law...abridging the freedom of speech, or of the press..." The First Amendment is the "indispensable bulwark of democracy."[4]

Broadcasting, the twentieth century electronic press, is the most powerful medium we have for disseminating information. Its power lies in its pervasiveness and in its ability to appeal directly through sight and sound to the intellect, and especially to the emotions, of its audience. This enormous power is in the hands of the Federal Communications Commission which has the final authority to grant or deny access to the technical means of broadcasting.

The social worth of any broadcasting system is determined by the honesty and integrity of the powerful few who can grant or deny this access. The writers, producers, and editors who create the programs, which are broadcasting's core, are subject to the governing structure of the institution which controls the technical means of broadcasting.

In the United States, the most influential gatekeepers are private financial interests licensed by the Federal Communications Commission. The history of broadcasting in this country is largely the story of the growth of a major commercial enterprise.

Several alternatives were available in the 1920s when it became apparent that some policies were necessary to deal with the burgeoning broadcasting structure. One was never considered – an unregulated market activity like publishing. The European model of a government monopoly was not

riously considered because of the American traditions of free enterprise
d the weakness of socialist ideology in this country. Regulation as a com
on carrier was rejected because of the spectre of an American monopoly
e AT&T.

When Congress passed the Radio Act of 1927, it rejected the government
onopoly model for broadcasting adopted by many other Western nations.
stead, broadcasting became a regulated commercial activity, with private
terests licensed by a federal agency as public trustees of specified fre
encies, and charged to operate them in the "public interest, convenience,
d necessity."

The system that emerged in 1927, and that remains today, is an uneasy
mpromise between government control and freedom of the press. Broad
sters are selected by government and licensed, the licensing authority is
dered not to censor. It is a compromise that is possible only in a pluralistic
ociety with a balance among a free print press, strong traditions of private
nterprise, and individual freedom. But in choosing a system of licensed,
mited channels, supported by advertising, the United States restricted its
oadcasting largely to programming designed to attract the greatest number
viewers or listeners.

By 1934 the limited ability of the commercial broadcasting structure to
ovide educational, cultural and informational programming was becom
g apparent. An amendment was proposed to the Communications Act of
at year, reserving 25 percent of all radio frequencies for educational, non
ofit use. The amendment was defeated, but in 1945 the Federal Commun
ations Commission set aside 20 of 100 FM channels for noncommercial
dio, and in 1952 reserved 242 television channels for the noncommercial
ctor.

Educational institutions and state and local governments voluntarily
ught these first noncommercial broadcasting licenses to enhance their
bility to educate their constituencies, a legitimate activity for them. But it
as an irony that in a nation where government broadcasting had not only
en rejected but was anathema, government was now holding broadcast
enses. And it was to be a source of problems.

Several structures were selected to administer these noncommercial
enses, including state departments of education, local school boards, state
niversity boards, and state agencies created specifically for broadcasting. In
e latter case, state statutes were passed to establish and to provide a legal
mework for the activities of the licensee.

As television's audiences increased, nonprofit community groups
gan to acquire noncommercial licenses, and began to broadcast more
neral interest programs.

By 1967, when Congress discussed how government could support
ternative uses of broadcasting without violating the First Amendment, it
as discussing a system already in place. 126 educational television stations
d 268 noncommercial FM radio stations were operating, most licensed to

educational institutions and state and local governments. Educational broad
casting was poised to become a national institution.

The 1967 Congressional debate was guided by the report of the Car
negie Commission on Educational Television,[5] established to "conduct a
broadly conceived study of noncommercial television" and to *"focus its atten
tion principally, although not exclusively, on community owned channels
and their services to the general public."*

The Carnegie Commission admitted that its attitude toward instruc
tional television, the purpose of most of the existing stations, was ambivalent.
It concluded that "with minor exceptions, the total disappearance of instruc
tional television would leave the educational system fundamentally
unchanged."

The Commission proposed a new kind of television — public television
which was to include "all that is of human interest and importance which is
not at the moment appropriate or available for support by advertising, and
which is not arranged for formal instruction." And it proposed a new system

> "not patterned after the commercial system or the British system
> or the Japanese system or any other existing system. We have at
> tempted to design something that corresponds to American tradi
> tions and American goals, that can coexist amicably with commer
> cial television, and that together with commercial television can
> meet the highest needs of our society."

To produce and distribute this new television, the Commission recom
mended a connected system of local stations and national production cen
ters, funded by private and government funds distributed by a "federally
chartered, nonprofit, nongovernmental corporation." The question was how
to expand and improve the services of educational broadcasting, while the
major concern was how to increase funding, especially the government fund
ing deemed necessary, without opening the door to funder control.

Guided by the Commission report and prompted by President Lyndon
B. Johnson, Congress passed the Public Broadcasting Act of 1967. While Con
gress did not accept all the Commission's recommendations, it did follow the
basic intent of the report by creating the Corporation for Public Broadcasting,
a private, nonprofit organization to receive and spend private and federal
funds for public broadcasting, and to provide an impartial, responsible buffer
from political pressure.

As it had in 1927, Congress made an uneasy compromise. It failed to
provide the stable funding that would insure effective planning and insulation
from political interference. And the ability of the Corporation to carry out its
mandate would depend on the ability of presidential board appointees to
function nonpolitically. With some minor changes, it is a theoretical answer
to a fundamental question that has worked well, and that has survived several
serious challenges.

The major problems in the Commission's report and the resulting legis
lation was its failure to deal with the diversity of licensee structures in the

ducational broadcasting system. The expansion of services and programs o broader audiences cast stations in a role they were ill equipped to play well. unding sources outside state government required accounting procedures of state licensees which they had no way to implement. State and local govern nent and institutional licensees had the most difficulties.

These problems were noted in a 1980 study,[6] which focused on financial roblems including budgeting, purchasing and reporting procedures. Per onnel management, including classification and compensation, were diffi ult areas for many licensees. Many licensees, especially institutional ones, vere concerned about governance and reporting structures.

To deal with some of these problems, many states have amended the tatutes that enable them to hold broadcast licenses and to operate stations. entucky has given its broadcasting authority full jurisdiction over its person el. Oklahoma has made it a misdemeanor punishable by a $1,000 fine or ne year imprisonment for any elected official or his or her representative o influence or direct, or attempt to influence or direct, the content of any rogram shown on public television. A number of states have established ongovernmental foundations to receive and disburse funds.

Concluding its section on insulation from political interference, the 980 study by Schenkkan said,

> "The First Amendment is, of course, one firm standard or criterion of protection, in spite of the variability of interpretations given it by the Supreme Court. Since public broadcasting is clearly not subject to the debate about being 'common carriers' of informa tion, its claim and right to protections afforded by the First Amend ment should be essentially unequivocal."

But public broadcasters, especially state government licensees, dis overed through the court cases on the "Death of a Princess" broadcast, that ese unequivocal protections were quite uncertain, and public broadcast ng's freedom of editorial discretion might not enjoy the protection of Ameri n ideals of free speech and free press. Legal analysis by Nicholas P. Miller, sq., shows public broadcasting's First Amendment rights to be "unclear," nalysis "a tangled web," and the law to be "murky."[7] Further analysis demon rates that because of the diversity of licensee types and their governing ructures, and the diversity of funding sources, including the government, e independent exercise of editorial discretion by public broadcasting pro ssionals is extremely vulnerable to external pressures from individuals and ntities who perceive a vested interest.

Governing boards and/or commissions of public broadcasting organi tions may be either liable as part of the problem, or capable of being a ajor part of the solution by insulating the broadcasting professional from ny undue external pressures. Board members and commissioners must be ware of the importance of their functional independence and of the dangers a democratic society of interference with public broadcasting's editorial scretion.

The Schenkkan study suggests a way for trustees to provide program servi e the public perceives as credible:

> "It is tempting to seek some kind of general document which so defines the role of the station that licensees or others in official position will be discouraged from tampering with the station's activities. No state or institution can be compelled to hold such a license and to pay for activities that they do not wish to be associ ated with, however, once the licensee responsibilities begin, there are public requirements and obligations that must not be subjected to personal pique and whimsy. One device that has been suggested as a means of addressing this matter with some respect and definition would be for the trustees of a licensee to sign a document which would indicate their understanding of the organization's status as a federal license holder and would elabo rate the protocols of station operations."

Participants in the Wingspread Conference on Editorial Integrity in Public Broadcasting arrived at a similar conclusion after considerable debate.[7] At their direction, the principles and the accompanying guidelines in this document were developed. The ultimate goal of these principles and guidelines is to assist trustees of public broadcasting licensee stations to fulfill their vital role in protecting the editorial integrity of public broadcasting in America.

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1. James R. Killian, Jr., et al. *Public Television, A Program for Action. The Report of the Carnegie Commission on Educational Television.* New York. 1967.
2. *Ibid.*
3. *Muir v. Alabama Educational Television Commission,* 688 F. 2d at 1041.
4. Harry S. Ashmore. *Fear in the Air — Broadcasting and the First Amendment: the Anatomy of a Constitutional Crisis.* New York. 1973.
5. Killian et al, *op. cit.*
6. Robert F. Schenkkan, Carol M. Thurston, Alan Sheldon. *Case Studies in Institutional Licensee Management.* Washington, 1980.
7. *Proceedings of the Wingspread Conference on Editorial Integrity in Public Broadcasting.* Southern Educational Communications Association, Columbia, S.C., 1985.

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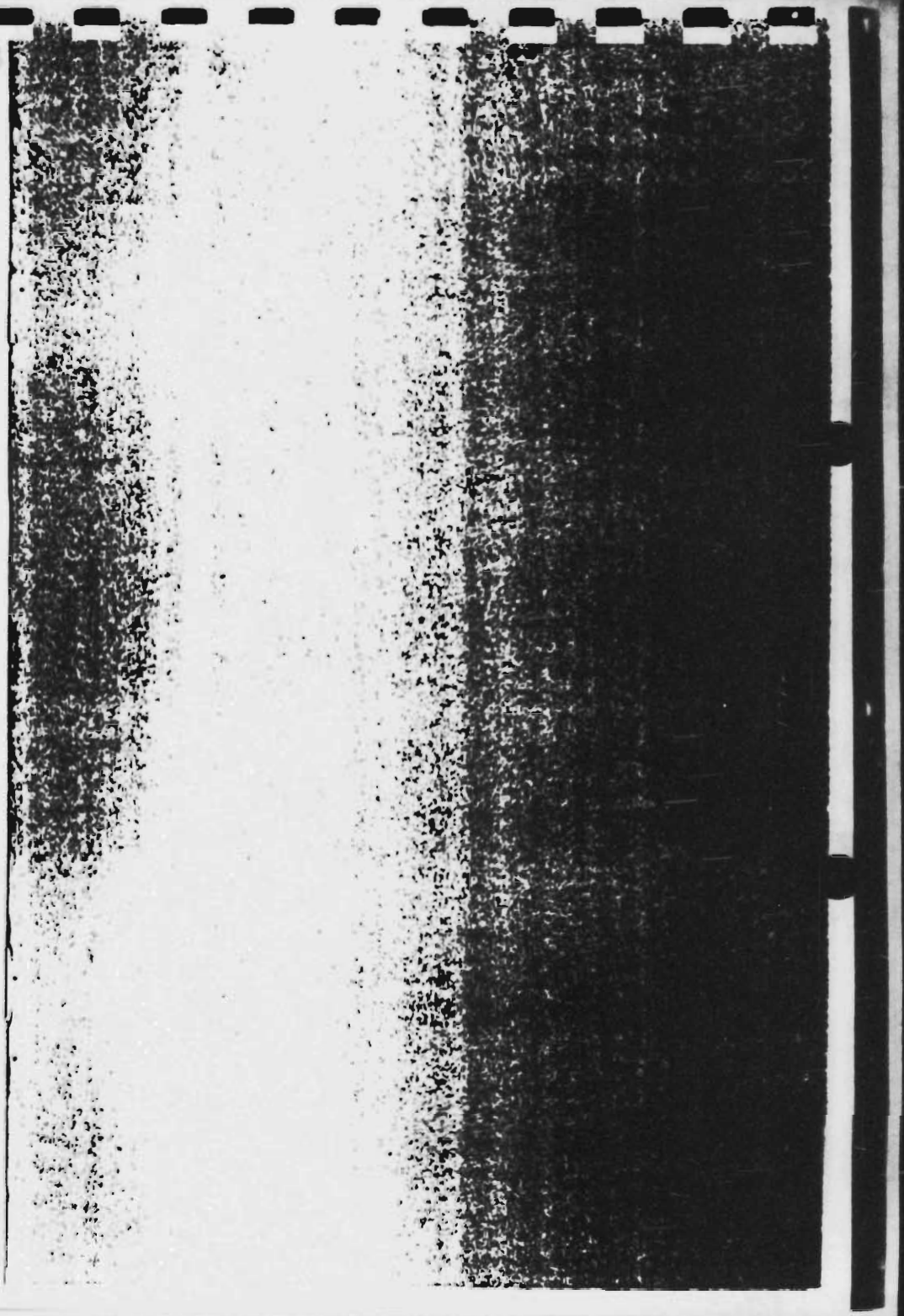

Exh. GG

Iowa Public Television Policies

Section - Programming

Policy # 2.1

Policy Name Programming Policy

2.1.1 It is the responsibility of the Iowa Public Broadcasting Board to set broad programming objectives and policy guidelines for Iowa Public Television. The Executive Director and his/her designees will have the responsibility for programming decisions, as well as for conformance with the programming policies of the Board. The following will be Iowa Public Television's programming policies:

General Programming

As the public television service for Iowa, Iowa Public Television has the unique potential of a mass medium whose programming is not limited by a need to compete for maximum audiences. Iowa Public Television may broadcast special programs and events which may otherwise be unavailable to the Iowa television audience. Innovation in programming may occasionally raise questions of taste and propriety. Iowa Public Television will exercise care to ensure that programs dealing with sensitive or controversial themes reflect an integrity of purpose, without blatant disregard for the tastes and mores of the people of Iowa. Iowa Public Television will give Iowa television audiences the opportunity to see significant programs and series of national interest. One of Iowa Public Television's aims should be to reach many different audiences. Its programming should attempt to broaden the experiences and horizons of all viewers throughout its broadcast area.

Education and Instruction

Educational and instructional broadcasting shall be a significant focus in the mission of Iowa Public Television. Programming shall facilitate the accomplishment of the educational objectives of the state, both in in-school use and for general education of the citizens of all ages.

Iowa Public Television will provide the leadership in the development and utilization of instructional/educational telecommunications through state-of-the-art technology and open-circuit broadcasting. It will provide educational opportunities for citizens of all ages and diverse academic backgrounds, in formal educational settings and for informal participation.

continued --

Legal Reference:

Date Adopted: 10-28-82

Iowa Public Television Policies

Section - Programming

Policy # 2.1

Policy Name (Programming Policy - continued)

Special Audiences

Iowa Public Television has a responsibility to give special consideration in its program planning to smaller groups, ethnic minorities, and other special audiences. Iowa Public Television should also serve its minority audiences through the presentation of a wide variety of subjects and viewpoints within a regular schedule of public affairs and entertainment programming.

Public Affairs

In the presentation of public affairs programming, Iowa Public Television should maintain maximum objectivity and fairness. Iowa Public Television should strive for a better informed citizenry of the state of Iowa, through the presentation of important and significant issues. Iowa Public Television should not avoid issues of controversy, but in presenting such topics must provide a fair and balanced program schedule to provide that the views of the citizenry are adequately represented. Iowa Public Television will not broadcast controversial programming where the underwriter or special interest groups have content control of the material used.

Public Participation

Ascertainment of the community's needs and interests is no longer a regulatory requirement for Iowa Public Television; however, the management staff of IPTV should perform and review this ascertainment process and utilize it in program development to ensure programs that are responsive to the needs of the state. Further public participation should be encouraged through specific advisory committees, an active Friends organization, and the solicitation of public comments on programming. In the process of program development and scheduling, due consideration will be given to all suggestions so obtained, with management making the determination as to the appropriateness of such proposals.

Legal Reference:

Date Adopted: 10-28-82
Revised 10-15-87

FEDERAL ELECTION COMMISSION
Washington, DC 20463

SENSITIVE

MEMORANDUM

February 18, 1997

TO: The Commission

FROM: Lawrence M. Noble
General Counsel

Lois G. Lerner
Associate General Counsel

BY: F. Andrew Turley
Supervisory Attorney, CED

SUBJECT: MUR 4592
Waiver of Confidentiality: Iowa Public Television

I. BACKGROUND

Respondent Iowa Public Television submitted its response to the complaint filed in MUR 4592 on January 21, 1997. As part of that response, respondent's counsel specifically requested that this matter not be kept confidential, but that it be opened to the public. Iowa Public Television is the sole respondent in this matter.

In submitting this waiver, Iowa Public Television has requested that the Commission not apply the confidentiality provision of 2 U.S.C. § 437(g)(a)(12)(A). This section provides that the Commission shall not make public any notification or investigation without written consent of the person receiving the notification or the person with respect to whom the investigation is made. By its terms, it does not impose any affirmative duty upon the Commission to publicize the matter at this time. Counsel has advised us that his client wishes to be free to discuss the complaint and its response publicly without violating any provisions of the Federal Election Campaign Act. The substance of the complainant's allegations have already been the subject of a lawsuit filed in the U.S. District Court for the Southern District of Iowa [*Marcus v. Iowa Public Television*, No. 4-96-CV-80690

(S.D. Iowa October 9, 1996]. Appeal by complainants of an adverse ruling at the trial level is presently pending before the 8th Circuit Court of Appeals.

The confidentiality provision is primarily designed to protect the respondent. Since there is only one respondent in this matter, respondent's proposed waiver of this provision will not adversely affect any other party. It will also permit the Commission to respond to any requests for information it may receive. We propose that such requests for information be subject to the following considerations: first, they must be in writing; and second, they would be considered by the Commission subject to the provisions of the Freedom of Information Act, Government in the Sunshine Act, and all relevant privileges which would limit or preclude the release of such requested information.

II. RECOMMENDATION

Authorize issuance of an appropriate letter to the respondent.

Attachment

Answer (MUR 4592) (w/o atchs)

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Iowa Public Television - Waiver of Confidentiality.	)	MUR 4592
	)	

CERTIFICATION

I, Marjorie W. Emmons, Secretary of the Federal Election Commission, do hereby certify that on February 24, 1997, the Commission decided by a vote of 5-0 to authorize issuance of an appropriate letter to the respondent, as recommended in the General Counsel's Memorandum dated February 18, 1997.

Commissioners Aikens, Elliott, McDonald, McGarry, and Thomas voted affirmatively for the decision.

Attest:

2-21-97
Date

Marjorie W. Emmons
Marjorie W. Emmons
Secretary of the Commission

Received in the Secretariat: Tues., Feb. 18, 1997 1:33 p.m.
Circulated to the Commission: Tues., Feb. 18, 1997 4:00 p.m.
Deadline for vote: Fri., Feb. 21, 1997 4:00 p.m.

bjr

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

February 24, 1997

Richard D. Marks, Esquire
Dow Lohnes & Albertson, PLLC
1200 New Hampshire Ave, N.W.
Washington, DC 20036-6802

re: MUR 4592

Dear Mr. Marks:

This is in response to your request, contained in your response to the above-captioned Matter Under Review (MUR), that your client, Iowa Public Television, waives its right that this matter be kept confidential under 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A). The Federal Election Commission hereby acknowledges this waiver.

The Commission will consider requests for information it may receive on this matter subject to the following considerations. First, such requests must be in writing. Second, such requests will be considered by the Commission subject to the provisions of the Freedom of Information Act (5 U.S.C. § 552, *et seq.*), Government In the Sunshine Act (5 U.S.C. § 552b *et seq.*), and all applicable privileges which may limit or preclude the release of the requested information.

Many thanks for your consideration. Please feel free to contact me or Ms. Alva Smith at (202) 219-3690 if we can be of any further assistance.

Very truly yours,

F. Andrew Turley
Supervisory Attorney
Central Enforcement Docket

AGENDA DOCUMENT NO. X98-13

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of) CASE CLOSURES UNDER ENFORCEMENT PRIORITY)

GENERAL COUNSEL'S REPORT

I. INTRODUCTION.

The cases listed below have been identified as either stale or of low priority based upon evaluation under the Enforcement Priority System (EPS). This report is submitted to recommend that the Commission no longer pursue these cases.

II. CASES RECOMMENDED FOR CLOSURE.

A. Cases Not Warranting Further Action Relative to Other Cases Pending Before the Commission

EPS was created to identify pending cases which, due to the length of their pendency in inactive status or the lower priority of the issues raised in the matters relative to others presently pending before the Commission, do not warrant further expenditure of resources. Central Enforcement Docket (CED) evaluates each incoming matter using Commission-approved criteria which results in a numerical rating of each case.

Closing cases permits the Commission to focus its limited resources on more important cases presently

pending before it. Based upon this review, we have identified 16 cases that do not warrant further action relative to other pending matters.[1] The attachment to this report contains summaries of each case, the EPS rating, and the factors leading to assignment of a low priority and recommendation not to further pursue the matter.

B. Stale Cases

Effective enforcement relies upon the timely pursuit of complaints and referrals to ensure compliance with the law. Investigations concerning activity more remote in time usually require a greater commitment of resources, primarily due to the fact that the evidence of such activity becomes more difficult to develop as it ages. Focusing investigative efforts on more recent and more significant activity also has a more positive effect on the electoral process and the regulated community. In recognition of this fact, EPS provides us with the means to identify those cases which remained unassigned for a significant period due to a lack of staff resources for effective investigation. The utility of commencing an investigation declines as these cases age, until they reach a point when activation of a case would not be an efficient use of the Commission's resources.

[1] These cases are MUR 4631 (*Perot/McClure*), MUR 4661 (*Cox and Amplicon, Inc.*), MUR 4667 (*Specter & Greenwood*), MUR 4668 (*Schakowsky for Congress*), MUR 4672 (*Friends of John O'Toole*), MUR 4673 (*Papan for Assembly*), MUR 4676 (*Warren County Democratic Committee*), MUR 4677 (*Patrick Kennedy*), MUR 4681 (*Jack Block*), MUR 4683 (*Janice Schakowsky for Congress*), MUR 4684 (*Spartanburg County Republicans*), MUR 4694 (*Jan Schakowsky for Congress*), MUR 4695 (*Schakowsky for Congress*), MUR 4696 (*Janice Schakowsky for Congress*), MUR 4703 (*Dumont Institute / Robert McGee*), and Pre-MUR 356 (*Pritzker for Congress*).

We have identified cases which have remained on the Central Enforcement Docket for a sufficient period of time to render them stale. We recommend 27 of these cases be closed.[3] Nine of these cases were part of the so-called "Major 96" cases that have not been able to be activated due to a lack of resources to effectively pursue them in a timely fashion.[4] Since the time period rendering them stale has now passed, we recommend their closure at this time.

We recommend that the Commission exercise its prosecutorial discretion and direct closure of the cases listed below, effective February 24, 1998. Closing

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[3] These cases are: MUR 4350 (*Republican Party of Minnesota*), MUR 4355 (*Aqua-Leisure Industries, Inc.*), MUR 4372 (*Nebraska Democratic Party*), MUR 4394 (*Americans for Term Limits*), MUR 4472 (*Committee to Elect Winston*), MUR 4483 (*Nebraska Democratic State Central Committee*), MUR 4504 (*NH Democratic State Party Committee*), MUR 4507 (*People for Boscinutz*), MUR 4509 (*Wellstone for Senate*), MUR 4565 (*Bell for Congress*), MUR 4570 (*Congresswomen Andrea Seastrand*), MUR 4571 (*Subert for Congress Committee*), MUR 4572 (*Friends of Dick B. Durbin*), MUR 4575 (*Dana Carrington*), MUR 4585 (*Hughes for Congress Committee*), MUR 4589 (*Congressman Bart Gordon*), MUR 4592 (*Iowa Public Television*), MUR 4593 (*Public Interest Institute*), MUR 4599 (*Bruce W. Hagensource*), MUR 4601 (*Choctaw Nation of Oklahoma*), MUR 4602 (*WFSB-TV Channel 3*), MUR 4604 (*Dana Carrington*), MUR 4605 (*Christian Coalition*), Pre-MUR 346 (*Coalition of Politically Active Christians*), RAD 96NF-09 (*O'Sullivan for Congress*), RAD 96L-12 (*Alaska Democratic Party*), and RAD 97NF-02 (*Zien for Congress*)

[4] These cases are: MUR 4350 (*Republican Party of Minnesota*), MUR 4372 (*Nebraska Democratic Party*), MUR 4394 (*Americans for Term Limits*), MUR 4472 (*Committee to Elect Winston*), MUR 4483 (*Nebraska Democratic State Central Committee*), MUR 4504 (*NH Democratic State Party Committee*), MUR 4507 (*People for Boscinutz*), MUR 4509 (*Wellstone for Senate*), and MUR 4565 (*Bell for Congress*).

these cases as of this date will permit CED and the Legal Review Team the necessary time to prepare closing letters and case files for the public record.

III. RECOMMENDATIONS.

A. Decline to open a MUR, close the file effective February 24, 1998, and approve the appropriate letters in the following matters:

1. RAD 96NF-09
2. RAD 96L-12
3. RAD 97NF-02
4. Pre-MUR 346
5. Pre-MUR 356

B. Take no action, close the file effective March 2, 1998, and approve the appropriate letters in the following matters:

1. MUR 4350
2. MUR 4355
3. MUR 4372
4. MUR 4394
5. MUR 4472
6. MUR 4483
7. MUR 4504
8. MUR 4507
9. MUR 4509
10. MUR 4565
11. MUR 4570
12. MUR 4571
13. MUR 4572
14. MUR 4575
15. MUR 4585
16. MUR 4589
17. MUR 4592
18. MUR 4593
19. MUR 4599
20. MUR 4601
21. MUR 4602
22. MUR 4604
23. MUR 4605
24. MUR 4631
25. MUR 4661
26. MUR 4667
27. MUR 4668
28. MUR 4672
29. MUR 4673
30. MUR 4676
31. MUR 4677
32. MUR 4681
33. MUR 4683
34. MUR 4684
35. MUR 4694
36. MUR 4695
37. MUR 4696
38. MUR 4703

Date

Lawrence M. Noble
General Counsel

FEDERAL ELECTION COMMISSION
Washington DC 20463

MEMORANDUM

TO LAWRENCE M NOBLE
GENERAL COUNSEL

FROM MARJORIE W EMMONS/LISA R DAVIS
COMMISSION SECRETARY

DATE FEBRUARY 19, 1998

SUBJECT Case Closures Under Enforcement Priority. General Counsel s Report dated February 11, 1998.

The above-captioned document was circulated to the Commission on **Thursday, February 12, 1998**

Objection(s) have been received from the Commissioner(s) as indicated by the name(s) checked below

Commissioner Aikens	_
Commissioner Elliott	_
Commissioner McDonald	XXX
Commissioner McGarry	_
Commissioner Thomas	XXX

This matter will be placed on the meeting agenda for

Tuesday, February 24, 1998

Please notify us who will represent your Division before the Commission on this matter

AGENDA DOCUMENT NO. X98-13

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	Agenda Document
Case Closures Under	)	No. X98-13
Enforcement Priority	)	

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session on February 24, 1998, do hereby certify that the Commission took the following actions with respect to Agenda Document No. X98-13:

1. Failed in a vote of 3-2 to pass a motion to approve the General Counsel's recommendations, subject to amendment of the closing date in recommendation A to read March 2, 1998, and subject to deletion of those cases listed in footnote 4 on Page 3 of the staff report.

   Commissioners McDonald, McGarry, and Thomas voted affirmatively for the motion. Commissioners Aikens and Elliott dissented.

2. Decided by a vote of 5-0 to

   A. Decline to open a MUR, close the file effective March 2, 1998, and approve the appropriate letters in the following matters:

      1. RAD 96NF-09
      2. RAD 96L-12
      3. RAD 97NF-02
      4. Pre-MUR 346
      5. Pre-MUR 356

(continued)

B. Take no action, close the file effective March 2, 1998, and approve the appropriate letters in the following matters:

1.	MUR 4350	20.	MUR 4601
2.	MUR 4355	21.	MUR 4602
3.	MUR 4372	22.	MUR 4604
4.	MUR 4394	23.	MUR 4605
5.	MUR 4472	24.	MUR 4631
6.	MUR 4483	25.	MUR 4661
7.	MUR 4504	26.	MUR 4667
8.	MUR 4507	27.	MUR 4668
9.	MUR 4509	28.	MUR 4672
10.	MUR 4565	29.	MUR 4673
11.	MUR 4570	30.	MUR 4676
12.	MUR 4571	31.	MUR 4677
13.	MUR 4572	32.	MUR 4681
14.	MUR 4575	33.	MUR 4683
15.	MUR 4585	34.	MUR 4684
16.	MUR 4589	35.	MUR 4694
17.	MUR 4592	36.	MUR 4695
18.	MUR 4593	37.	MUR 4696
19.	MUR 4599	38.	MUR 4703

Commissioners Aikens, Elliott, McDonald, McGarry, and Thomas voted affirmatively for the decision.

Attest:

2-25-98
Date

Marjorie W. Emmons
Marjorie W. Emmons
Secretary of the Commission

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

March 2, 1998

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Jay B. Marcus, Esquire
Marcus & Thompson
51 West Washington, Suite 201
Fairfield, IA 52556

RE: MUR 4592

Dear Mr. Marcus

On December 9, 1996, the Federal Election Commission received your complaint alleging certain violations of the Federal Election Campaign Act of 1971, as amended ("the Act").

After considering the circumstances of this matter, the Commission exercised its prosecutorial discretion to take no action in the matter. This case was evaluated objectively relative to other matters on the Commission's docket. In light of the information on the record, the relative significance of the case, and the amount of time that has elapsed, the Commission determined to close its file in this matter on March 2, 1998. This matter will become part of the public record within 30 days.

The Act allows a complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g(a)(8).

Sincerely,

F. Andrew Turley
Supervisory Attorney
Central Enforcement Docket

29043836237C

FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

March 2, 1998

Mr. Richard D. Marks, Esquire
Dow, Lohnes & Alberton
1200 New Hampshire Ave., N.W., Suite 800
Washington, D.C. 20036-6802

RE: MUR 4592
Iowa Public Television

Dear Mr. Marks:

On December 11, 1996, the Federal Election Commission notified your client of a complaint alleging certain violations of the Federal Election Campaign Act of 1971, as amended. A copy of the complaint was enclosed with that notification.

After considering the circumstances of this matter, the Commission exercised its prosecutorial discretion to take no action against your client. This case was evaluated objectively relative to other matters on the Commission's docket. In light of the information on the record, the relative significance of the case, and the amount of time that has elapsed, the Commission determined to close its file in the matter on March 2, 1998.

The confidentiality provisions of 2 U.S.C. § 437g(a)(12) no longer apply and this matter is now public. In addition, although the complete file must be placed on the public record within 30 days, this could occur at any time following certification of the Commission's vote. If you wish to submit any factual or legal materials to appear on the public record, please do so as soon as possible. While the file may be placed on the public record prior to receipt of your additional materials, any permissible submissions will be added to the public record when received.

If you have any questions, please contact Alva E. Smith on our toll-free telephone number, (800) 424-9530. Our local telephone number is (202) 694-1650.

Sincerely,

F. Andrew Turley
Supervisory Attorney
Central Enforcement Docket

9304386257

FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

THIS IS THE END OF MUR # 4592

DATE FILMED 3/11/98 CAMERA NO. 2

CAMERAMAN EEC