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November 15, 2012

FILED/ACCEPTED

NOV 16 2012

Federal Communications Commission
Office of the Secretary

By Messenger

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Attention: Media Bureau, Policy Division, Political Programming Branch

Re: Complaint of Randall Terry for President Against Stations WTVJ and WSCV

Dear Ms. Dortch:

The undersigned submits this letter on behalf of the NBC Owned Television Stations ("NBCOTS") and Stations WTVJ, Miami, FL, and WSCV, Ft. Lauderdale, FL (the "Stations"), in response to the above-referenced "Complaint of Randall Terry for President" ("Complaint"), which was delivered via email on November 5, 2012, and filed with the Secretary on November 6, 2012, by the law firm of Gammon and Grange.[1] NBCOTS, through its counsel Caplin & Drysdale, has previously addressed the legal and factual arguments raised in the Complaint via email correspondence and filings submitted to the Political Programming Branch of the Media Bureau.[2] The purpose of this filing is to ensure that the record is complete by summarizing and resubmitting those emails and filings under cover of this letter.

As the Commission is aware, during the 2012 election Mr. Terry claimed to be a bona fide candidate for President, based on his appearance on the ballot in West Virginia and, concurrently, a bona fide candidate for the U.S. House of Representatives, representing the 20th congressional district of Florida. The core of the Complaint is Mr. Terry's assertion that the Stations have denied Mr. Terry reasonable access for candidate advertising in violation of Sections 312 and 315 of the Communications Act of 1934,

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[1] Although the Complaint is styled as the "Complaint of Randall Terry for President," it is clear from the body of the Complaint that it actually relates to Mr. Terry's purported candidacy for the U.S. House of Representatives in Florida's 20th congressional district.

[2] *See* email dated Nov. 5, 2012, from Matthew Sanderson, Caplin & Drysdale, to Bobby Baker and Hope Cooper, Political Programming Branch (attaching copy of Stations' October 22, 2012, response and renewed request for information submitted to Mr. Terry's counsel) (attached hereto as Exhibit 1); Brief in Support of Station WPLG-TV filed by WSCV and WTVJ (Oct. 28, 2012) (addressing, in response to a complaint filed against Station WPLG-TV, Miami, the same legal issues raised by the Complaint filed against the Stations) (attached hereto as Exhibit 2);

as amended.[3] In addition, Mr. Terry claims that the Stations failed to respond to Mr. Terry's request for reasonable access.[4] As our previous filings established, Mr. Terry failed to meet his burden of demonstrating that he was a legally qualified candidate entitled to reasonable access on the Stations, and his claim that the Stations failed to respond to his request is false.

Burden of Proof and Standard of Review

As our prior submissions and the Commission's rules make clear, Mr. Terry bore the burden of proving that he is a legally qualified candidate entitled to the privileges of reasonable access.[5] Under the well-established standard of review in such cases, the Commission, in reviewing the Complaint, will defer to the Stations' determination of whether Mr. Terry met that burden unless it can be demonstrated that the Stations acted unreasonably or in bad faith.[6] On the facts and the law presented in our prior submissions, it is clear that the Stations did not act unreasonably or in bad faith. Accordingly, Mr. Terry's complaint should be promptly dismissed or denied.

Legally Qualified Status

When the Stations received Mr. Terry's request to buy advertising time, we requested certain information in order to determine whether he was a legally qualified candidate entitled to reasonable access.[7] Specifically, we sought evidence that Mr. Terry was at the time, or would be no later than Election Day, a resident of Florida, as required by Article I, Section II, of the U.S. Constitution.[8] To date, despite multiple requests, Mr. Terry has failed to provide any information substantiating that he was in fact a resident of Florida on or before Election Day. We also sought confirmation that Mr. Terry's concurrent candidacies for President and Congress complied with Florida's prohibition on simultaneous candidacies.[9]

On October 18, 2012, Mr. Terry's counsel responded to that request by stating that Mr. Terry's name appeared on the Florida ballot and by essentially arguing that this ballot appearance resolved all outstanding questions with regard to the bona fides of his candidacy in Florida.[10] On October 19, 2012, we acknowledged receipt of the message from Mr. Terry's counsel and stated that we were reviewing it with our outside counsel and would respond to the message as soon as possible.

According to the Complaint, no further response was received from the Stations. This claim is false. By email dated October 22, 2012, Matthew Sanderson of Caplin & Drysdale, counsel for the Stations, responded in detail to Mr. Terry's counsel's October 19 message, rebutted the argument that appearance on a ballot, by itself, could resolve all legal qualifications questions and renewed the Stations' request for

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[3] Complaint at 1.

[4] *Id.* at 2.

[5] *See* 47 C.F.R. § 73.1941(d).

[6] *Political Broadcasting Primer*, 100 F.C.C.2d 1476, 1523 (1984) ("The Commission will not substitute its judgment for that of the licensee but, rather, it will determine in any case that may arise whether the licensee can be said to have acted reasonably and in good faith in fulfilling his obligations under this section").

[7] Complaint, Attachment 1 (email from the undersigned to Mr. Jim Henderson, counsel for Mr. Terry, dated October 18, 2012).

[8] *Id.*

[9] *Id.*

[10] *Id.*

evidence of his Florida residency and legal qualifications under Florida's prohibition on simultaneous candidacies.[11] We received no further communication from the Terry campaign on this matter until we received an emailed copy of the Complaint at 5:40 PM on November 5, the evening before Election Day and a full two weeks after our last request for substantiation of his legal qualifications. Mr. Terry cited "substantial delay" as the reason for his November 5 request for immediate action by the Commission, but the facts cited above demonstrate that any delay was directly the result of his own inaction. Moreover, in the absence of further communication from the Terry campaign during that two-week period, it was entirely reasonable for the Stations to conclude that he had not met his burden of establishing his legal qualifications or his right to reasonable access. For these reasons alone, the Complaint should be dismissed or denied with no further action by the Commission.

Reasonable Access is a Limited Right

Even if Mr. Terry had been able to meet his burden of establishing his legal qualifications to hold the office of Representative from Florida's 20th congressional district, he would have been entitled to reasonable access on the Stations only if he had also demonstrated that his proposed advertisements were solely "for the purpose of advancing" his purported candidacy. As we demonstrated in the brief we filed in support of Station WPLG-TV (which faced the same legal issues prompted by a proposed Terry ad buy) and which we incorporate herein,[12] the right of reasonable access is a limited, not a general, right. In reviewing the constitutionality of the reasonable access requirement set forth in Section 312, the U.S. Supreme Court observed that Congress created "a *limited* right to 'reasonable' access."[13] The Court found that its limited nature is derived from it being available only to a certain group of individuals ("legally qualified candidates") for a single purpose ("only for the purpose of advancing their candidacies").[14] Even a legally qualified candidate, then, is restricted in utilizing reasonable access *only* for the purpose of advancing *his* candidacy, not for attacking anyone other than his opponent and not for the purpose of promoting any other person.

Mr. Terry presented to the Stations an advertisement that did not reference his purported congressional candidacy or mention the candidacies of any opponents for the position he claimed to be seeking.[15] The ad instead mentioned only President Barack Obama, who clearly was not Mr. Terry's opponent for Florida's 20th district congressional seat. It is not apparent how this type of advertisement could advance Mr. Terry's alleged congressional candidacy, and Mr. Terry offered no explanation. Further, Mr. Terry's own printed campaign materials prove conclusively that the sole purpose of his Florida campaign was to support Mitt Romney's election by attempting to take perverse advantage of reasonable access privileges in the hope of taking votes away from President Obama.[16] Under these circumstances, the Stations did

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[11] Exhibit 1.

[12] Exhibit 2.

[13] *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981).

[14] *Id.*

[15] Exhibit 2 at 11.

[16] *Id.*; *see also* Petition for Reconsideration filed by Gannett Co., Inc. on Nov. 2, 2012 (DA 12-1734) and Exhibit A attached thereto at 3 ("Our plan focuses on suppressing Obama's vote in seven key states: Virginia, Ohio, Pennsylvania, Indiana, Iowa, Colorado and Florida. This is a targeted, low cost plan that allows "political sniper fire" from the three "safe Romney states" – West Virginia, Kentucky, and Nebraska – (where Romney will win by 12% or more) to suppress Obama's vote in six adjoining "swing states." We can reach tens of millions of people in swing states – **and hurt Obama** – by running in three "safe Romney states" where I WILL NOT hurt Romney") (emphasis original).

not act unreasonably or in bad faith in concluding that Mr. Terry had not proven that his advertisement was "only for the purpose of advancing" his own candidacy.

Stripped of its false veneer as a candidate ad, the ad proffered by Mr. Terry is nothing more than a controversial issue ad, which the Stations may accept or reject within their sole discretion. An interpretation that would force access in this context would violate broadcasters' First Amendment rights. The Supreme Court upheld Section 312 from constitutional challenge because of the narrow scope of its provisions. It would clearly be unconstitutional as applied if Section 312 were interpreted to permit anyone who can find his way onto a ballot to force unwilling broadcasters to accept messages having nothing to do with his purported candidacy. Broadcasters must have the right to reject these issue advertisements, as they do with all other advertising.

Conclusion

Based on the foregoing, it is clear that he Stations did not act unreasonably or in bad faith in requesting additional substantiation from Mr. Terry demonstrating that he was a legally qualified candidate entitled to reasonable access and that the advertisement he proffered was for the purpose of advancing his own candidacy. The Stations also did not act unreasonably or in bad faith in concluding that Mr. Terry had failed to meet his burden on both scores. Accordingly, the Complaint should be dismissed or denied.

Respectfully submitted,

NBC Owned Television Stations

By:

Margaret L. Tobey
Vice President, Regulatory Affairs
NBCUniversal
Assistant Secretary
NBC Telemundo License LLC
300 New Jersey Avenue, NW
Suite 700
Washington, DC 20001
202-524-6401

cc: Patrick D. Purtill
Matthew Sanderson
Bobby Baker (FCC)
Hope Cooper (FCC)

Exhibit 1

Tobey, Margaret (NBCUniversal)

From: Matthew Sanderson <msanderson@capdale.com>
Sent: Monday, November 05, 2012 8:36 PM
To: Hope.Cooper@fcc.gov; Robert Baker
Cc: Tobey, Margaret (NBCUniversal); Trevor Potter; Wray Fitch; Patrick Purtill
Subject: RE: Complaint of Terry for President against WSCV-TV & WTVJ-TV forDenial of Reasonable Access
Attachments: FW: Request by Stations WSCV and WTVJ for Documentation

Importance: High

Mr. Baker and Ms. Cooper:

The complaint against Stations WTVJ and WSCV sent at 5:40 p.m. today by Randall Terry's counsel contains a fundamental factual error. The complaint declares: "To the best of our information, NBC and the Stations have not responded since [October 19th] to Mr. Terry's request for reasonable access under sections 312 and 315." This statement is wrong. On October 22, 2012, the undersigned sent a subsequent message directly to Mr. Terry's counsel (see attached) that further explained the Stations' position, and solicited additional information from Mr. Terry about his eligibility for reasonable-access privileges. Neither Mr. Terry nor his counsel responded to that correspondence. They have instead waited until the evening before Election Day—a full two weeks after the Stations' last (and still outstanding) request to him and a mere 25 hours before polls close in Florida—to seek action by the Commission. Mr. Terry cites "substantial delay" as a reason for the Commission's expedited consideration, but the delay is entirely the result of his own inaction.

Even putting aside the October 22nd message disregarded by Mr. Terry's counsel, Mr. Terry can hardly claim that the Stations have been unresponsive. As you know, the Stations filed a Brief in Support to inform the Commission's deliberations regarding a matter between Mr. Terry and WPLG-TV, another South Florida television station. That Brief in Support articulated certain grounds for finding that Mr. Terry is ineligible for reasonable-access privileges that apply equally to the Stations.

The Stations have therefore been responsive in their dealings with Mr. Terry and proactive in providing information to the Commission.

Sincerely,

Matthew Sanderson

Matthew T. Sanderson
Caplin & Drysdale, Chartered
(202) 862-5046 (direct)
One Thomas Circle, NW
Washington, DC 20005
msanderson@capdale.com
www.capdale.com/msanderson/

From: Patrick Purtill [mailto:PDP@GG-Law.com]
Sent: Monday, November 05, 2012 5:40 PM

To: Hope.Cooper@fcc.gov; Robert Baker
Cc: Margaret.Tobey@nbcuni.com; Matthew Sanderson; Trevor Potter; Wray Fitch
Subject: Complaint of Terry for President against WSCV-TV & WTVJ-TV forDenial of Reasonable Access

November 5, 2012

Mr. Baker and Ms. Cooper:

Attached please find a complaint from Terry for Congress against NBCUniversal and WSCV-TV & WTVJ-TV regarding the denial of reasonable access under sections 312 and 315 of the Communications Act. A hard copy is being filed with the Commission. Please contact Wray Fitch or myself with any questions. Thank you for your assistance.

Respectfully,

Patrick Purtill

Patrick D. Purtill
Associate

Gammon & Grange, P.C.
8280 Greensboro Dr - 7th Floor
McLean, VA 22102
Phone: 703-761-5000 ext. 123
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Tobey, Margaret (NBCUniversal)

From: Matthew Sanderson <msanderson@capdale.com>
Sent: Monday, November 05, 2012 6:13 PM
To: Matthew Sanderson
Subject: FW: Request by Stations WSCV and WTVJ for Documentation

Importance: High

From: Matthew Sanderson
Sent: Monday, October 22, 2012 3:30 PM
To: 'PDP@GG-Law.com'
Cc: 'Tobey, Margaret (NBCUniversal)'; Trevor Potter
Subject: Request by Stations WSCV and WTVJ for Documentation
Importance: High

Mr. Purtill:

My name is Matt Sanderson. I serve as outside counsel to WSCV and WTVJ ("the Stations") on political programming matters. The Stations appreciate your willingness to assist them in their review of Mr. Randall Terry's request for broadcast time. They are expending every effort to make a reasonable determination regarding Mr. Terry's claim to "legally qualified candidate" status. I write today in hope of moving this discussion forward so that a resolution can be reached.

As Margaret Tobey mentioned in a previous email, the Stations are only waiting for Mr. Terry to submit adequate evidence that he is a "legally qualified candidate" entitled to purchase advertising time. Mr. Terry bears the burden of proof in establishing his "legally qualified candidate" status. [47 C.F.R. 73.194(d)]. And to meet this burden, Mr. Terry must show that he: (1) has publicly announced his intention to run for nomination or office; (2) is qualified under the applicable local, state, or Federal law to hold the office for which he or she is a candidate; and (3) has qualified for a place on the ballot.

QUALIFIED TO HOLD THE OFFICE—RESIDENCY CONSIDERATIONS

Ms. Tobey's prior email indicated that Mr. Terry had not yet met his burden of proof in showing he is "qualified … to hold the office" of U.S. Representative because he has still not submitted evidence of his Florida residency. Mr. Terry must be a Florida resident by Election Day to be so qualified. [U.S. Const. Art. I Sec. 2].

Your response suggested that the Florida Secretary of State's placement of Mr. Terry's name on the ballot was, by itself, enough to show that he will be a Florida resident on or before Election Day, apparently based on the assumption that the Secretary made a residency-related determination for Mr. Terry that deserves "a strong legal presumption" of correctness. The Secretary of State, however, has never determined whether Mr. Terry will be a Florida resident by Election Day. The "Federal Candidate Oath" Mr. Terry submitted to the Secretary makes no specific mention of his residency. And, in fact, the Secretary is statutorily prohibited from performing anything more than the "ministerial function" of receiving candidate ballot-access submissions. The Secretary may not even determine whether a submission's content is accurate, let alone decide whether a candidate like Mr. Terry will be a Florida resident by Election Day. [Fla. Stat. 99.061(7)(c)].

In contrast to the Florida Secretary of State, FCC rules and precedents specifically contemplate that the Stations must evaluate whether Mr. Terry—an individual claiming to be a "legally qualified candidate"—has satisfied

residency requirements and other applicable rules. [See, e.g., In Re Complaint by Michael Levinson Against Station WXXI-TV Rochester, New York, 1 F.C.C.R. 1305 (1986)]. To date, Mr. Terry has only submitted his "Federal Candidate Oath," which actually states that he is currently a West Virginia resident. The Stations simply cannot evaluate Mr. Terry's claim that he will be a Florida resident on or before Election Day without evidence. Since, as you note, Election Day is approaching quickly, we anticipate that Mr. Terry will have no trouble gathering the requisite documentation if he does indeed intend to be a Florida resident by Election Day. Accordingly, the Stations ask again that Mr. Terry submit proof (e.g., Florida driver's license, tax receipt, utility bill) that he will make Florida his permanent—not temporary—residence by Election Day.

QUALIFIED FOR A PLACE ON THE BALLOT—SIMULTANEOUS CANDIDACY ISSUES

Ms. Tobey's prior email also requested additional information about whether Mr. Terry had actually qualified for a place on the Florida ballot. The Stations are aware that Mr. Terry also claims to be a candidate for President of the United States in West Virginia and perhaps other jurisdictions. As noted, however, Florida law declares that "No person may qualify as a candidate for more than one public office, whether federal, state, district, county, or municipal, if the terms or any part thereof run concurrently with each other." [Fla. Stat. Ann. 99.012(2)]. ("Public office," in turn, means "any federal, state, county, municipal, school, or other district office or position which is filled by vote of the electors.") [Fla. Stat. Ann. 97.021(31)].

You responded to Ms. Tobey's request by stating "Florida cannot apply its laws outside of its own borders." This statutory provision, however, need not reach beyond Florida's borders to give effect to its plain meaning. All persons are prohibited from simultaneously running for multiple "public offices" if the offices' terms overlap. Although Florida voters will not be able to vote for Mr. Terry for president, the office of President of the United States is a "public office" under Florida law because it is a national "office or position which is filled by vote of the [Florida] electors." Mr. Terry's simultaneous assertions that he is running for both the U.S. House and President therefore appear, by the plain meaning of the statute, to make him not actually qualified as a U.S. House candidate for a place on the Florida ballot, despite his inclusion on the Florida Secretary of State's listing of candidates. The Stations would certainly review any correspondence you might have with the Florida Secretary of State in which Mr. Terry informed the Secretary of his presidential candidacy in West Virginia and elsewhere, along with the Secretary's specific approval of this arrangement.

Finally, you mentioned that if the Stations hold to this interpretation of Florida law, they and all other NBCUniversal stations and affiliates in Florida must deny the Romney/Ryan campaign "reasonable access" to advertising time. This is incorrect. The Stations (and presumably NBCUniversal's other Florida stations and affiliates) have reasonably concluded that Mitt Romney is a "legally qualified candidate" and therefore need not reach a determination of whether Paul Ryan, Mr. Romney's running mate, is also a "legally qualified candidate" when providing reasonable access to the Romney/Ryan campaign.

Thank you again for your assistance in this matter. Please notify me if you have any questions or concerns.

Best,

Matt

Matthew T. Sanderson
Caplin & Drysdale, Chartered
(202) 862-5046 (direct)

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Exhibit 2

Tobey, Margaret (NBCUniversal)

From:	Matthew Sanderson <msanderson@capdale.com>
Sent:	Sunday, October 28, 2012 10:34 PM
To:	Robert Baker
Cc:	Hope.Cooper@fcc.gov; Mark.Berlin@fcc.gov; AWF@GG-Law.com; PDP@GG-Law.com; kwimmer@cov.com; Monroe, Kerry; Tobey, Margaret (NBCUniversal); Trevor Potter
Subject:	WSCV and WTVJ Brief in Support of WPLG-TV (Randall Terry/WPLG-TV Matter)
Attachments:	WSCV and WTVJ Brief in Support of WPLG-TV (Signed).PDF
Importance:	High

Mr. Baker:

Attached is a Brief in Support of WPLG-TV by Stations WSCV and WTVJ. A hard copy will be filed with the Commission when it reopens after its Hurricane Sandy-related closure. Please contact Trevor Potter or me with any questions.

Respectfully Submitted,

Matt Sanderson

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October 28, 2012

VIA ELECTRONIC MAIL AND HAND DELIVERY

Mr. Robert Baker
Policy Division (Political Programming Office, Media Bureau)
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: WSCV and WTVJ Brief in Support of WPLG-TV

Dear Mr. Baker:

WSCV, Ft. Lauderdale, and WTVJ, Miami (the "Stations"), licensed to NBC Telemundo License LLC, understand that on October 22, 2012, Pro-Life Candidates and Randall Terry for Congress filed an informal complaint against Post-Newsweek Stations, Florida, Inc. and WPLG-TV pursuant to 47 C.F.R. § 1.41, claiming that Mr. Terry, as a purported federal candidate, had been denied "reasonable access" under Commission rules. The Stations have not received a complaint from Mr. Terry and therefore understand that their rights will not be adjudicated in this proceeding. Nevertheless, the Stations have received a request to purchase advertising time from Mr. Terry and have had interactions with him that are similar, though not identical, to the interactions between Mr. Terry and WPLG-TV.

Enclosed is a Brief in Support of WPLG-TV that the Stations respectfully request the Commission to consider while resolving this matter. It addresses, as the Stations see it, three main issues relevant to the Terry/WPLG-TV proceedings. If at a later date Mr. Terry files a complaint against the Stations, the Stations would expect to make other arguments at that time in addition to those articulated in the Brief. Accordingly, neither the Commission nor any other party should view the enclosed Brief as the final or comprehensive position of the Stations on these matters. The Stations provide this Brief solely for the benefit of the Commission and the parties involved, and to assist the Commission in resolving this matter in a timely and appropriate manner.

The Commission has ample authority to consider the enclosed Brief. Specifically, the Commission is empowered by statute to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C.A. § 154(j). This broad authority also is reflected in Commission rules, which provide that the Commission "may on its own motion or petition of any interested party hold such proceedings as it may deem necessary . . . for the purpose of obtaining information necessary or helpful...." 47 C.F.R. § 1.1. Commission rules also permit interested persons such as the Stations to request Commission

action. 47 C.F.R. § 1.41. This flexibility is in keeping with the Administrative Procedure Act, which provides that "[s]o far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding...." 5 U.S.C.A. § 555(b).

We believe the enclosed Brief will prove helpful to the Commission's resolution of this matter. In addition to the arguments presented therein, the Brief demonstrates that the Stations, independently of WPLG-TV, also have determined that Mr. Terry is not a "legally qualified candidate" under Commission rules. We recognize that the determination of "other stations" with regard to whether a person is a legally qualified candidate "does not alone establish" whether a station's determination is reasonable. See In Re Complaint of Randall Terry Against Station WMAQ-TV, Chicago, Illinois, 27 F.C.C.R. 598, 600 (2012). However, although not dispositive, these separate determinations are nevertheless strong evidence of the reasonableness of WPLG-TV's similar determination and therefore highly relevant to the Commission's consideration of this complaint.

In summary, the Stations respectfully urge the Commission to take the enclosed Brief into consideration and request the Commission to find that WPLG-TV has acted reasonably and in good faith in denying the complainant's request for advertising time.

Respectfully Submitted,

Trevor Potter
Caplin & Drysdale, Chtd.

Matthew T. Sanderson
Caplin & Drysdale, Chtd.

Counsel to NBC Telemundo License LLC

cc:
Hope Cooper (by email)
Mark Berlin (by email)
A. Wray Fitch (by email)
Patrick D. Purtill (by email)
Kurt Wimmer (by email)
Kerry L. Monroe (by email)
Margaret L. Tobey (by email)

Enclosure: Brief of WSCV and WTVJ in Support of WPLG-TV

BRIEF OF WSCV AND WTVJ IN SUPPORT OF WPLG-TV

Political activist Randall Terry requested advertising time from several South Florida broadcast stations, including Stations WSCV, Ft. Lauderdale, and WTVJ, Miami, licensed to NBC Telemundo License LLC ("the Stations"), by invoking a Commission regulation that requires broadcast licensees to provide "legally qualified candidates" with "reasonable access to … reasonable amounts of time" for the sole purpose of advancing their candidacies.[1] The Stations carefully considered evidence supplied by Mr. Terry regarding his ostensible U.S. House candidacy in Florida's 20th congressional district. They conclude that Mr. Terry has not proven he is a "legally qualified candidate"[2] because facts and applicable law undermine his claims. They have twice asked Mr. Terry for additional information. Mr. Terry has not responded to the Stations' requests.

Mr. Terry now asks the Commission in a complaint against WPLG-TV, another South Florida television station, to determine *de novo* that he is a "legally qualified candidate." But that is not the Commission's charge here. Congress created only "a *limited* right to 'reasonable' access," and a principal reason the U.S. Supreme Court upheld this limited right was the Commission's representation that it would provide "leeway to broadcasters and not merely attempt *de novo* to determine the reasonableness of their judgments" and defer to broadcasters if they "considered the relevant factors in good faith."[3] Consequently, agency precedent commits the Commission to this deferential standard of review, which overturns a broadcaster's reasonable-access determination only if "it was unreasonable or made in bad faith."[4] The question before the Commission, then, is simple: Did WPLG-TV act unreasonably or in bad faith by deciding that Mr. Terry has not proven he is a "legally qualified candidate"?

The Stations, like WPLG-TV, interacted with Mr. Terry and are confident that their decision about Mr. Terry's "legally qualified candidate" status meets the Commission's standard because they did not act unreasonably or in bad faith in determining: (1) Mr. Terry has not shown he is "qualified … to hold the office" of U.S. Representative; (2) Mr. Terry has not demonstrated that he is actually "qualified for a place on the ballot"; and (3) Mr. Terry has not established that his advertising is solely "for the purpose of advancing" his supposed candidacy. The Stations describe below their reasons for making these three determinations, which may serve as a resource to the Commission in the Terry/WPLG-TV dispute. Importantly, the Stations note, in order for Mr. Terry to prevail in his complaint, the Commission must find that WPLG-TV made *all three* determinations in an unreasonable or bad-faith manner.

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[1] 47 C.F.R. § 73.1944(a).

[2] Mr. Terry, as an individual claiming "legally qualified candidate" status bore the burden of proof. 47 C.F.R. § 73.1941(d). *See also* In Re Complaint of Anthony R. Martin-Trigona Against Radio Station WELI New Haven, Connecticut, 2 F.C.C.R. 109 (1987).

[3] CBS, Inc. v. F.C.C., 453 U.S. 367, 396-97 (1981) (emphasis in original).

[4] *See, e.g.,* In Re Complaint by Michael Levinson Against Station WXXI-TV, Rochester, New York, 1 F.C.C.R. 1305 (1986); In Re Complaint of Carter-Mondale Presidential Comm., Inc. Against the ABC, CBS & NBC Television Networks, 74 F.C.C.2d 657, 672 (1979). *See also* Pub. Notice: The Law of Political Broad. & Cablecasting, 69 F.C.C.2d 2209, 2222 (1978) ("The Commission relies first of all on the reasonable, good faith judgment of broadcasters in deciding what reasonable access is in any particular situation.").

I. IT IS NOT UNREASONABLE OR IN BAD FAITH TO CONCLUDE MR. TERRY HAS NOT SHOWN HE IS "QUALIFIED ... TO HOLD THE OFFICE" OF U.S. REPRESENTATIVE

Mr. Terry is entitled to "reasonable access" as a "legally qualified candidate" only if he shows he is "qualified under the applicable local, State or Federal law to hold the office" of U.S. Representative.[5] Mr. Terry must be a Florida resident on or before Election Day to be so qualified.[6]

Residency is established by intending to remain permanently in the State of Florida and by demonstrating that same intent through overt acts, like securing a driver's license or receiving utility bills at a personal residence.[7] Permanence is key. A temporary or conditional presence in Florida "simply does not establish Florida residence."[8] By Election Day, then, Mr. Terry must possess an intent to remain permanently in Florida and display his intent through overt acts.

To be clear, the Stations do not argue that Mr. Terry must already be a Florida resident at this time. But the Stations have concluded, based on evidence presented thus far, that Mr. Terry has not proven he *will be* a resident of Florida on or before Election Day and that he is thereby "qualified ... to hold the office" of U.S. Representative. They believe this conclusion is correct, and certainly not unreasonable or made in bad faith, because: (A) proof submitted by Mr. Terry does not, as a matter of law, support his claim that he will be a Florida resident on or before Election Day; (B) available facts indicate that Mr. Terry will not be a Florida resident on or before Election Day, and Mr. Terry has not supplied to the Stations any evidence to the contrary.

A. Mr. Terry's Evidence Does Not, as a Matter of Law, Support His Claim

Mr. Terry has provided to the Stations two residency-related documents that do not, as a matter of law, support his claim that he will be a Florida resident by Election Day.

The first is an email from the Florida Division of Elections' assistant general counsel that declares: "[t]he only residency requirement for a candidate for U.S. Representative is that the candidate must be an inhabitant of the state in which he/she would represent when elected. (U.S. Const. Art I, s.2)."[9] Mr. Terry presents this email as if it somehow verifies his Florida residency

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[5] 47 C.F.R. § 73.1940(a)(2).

[6] U.S. Const. Art. I Sec. 2. *See also* 38 A.L.R. Fed. 2d 335 § 4 (2009) (describing cases interpreting "when elected" term from constitutional provision).

[7] Bloomfield v. City of St. Petersburg Beach, 82 So. 2d 364, 368 (Fla. 1955) (concluding that "legal residence consists of the concurrence of both fact and intention"). *See also* Fla. Div. of Elections Adv. Op. DE-78-38 (Sept. 1, 1978) (stating that residence "is wherever a person mentally intends it to be and which can be factually supported"); Fla. Atty. Gen. Op. 063-31 (Mar. 20, 1963) (listing the factual support to show residency as voter registration, drivers license, tax receipts, receipt of mail, and carrying on of activities normally indicative of home life).

[8] Marshall v. Marshall, 988 So. 2d 644, 649 (Fla. Dist. Ct. App. 2008).

[9] Email from Gary J. Holland to Randall Terry (May 23, 2012), attached hereto as Attachment A.

claim.[10] In reality, this says nothing about Mr. Terry and does nothing more than restate the constitutional requirement for U.S. Representative candidates. The email, on its face, is not credible proof that Mr. Terry will be a Florida resident on or before Election Day.

The second claimed residency-related document is a link to the Florida Secretary of State's 2012 candidate listing.[11] An appearance on the Secretary's candidate listing, however, cannot, as a matter of law, serve as evidence that Mr. Terry will be a Florida resident on or before Election Day because: (1) the Florida Secretary of State is both statutorily prohibited and constitutionally constrained from making a residency-related determination; and (2) Commission rules do not allow an individual to use an appearance on a candidate listing to establish that he will be a resident on or before Election Day.

1. The Secretary of State is Statutorily Prohibited and Constitutionally Constrained from Making a Residency-Related Determination

Mr. Terry suggests his appearance on the Secretary of State's 2012 candidate listing is itself enough to show he will be a Florida resident on or before Election Day, apparently based on an assumption that the Secretary has made some residency-related determination.[12]

The Secretary of State, however, has never determined whether Mr. Terry will be a Florida resident by Election Day. In fact, the Secretary's role is reduced by statute to the mere "ministerial function" of receiving ballot-access submissions.[13] The Secretary may not even determine whether a submission's content is accurate, let alone decide whether a particular individual like Mr. Terry will be a Florida resident on or before Election Day:

> The qualifying officer's role is purely a ministerial one. The qualifying officer is not to look beyond the face of the qualifying papers to determine if the person is a qualified candidate. If the qualifying papers are complete on their face … *even when the qualifying officer is clearly aware that the candidate does not meet constitutional or statutory requirements for the officer*, the qualifying officer should qualify the candidate and place the candidate's name on the ballot.[14]

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[10] Complaint of Randall Terry Against WPLG-TV (Oct. 22, 2012) ("Ms. Offerman has provided Post-Newsweek and WPLG with a May 23, 2012 email from Gary J. Holland, Assistant General Counsel, Florida Department of State that states the only residency requirement is to be an inhabitant of the state when elected to the office.").

[11] Fla. Div. of Elections Website, Candidate Listing (2012), www.election.dos.state.fl.us/candidate/CanList.asp.

[12] Email from Patrick Purtill to Margaret Tobey (Oct. 18, 2012), attached hereto as Attachment B.

[13] Fla. Stat. 99.061(7)(c) (mandating that a "filing officer," a term that includes the Secretary of State, perform "a ministerial function in reviewing qualifying papers. In determining whether a candidate is qualified, the filing officer shall review the qualifying papers to determine whether all items required by paragraph (a) have been properly filed and whether each item is complete on its face.… The filing officer may not determine whether the contents of the qualifying papers are accurate.").

[14] Fla. Div. of Elections Adv. Op. DE 11-05 (Nov. 10 2011) (emphasis added). *See also* Fla. Div. of Elections Adv. Op. DE 12-01 (2012) ("[E]ven if a candidate falsely attests to the statement …, your duty as a ministerial officer … is to accept the document and qualify the candidate if all of the candidate's qualifying papers are complete on their face."). The assistant general counsel at the Secretary's Division of Elections confirmed that the Secretary does not review residency-related evidence or conduct any inquiry during the ballot-access process. Email from Gary J. Holland to Matthew Sanderson (Oct. 19, 2012), attached hereto as Attachment C.

Mr. Terry is therefore not on the Secretary's candidate listing because he will be a Florida resident by Election Day. Mr. Terry is on the listing only because he managed to fill-in all the blanks on a form.

Even putting aside these statutory barriers, the Secretary could not determine Mr. Terry's residency because the Secretary is also constitutionally restrained in making residency-related pronouncements about congressional candidates. Residency, as mentioned, is a prerequisite for the office of U.S. Representative prescribed by the congressional "Qualification Clauses" of the U.S. Constitution.[15] In 1995, the U.S. Supreme Court held that although the states may have once possessed "some control over congressional qualifications," the "Qualifications Clauses were intended to preclude the States from exercising *any such* power."[16] Thus, even if the Secretary were not prevented by statute from concluding that Mr. Terry will be a Florida resident on or before Election Day, the Secretary is still constitutionally constrained from doing so.

Now, Mr. Terry could suggest that because the Secretary's discretion is cabined, broadcasters' discretion should be also. But Commission rules and precedents specifically contemplate that the Stations must evaluate whether Mr. Terry, as an individual claiming to be a "legally qualified candidate," has satisfied residency requirements and other applicable conditions.[17] Unlike the Secretary, they are permitted—if not obligated—to appraise the adequacy and accuracy of an individual's representations. The Stations requested additional information from Mr. Terry precisely because they knew that his appearance on the Secretary's candidate listing did not reflect any residency-related finding by the Secretary.

Although Mr. Terry has now been presented with proof from the State of Florida itself that the Secretary did not and cannot decide whether he will be a Florida resident on or before Election Day, Mr. Terry still asks the Commission to give that effect to his appearance on the Secretary's candidate listing. The Stations recognize the Commission may at times find help in a state government official's determination.[18] That is not possible here, though. The Secretary of State is both expressly barred by state statute and constitutionally constrained from assessing Mr. Terry's residency claim. There is simply no state-level decision to which the Commission can defer or refer. Indeed, the Commission cannot credit Mr. Terry's empty appeal to the Secretary's "non-decision" without wresting from broadcasters any ability to evaluate individuals' claims and empowering individuals to determine their own qualifications unchecked. This would

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[15] U.S. Const. Art. I Sec. 2.

[16] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 806 (1995) (emphasis added). Courts have also recognized that states may not exercise authority over congressional candidate residency requirements in particular because they are found in the Qualification Clauses. *See e.g.,* Schaefer v. Townsend, 215 F.3d 1031, 1039 (9th Cir. 2000).

[17] *See, e.g.,* Mitchell Rogovin, Esq. Donovan Leisure, 7 F.C.C.R. 1780 (1992) (stating that the Commission "will continue to rely on the reasonable, good faith judgments of licensees to provide reasonable access...").

[18] *See, e.g.,* In Re Complaint of John J. Marino Against Station WCVB-TV Boston, Massachusetts, 71 F.C.C.2d 311, 313 (1979) (finding that a state-level official's determination made an individual a "legally qualified candidate.") The Stations note that because of the Florida Secretary of State's statutory prohibitions and constitutional constraints first articulated in 1995, the Commission cannot rely on a state-level decision about congressional *office* qualifications here, as the Commission did in the 1979 *John J. Marino* matter.

effectively give rise to a "general right of access" for individuals to advertising time and vitiate the "*limited* right to 'reasonable' access" Congress created.[19]

2. Commission Rules Prevent an Individual from Using a Ballot Certification to Establish that He Will Be a Resident by Election Day

By arguing that his appearance on the Secretary of State's candidate listing is itself sufficient to demonstrate that he will be a Florida resident on or before Election Day,[20] Mr. Terry conflates two separate and equally important elements of the Commission's "legally qualified candidate" rule—both of which much be satisfied by a would-be candidate.

Mr. Terry's argument contradicts the plain meaning and structure of the Commission's rules. Ballot qualification and office qualification are manifestly different, the former allowing an appearance as a candidate on an election ballot and the latter permitting a candidate who is successful in an election to then fill a public office.[21] This distinction, which is constitutionally mandated for federal candidates, is reflected in Commission rules. To be a "legally qualified candidate," an individual must, for purposes here, satisfy two main prongs: (1) show he is qualified "to hold [an] office"; and (2) show he is actually "qualified for a place on the ballot."[22] This test deliberately uses the word "and" to signify that both the "office" prong and the "ballot" prong must be met separately, a fact the Commission recognizes.[23]

Mr. Terry demands that the Stations, and now the Commission, find that his appearance on the Secretary's candidate listing is proof he satisfies the "office" qualification prong. The "legally qualified candidate" test's clear, separate treatment of ballot qualification and office qualification prevents such a finding.[24] To give heed to Mr. Terry, the Commission would need to act arbitrarily and capriciously, collapsing the "legally qualified candidate" test's two prongs into one during an adjudication when the Commission has repeatedly acknowledged that these

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[19] CBS, Inc. v. F.C.C., 453 U.S. 367, 396 (1981) ("Petitioners are correct that the Court has never approved a *general* right of access to the media... Nor do we do so today.") (emphasis in original) *See also* In Re Complaint of Carter-Mondale Presidential Comm., Inc. Against the ABC, CBS & NBC Television Networks, 74 F.C.C.2d 657, 671 (1979) ("We believe that Section 312(a)(7) cannot, however, be implemented reasonably if either the interests of broadcasters or candidates are allowed to become preeminent.")

[20] Email from Patrick Purtill to Margaret Tobey (Oct. 18, 2012), attached hereto as Attachment B.

[21] Cartwright v. Barnes, 304 F.3d 1138, 1142 (11th Cir. 2002) (discussing the difference between ballot-access qualification and office qualification). *See also* considered Fed. Communications Comm'n, 100 F.C.C.2d 1476, 1481 (1984) (remarking that an underage presidential candidate did not meet the "office" qualification prong of the "legally qualified candidate" test even though he or she appeared as a candidate on the ballot in six states).

[22] 47 C.F.R. § 73.1940(a)(2), (b)(1).

[23] Fed. Communications Comm'n, 100 F.C.C.2d 1476, 1480 (1984) ("Note the 'ands' and 'ors' in the above language. For example, a mere announcement that he is a candidate does not make a person legally qualified for the purposes of our rules. He must also be eligible to hold the office he is seeking and either have qualified for a place on the ballot or have qualified, as explained in (2) above, as a write-in candidate.").

[24] *See* United States v. Nordic Vill. Inc., 503 U.S. 30, 36 (1992) (noting language must "if possible, be construed in such fashion that every word has some operative effect."); Blackmon-Malloy v. U.S. Capitol Police Bd., 575 F.3d 699, 709 (D.C. Cir. 2009) (applying the rule against superfluity in interpreting a regulation's plain text).

prongs must be satisfied separately.[25] The plain meaning and structure of Commission rules therefore show that any appearance on a candidate list—including Mr. Terry's—is insufficient to establish that an individual will be a resident on or before Election Day.

B. Available Facts Suggest Mr. Terry Will Not Be a Florida Resident On or Before Election Day, and He Has Not Supplied Any Proof to the Contrary

Available facts suggest that Mr. Terry will not be a Florida resident on or before Election Day. For example, the congressional "Federal Candidate Oath" that Mr. Terry has on-file with the Florida Secretary of State reveals that, just one week prior to Election Day, he receives mail in West Virginia and has a West Virginia telephone number.[26] Furthermore, Mr. Terry has filed many official documents related to his alleged presidential candidacy that indicate he is a West Virginia resident.[27] This is no throwaway representation made by Mr. Terry. A presidential candidate must reside in a particular state for purposes of the formal presidential election process.[28] If Mr. Terry is somehow a *bona fide* candidate for both U.S. Representative and President, as he claims, then he is making conflicting representations about his residency on Election Day that cannot be reconciled. Mr. Terry cannot exhibit the intention to remain in two places permanently, an intention that is required to establish residency.

Aside from referencing his appearance on the Secretary's candidate listing, Mr. Terry has not supplied any other proof that he will be a Florida resident on or before Election Day. As mentioned, residency is established both by possessing an intent to remain permanently in the State of Florida and by demonstrating that same intent through overt acts.[29] Mr. Terry, however, has not expressed to the Stations any intention to make Florida his permanent residence on or before Election Day, nor has he provided any proof of overt acts that would display this intent. Since, as Mr. Terry notes, Election Day is only days away, the Stations believe he should have had no trouble gathering the requisite documentation (e.g., Florida driver's license, utility bill) if he honestly intends to make Florida his permanent—not temporary—residence by Election Day.

In sum, the Stations do not contend that Mr. Terry must already be a Florida resident at this time. Rather, the Stations have reasonably concluded that Mr. Terry has not established that he will be a Florida resident by Election Day because he still appears to reside in West Virginia just a matter of days before the 2012 general election.

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[25] I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 445-46 (1987) (employing "traditional tools of statutory construction" to hold that deference to an agency's interpretation was not appropriate).

[26] Randall A. Terry Federal Candidate Oath, attached hereto as Attachment D.

[27] *See, e.g.*, Randall A. Terry FEC Form 2 Statement of Candidacy, *available at* http://images.nictusa.com/pdf/856/12951956856/12951956856.pdf.

[28] U.S. Const. amend. XII ("The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves...").

[29] Bloomfield v. City of St. Petersburg Beach, 82 So. 2d 364, 368 (Fla. 1955) (concluding that "legal residence consists of the concurrence of both fact and intention"). *See also* Fla. Div. of Elections Adv. Op. DE-78-38 (Sept. 1, 1978) (stating that residence "is wherever a person mentally intends it to be and which can be factually supported").

II. IT IS NOT UNREASONABLE OR IN BAD FAITH TO CONCLUDE MR. TERRY HAS NOT DEMONSTRATED HE IS ACTUALLY "QUALIFIED FOR A PLACE ON THE BALLOT"

Mr. Terry is entitled to "reasonable access" as a "legally qualified candidate" only if he shows that he is actually "qualified for a place on the ballot."[30]

Mr. Terry again cites his appearance on the Florida Secretary of State's 2012 candidate listing, this time as proof that he is "qualified for a place on the ballot." This is incorrect. Mr. Terry's presence on the candidate listing does not mean he is actually "qualified." The Secretary did not and cannot[31] ascertain whether Mr. Terry truly meets all relevant legal qualifications to appear as a candidate on the ballot:

> The qualifying officer's role is purely a ministerial one. The qualifying officer is not to look beyond the face of the qualifying papers to determine if the person is a qualified candidate. If the qualifying papers are complete on their face ... *even when the qualifying officer is clearly aware that the candidate does not meet constitutional or statutory requirements for the officer, the qualifying officer should qualify the candidate and place the candidate's name on the ballot.*[32]

The Secretary, in other words, is flatly prohibited from making any decision with regard to a particular candidate's ballot qualification.[33] A list compiled after an automatic, discretion-free process is meaningless. The Secretary's list does not show that Mr. Terry is a qualified candidate any more than a Who'sWho listing would demonstrate that he is prominent or accomplished.

Unlike the Secretary, the Stations have a responsibility under Commission rules to make a determination about whether a particular individual is truly "qualified for a place on the ballot."[34] The Secretary's "non-decision" regarding Mr. Terry's ballot qualification does not compel the Stations to ignore facts that may speak to whether Mr. Terry is actually "qualified."

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[30] 47 C.F.R. § 73.1940(b)(1).

[31] Fla. Stat. 99.061(7)(c) (mandating that a "filing officer," a term that includes the Secretary of State, "performs a ministerial function in reviewing qualifying papers.... The filing officer may not determine whether the contents of the qualifying papers are accurate.").

[32] Fla. Div. of Elections Adv. Op. DE 11-05 (Nov. 10 2011) (emphasis added). *See also* Fla. Stat. 99.061(7)(c) (mandating that a "filing officer," a term that includes the Secretary of State, "may not determine whether the contents of the qualifying papers are accurate."); Fla. Div. of Elections Adv. Op. DE 12-01 (2012) (stating to a filing officer that "[E]ven if a candidate falsely attests to the statement ..., your duty as a ministerial officer ... is to accept the document and qualify the candidate if all of the candidate's qualifying papers are complete on their face.").

[33] Please note that the unlike with office qualification, the Secretary's ballot-access qualification discretion is governed only by state statute. As a matter of constitutional law, the Secretary may issue, interpret, and enforce ballot-access regulations. *See* Cartwright v. Barnes, 304 F.3d 1138, 1142 (11th Cir. 2002) (discussing the difference between ballot-access qualification and office qualification).

[34] Pub. Notice: The Law of Political Broad. & Cablecasting, 69 F.C.C.2d 2209, 2222 (1978) (favoring reliance on "reasonable, good faith judgment of broadcasters in deciding what reasonable access is in any particular situation").

One such fact known by the Stations is that Mr. Terry, in addition to his purported congressional candidacy, also professes to be a candidate for President of the United States in West Virginia and elsewhere. Florida state law prohibits an individual from qualifying as a candidate if he runs "for more than one public office, whether federal, state, district, county, or municipal, if the terms or any part thereof run concurrently with each other."[35]

The Florida Secretary of State has not yet issued an advisory opinion that interprets this "multiple-candidacy" prohibition in a context similar to Mr. Terry's circumstance. Mr. Terry has characterized an informal, non-binding[36] email from the Secretary's attorney staff member as authoritative guidance in an apparent attempt to circumvent the process under which the Secretary's personnel are legally allowed to issue an opinion.[37] After the attorney staff member discovered Mr. Terry had submitted this email to the Commission, the staff member clarified:

> There are certainly other interpretations that could be made concerning this matter based upon relevant legislative history and statutory interpretations. The bottom line: Reasonable persons can reasonably disagree over the same law and my interpretation should not be considered the position of the Florida Department of State/Division of Elections and *it should not be relied upon as authoritative in any manner*."[38]

The Stations read the multiple-candidacy prohibition to preclude from ballot qualification an individual like Mr. Terry who claims to seek multiple federal-level public offices filled by Florida voters, even if one of those offices is pursued out-of-state. The Stations have thoroughly reviewed this position and believe it is correct. Because the Commission's standard of review is not *de novo* review, the Commission may disregard the Stations' view that the prohibition makes Mr. Terry not actually "qualified for a place on the ballot" in Florida only if it determines that view to be unreasonable or held in bad faith. The Stations' interpretation is not unreasonable or in bad faith, though, because it rests squarely on: (A) the plain meaning of statutory terms; (B) the public policy interests served by the multiple-candidacy prohibition.

A. The Plain Meaning of Statutory Terms Favor the Stations' Interpretation

Again, the multiple-candidacy prohibition states that an individual may not qualify as a Florida candidate if he runs "for more than one public office, whether federal, state, district, county, or municipal, if the terms or any part thereof run concurrently...." "Public office," in turn, means "*any* federal, state, county, municipal, school, or other district office or position which is filled by vote of the electors."[39] The Secretary has previously concluded that the prohibition applies to candidacies for "all public offices, regardless of the level of government"

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[35] Fla. Stat. Ann. § 99.012(2).

[36] Fla. Admin. Code Ann. r. 1S-2.010(7) ("The process described in the preceding provisions of Rule 1S-2.010, F.A.C., is the only process by which the Division of Elections is authorized to provide advisory opinions pursuant to Section 106.23(2), F.S. *Other telephone, verbal or written advice does not constitute an advisory opinion rendered pursuant to that law.*").

[37] Fla. Admin. Code Ann. r. 1S-2.010(1)-(6).

[38] Email from Gary J. Holland to Patrick Purtill (Oct. 24, 2012) (emphasis added), attached hereto as Attachment E.

[39] Fla. Stat. Ann. § 97.021(31) (emphasis added).

and has a "wide application."[40] Thus, the scope of "public office" and therefore the prohibition's scope, is limited only by the caveat that both offices must be "filled by vote of the electors."

President of the United States is a "public office" under Florida law because it is a national "office or position which is filled by the vote of the [Florida] electors." While it is true that Florida voters will not be able to vote for Mr. Terry for president, that fact is not material under the statute as it is currently structured because the *office* of President of the United States is still "filled by vote of the [Florida] electors." Mr. Terry's simultaneous assertions that he is running for both the U.S. House and President of the United States therefore appear, by plain meaning of the statute, to make him not actually qualified as a U.S. House candidate for a place on the ballot, despite his inclusion on the Secretary of State's listing of candidates.

Legislative history lends further credibility to this plain-language interpretation. The original version of the multiple-candidacy prohibition contained the phrase "within the state of Florida."[41] The legislature has now removed that language, conceivably because it wanted the prohibition to apply to individuals like Mr. Terry who claim to seek multiple federal-level public offices filled by Florida voters, even if one of those offices is pursued out-of-state.

Mr. Terry counters that this interpretation cannot be correct because it "violates a basic rule of statutory interpretation" against extraterritorial jurisdiction.[42] The Stations do not contend that this is an extraterritorial prohibition, which would purport to exercise direct control over property and persons outside of Florida.[43] An extraterritorial prohibition would, for example, forbid *another state* from certifying Mr. Terry as a candidate on its ballot because of his supposed Florida candidacy. The multiple-candidacy prohibition does nothing of the sort. It is instead focused only on the conditions for qualification as a candidate on the Florida ballot. The prohibition need not reach beyond Florida's borders to give effect to its plain meaning.

Mr. Terry also mentions that if the Stations hold to their interpretation, they must deny the Romney-Ryan campaign "reasonable access" to advertising time. This is incorrect. Mr. Ryan's qualification for the congressional ballot is a matter of Wisconsin state law, which differs greatly from Florida law in this respect.[44] Moreover, the Stations have reasonably concluded that Mitt Romney is a "legally qualified candidate" in Florida and therefore need not reach a determination of whether Paul Ryan, Mr. Romney's running mate, is also "legally qualified" when providing reasonable access to the Romney-Ryan campaign.

Mr. Terry's two objections to the Stations' reading both wither upon closer inspection. He is unable to find any justification to narrow the plain interpretation of the multiple-candidacy prohibition's language that the Stations favor.

B. Underlying Public Policy Interests Support the Stations' Interpretation

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[40] Fla. Div. of Elections Adv. Op. DE-78-38 (Sept. 1, 1978).

[41] Fla. State Senate, Journal of the Senate at 676 (May 8, 1963).

[42] Complaint of Randall Terry Against WPLG-TV (Oct. 22, 2012).

[43] *See* Hotchkiss v. Martin, 52 So. 2d 113, 114 (Fla. 1951); State v. Hocker, 35 Fla. 19, 22 (1895).

[44] Wis. Stat. Ann. § 8.03(1)-(2).

The multiple-candidacy prohibition was instituted to serve several underlying public policy interests that are articulated in the Florida Supreme Court case *State ex rel Fair v. Adams*.[45] The *Adams* Court considered an individual's ability to run simultaneously for three public offices filled by Florida electors and concluded that "multiple candidacies are not consistent with the public policy of this state."[46] In particular, the Court found that the following public policy considerations justified the prohibition:

- "'[T]he election machinery, which is run at such a great expense to the public, is for the purpose of doing a *useful, and not a useless thing.*' In other words, an election under such circumstances [i.e. an election allowing multiple candidacies] would be a futility."
- Multiple candidacies empower candidates to choose one office over another "upon [their] whim and option ... without reference to the will of the people who voted," an act that causes votes as to the discarded offices to be "frittered away" or "thrown away."
- Voters "have a right to expect one seeking their suffrage to qualify and fill the office he seeks" and when an individual submits a candidate oath "he should be held to have represented to the electorate not only that he is qualified to fill, but also that if successful in his bid *will fill* the office which he seeks at their hands."[47]

All these public policy considerations would be served by interpreting the prohibition to apply to individuals like Mr. Terry who claim to seek multiple federal-level public offices filled by Florida voters, even if one office is pursued out-of-state. Public policy should, of course, be considered when interpreting a statute. And the public policy interests served here indicate that a broader reading is in order rather than the narrow interpretation Mr. Terry supports.

III. IT IS NOT UNREASONABLE OR IN BAD FAITH TO CONCLUDE MR. TERRY HAS NOT ESTABLISHED THAT HIS PROPOSED ADVERTISEMENT IS "ONLY FOR THE PURPOSE OF ADVANCING" HIS SUPPOSED CANDIDACY

Mr. Terry is entitled to "reasonable access" only if he establishes that his proposed advertisement is solely "for the purpose of advancing" his supposed candidacy.

In reviewing the constitutionality of the "reasonable access" requirement, the U.S. Supreme Court noted that Congress created "a *limited* right to 'reasonable' access."[48] The Court found that its "limited" nature is derived from it being available only to a certain group of individuals ("legally qualified candidates") for only a single purpose ("only for the purpose of advancing their candidacies").[49] Even a "legally qualified candidate," then, is restricted in utilizing reasonable access *only* for the purpose of advancing *his* candidacy, not for attacking anyone other than his opponent and not for the purpose of promoting any other person.

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[45] *See* Fla. Div. of Elections Adv. Op. DE-78-38 (Sept. 1, 1978) (saying *Adams* led to the multiple-candidacy ban).

[46] State ex rel. Fair v. Adams, 139 So. 2d 879, 881 (Fla. 1962).

[47] Id. at 883-884.

[48] CBS, Inc. v. F.C.C., 453 U.S. 367, 396 (1981).

[49] Id.

Mr. Terry presented to the Stations an advertisement that does not reference his apparent congressional candidacy or mention the candidacies of any congressional opponents. The ad instead mentions only President Barack Obama, who is not running for U.S. Representative in Florida's 20th district. It is not apparent how this type of advertisement could advance Mr. Terry's alleged congressional campaign. Further, Mr. Terry's own printed campaign materials prove conclusively that his only purpose in running his supposed congressional candidacy is to support Mitt Romney by attempting to take perverse advantage of "reasonable access" in hope of taking votes away from Barack Obama.[50] Interestingly, Federal Election Commission rules would prohibit Mr. Terry from using a congressional campaign committee in this manner.[51] Because of these facts and because Mr. Terry has not offered an explanation, the Stations do not act unreasonably or in bad faith by concluding that Mr. Terry has not proven that his advertisement was "only for the purpose of advancing" his own candidacy.

IV. CONCLUSION

The Commission may overrule a broadcaster's reasonable-access determination only if "it was unreasonable or made in bad faith." WPLG-TV could have found Randall Terry was not a "legally qualified candidate" and therefore ineligible to demand advertising time based on three independent grounds, any one of which was sufficient: (1) Mr. Terry's failure to show he is "qualified ... to hold the office" of U.S. Representative; (2) Mr. Terry's failure to demonstrate that he is actually "qualified for a place on the ballot"; and (3) Mr. Terry's failure to establish that his advertising is solely "for the purpose of advancing" his supposed candidacy. Mr. Terry may prevail in his complaint, then, only if the Commission finds that WPLG-TV made *all three* determinations in an unreasonable or bad-faith manner.

For the foregoing reasons described in this Brief, the Stations believe WPLG-TV did not act unreasonably or in bad faith, and they therefore urge the Commission to dismiss this matter.

Respectfully Submitted,

Trevor Potter
Caplin & Drysdale, Chtd.

Matthew T. Sanderson
Caplin & Drysdale, Chtd.

Counsel to NBC Telemundo License LLC

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[50] Randall A. Terry, *Want Obama Defeated* (2012) ("Friend, Florida is perhaps our boldest, most daring effort, which could cost Obama the White House."), available at www.terryforpresident.com/documents/WantObamaDefeated.com.

[51] 2 U.S.C. § 432(e)(3) ("No political committee which supports or has supported more than one candidate may be designated as an authorized committee."). *See also* 11 C.F.R. § 102.13(c)(1).

ATTACHMENT A

Patrick Purtill - From FL SOS Will you confirm to me the residency issues in the stateof Florida to run for U.S. House.

From: Randall Terry <1randallterry@gmail.com>
To: Patrick Purtill <PDP@gg-law.com>
Date: 10/18/2012 3:18 PM
Subject: From FL SOS Will you confirm to me the residency issues in the stateof Florida to run for U.S. House.

---------- Forwarded message ----------
From: **Holland, Gary J.** <Gary.Holland@dos.myflorida.com>
Date: Wed, May 23, 2012 at 9:52 AM
Subject: RE: Will you confirm to me the residency issues in the state of Florida to run for U.S. House.
To: Randall Terry <1randallterry@gmail.com>
Cc: "Small, Stacey L." <Stacey.Small@dos.myflorida.com>

The only residency requirement for a candidate for U.S. Representative is that the candidate must be an inhabitant of the state in which he/she would represent when elected. (U.S. Const. Art I, s.2). (The Constitution also requires the person to be 25 years old and have been a U.S. citizen for 7 years.)

Gary J. Holland

Assistant General Counsel

Florida Department of State

R.A. Gray Building, 500 S. Bronough Street

Tallahassee, FL 32399-0250

Phone: 850-245-6536

Fax: 850-245-6127

Note: This response is provided for reference only and does not constitute a formal legal opinion or representation from the Department of State or the Division of Elections. As applied to a particular set of facts or circumstances, interested parties should refer to the Florida Statutes and applicable case law, and/or consult an attorney to represent their interests before drawing any legal conclusions or relying upon the information provided.

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From: Randall Terry [mailto:1randallterry@gmail.com]

Sent: Wednesday, May 23, 2012 9:47 AM
To: Small, Stacey L.; Holland, Gary J.
Subject: 850-245-6536. Stacey, Gary Holland. Thank you for your time. WIll you confirm to me the residency issues in the state of Florida to run for U.S. House.

Can you please email me what we talked about concerning residency?

I will get the paperwork to you asap.

Thank you,

Randall Terry

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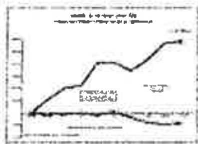

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ATTACHMENT B

From: Patrick Purtill [mailto:PDP@GG-Law.com]
Sent: Thursday, October 18, 2012 6:07 PM
To: Tobey, Margaret (NBCUniversal)
Cc: Wray Fitch
Subject: Request by Station WSCV & WTVJ for documentation

October 18, 2012

Margaret L. Tobey
Vice President, Regulatory Affairs
NBCUniversal
300 New Jersey Avenue, NW
Suite 700
Washington, DC 20001

Dear Ms. Tobey:

Thank you for your emails regarding Mr. Terry's request for reasonable access under section 312 of the Communications Act on WSCV (Ft. Lauderdale, FL) and WTVJ (Miami, FL). Mr. Henderson forwarded them to me for response. As I understand it, you have raised two separate issues that will be addressed separately in this email.

(1) You assert that Fla. Stat. Ann. § 99.012(2), which prohibits a candidate from qualifying as a candidate for more than one public office, disqualifies Mr. Terry from eligibility for the 20th Congressional District in Florida because he is also a candidate for President of the United States in several other States. However, your assertion is incorrect and violates a basic rule of statutory interpretation: namely, Florida cannot apply its laws outside of its own borders. A simple example should make the matter clear. If your argument were correct, all of NBC Universal's affiliates in Florida would be required to deny reasonable access to the Romney/Ryan campaign. As I am sure you know, Paul Ryan is presently on the ballot in Florida as a candidate for Vice President of the United States and on the ballot in Wisconsin for U.S. Representative for the 1st Congressional District.

If you are not denying the Romney/Ryan campaign reasonable access under section 312, then you are violating the anti-discrimination provisions of Section 73.1941(e) of the Federal Communication Commission's rules by applying a different standard to Mr. Terry who is clearly a similarly-situated "legally qualified candidate" for Federal office.

(2) You assert that "Mr. Terry's initial response to WTVJ's request for information was limited to a simple print-out from the Florida Department of State that lists him as a candidate" and that this "was obviously insufficient to establish that Mr. Terry satisfied all three "prongs" of the FCC's "legally qualified candidate" definition." Please note, that the FCC verbally ruled on October 12, 2012 that a candidate in Mr. Terry's exact same position was a legally qualified candidate for Federal office under the Communications Act. However, in the interest of thoroughness, let me address each of your concerns to move this matter forward.

Mr. Terry has been certified by the state of Florida and placed on the ballot as a candidate for the U.S. House of Representatives in Florida's 20th Congressional District. Below is the link to the Secretary of State's website demonstrating Mr. Terry is on the ballot.

Under the rules of the Federal Communications Commission (specifically 47 CFR §73.1940), a "legally qualified candidate" for public office is any person who has publicly announced his intention to run; AND is qualified under the applicable local, State or Federal law to hold the office for which he is a candidate; AND has *either* qualified for a place on the ballot OR publicly committed to seeking election by the write-in method.

Publicly Announced

Being placed on the ballot establishes the fact that Mr. Terry has publicly announced his candidacy. See the FCC's *Political Primer 1984* which states:

> [A] candidate may meet the "public announcement" requirement of the rules by simply stating publicly that he is a candidate for nomination or election to a certain office. Filing the necessary papers or obtaining the required certification under his State's laws in order to qualify for a place on the ballot is considered to be the equivalent of a public announcement of candidacy. *Political Primer 1984*, 100 F.C.C.2d 1476, 1480 (FCC 1984).

Qualified for the Office for Which He is a Candidate

Mr. Terry is qualified for the Office for which he is candidate. When a candidate's name appears on the ballot, Federal courts have concluded that "there is a strong legal presumption that public officials performed their duty in placing the candidates' names upon the official ballots pursuant to law and after compliance with all legal requirements." *Lamb v Sutton*, 164 F Supp 928 (1958, DC Tenn), *affd* 274 F2d 705 (1960, CA6 Tenn), *cert den* 363 US 830 (1960)

The Commission has historically shared this presumption and has explicitly stated that it "look[s] to the laws of the various states regarding their qualifications for ballot status in determining whether candidates have qualified for places on the ballot. Unless filings by candidates which are required by states before fund-raising operations can begin would also qualify such candidates for places on the ballot, such filings would not make these candidates "legally qualified" so as to bring the equal opportunities provision of Section 315 into play." *In re Sutton*, 67 F.C.C.2d 188, 189 (FCC 1977) Conversely, if the filings of candidates required by states qualify the candidates for a place on the ballot, such filings would make these candidates "legally qualified" so as to bring the equal opportunities provisions of Section 315 into play.

Additionally, on October 12, 2012 the Federal Communications Commission verbally ruled that a candidate on the ballot for a Federal office that did not presently reside in the state was a "legally qualified candidate" entitled to "reasonable access" under Section 312.

Finally, Gary J. Holland, Assistant General Counsel, Florida Department of State by email dated May 23, 2012 stated that "[T]he only residency requirement for a candidate for U.S. Representative is that the candidate must be an inhabitant of the state in which he/she would represent when elected. (U.S. Const. Art I, s.2). (The Constitution also requires the person to be 25 years old and have been a U.S. citizen for 7 years.)" A pdf copy of Mr. Holland's email is attached.

Has Qualified for a Place on the Ballot

See: http://election.dos.state.fl.us/candidate/CanList.asp for proof that Mr. Terry is on the ballot as a candidate for the U.S. House of Representatives in Florida's 20th Congressional District.

I expect that this communication provides all of the proof you need to confirm that Mr. Terry is a "legally qualified candidate" for Federal office and entitled to reasonable access under section 312. There are only 19 days left before Election Day. Therefore, time is of the essence in this matter and I hope to hear from you shortly.

Sincerely,

Patrick Purtill

Patrick D. Purtill
Associate

Gammon & Grange, P.C.
8280 Greensboro Dr - 7th Floor
McLean, VA 22102
Phone: 703-761-5000 ext. 123
Fax: 703-761-5023
PDP@GG-Law.com

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>>> "James M. Henderson, Sr." <jmhenderson58@gmail.com> 10/18/2012 1:51 PM >>>
Patrick,

At Randall's instruction, here is another request, this one from WSCV.

Warm regards,

Jim Henderson

From: Tobey, Margaret (NBCUniversal) [mailto:Margaret.Tobey@nbcuni.com]
Sent: Thursday, October 18, 2012 1:11 PM
To: jmhenderson58@gmail.com
Cc: kmofferman@gmail.com
Subject: Request by Station WSCV for documentation

Dear Mr. Henderson:

I have been informed that the Randall Terry campaign for a seat in the U.S. House of Representatives representing the 20th District of Florida has requested to buy time on Station WSCV, Ft. Lauderdale, FL, which is commonly owned with Station WTVJ, Miami, FL. Earlier

this week, in response to the campaign's request to buy time on WTVJ, I sent you the email set forth below in which I requested additional documentation demonstrating that Mr. Terry is a legally qualified candidate for the office in question. The purpose of this email is to advise you that the same information is needed by Station WSCV.

Sincerely,

Margaret Tobey

****

Text of email sent 10/16/2012:

Mr. Henderson:

Your email to WTVJ earlier this week has been forwarded to me for response. In that email, you stated that the station made a decision "in error" by declining Mr. Randall Terry's request to purchase advertising time.

To be clear, WTVJ is simply waiting for Mr. Terry to submit adequate evidence that he is a "legally qualified candidate" entitled to purchase advertising time from WTVJ. As you may know, Mr. Terry bears the burden of proof in establishing his "legally qualified candidate" status. [47 C.F.R. 73.194(d)].

Mr. Terry's initial response to WTVJ's request for information was limited to a simple print-out from the Florida Department of State that lists him as a candidate. This was obviously insufficient to establish that Mr. Terry satisfied all three "prongs" of the FCC's "legally qualified candidate" definition. You have now provided additional information concerning the announcement of Mr. Terry's congressional candidacy. As set forth below, WTVJ seeks additional information regarding a few specific matters.

WTVJ understands from its affiliated station in Washington, DC, that Mr. Terry is currently claiming to be a candidate for President of the United States in West Virginia's upcoming general election. Mr. Terry's campaign website also appears to suggest that he is a candidate for President of the United States in other jurisdictions.

Florida law, however, prohibits simultaneous candidacies for multiple offices: "No person may qualify as a candidate for more than one public office, whether federal, state, district, county, or municipal, if the terms or any part thereof run concurrently with each other." [Fla. Stat. Ann. § 99.012(2)]. ("Public office," in turn, means "any federal, state, county, municipal, school, or other district office or position which is filled by vote of the electors.") [Fla. Stat. Ann. § 97.021(31)]. U.S. Representative and President are both offices filled by the vote of Florida's electors (i.e., voters). This prohibition therefore indicates that Mr. Terry is not actually qualified as a U.S. House candidate, despite his appearance on the Florida Secretary of State's listing of candidates. We therefore ask you to forward the correspondence in which Mr. Terry informed the Florida Secretary of State of his presidential candidacy in West Virginia and elsewhere,

along with the Florida Secretary of State's specific approval of this arrangement. (Please note that the "Federal Candidate Oath" that Mr. Terry filed earlier covers the "Resign-to-Run" provision found at Section 99.012(3)(a), not the "simultaneous candidacy" prohibition found at Section 99.012(2).)

Additionally, you stated in your email earlier this week that Mr. Terry "meets the residency ... requirements already." You have not, however, submitted any evidence that Mr. Terry has established a presence in Florida, such that he can be considered a resident of the state. In fact, filings with government entities (including the Federal Candidate Oath noted above) suggest that Mr. Terry is a resident of another state. We therefore ask you to forward all available evidence that Mr. Terry is a Florida resident, as well as evidence that Mr. Terry's filings that indicate he is a resident of another state were fully disclosed to the Florida Secretary of State.

We thank you for your cooperation and assistance.

Sincerely,

Margaret L. Tobey
Vice President, Regulatory Affairs

+1 202-524 6401 (phone)
+1 202-262-8480 (mobile)
margaret.tobey@nbcuni.com

NBCUniversal
300 New Jersey Avenue, NW
Suite 700
Washington, DC 20001

www.nbcuni.com

ATTACHMENT C

Matthew Sanderson

From: Holland, Gary J. [Gary.Holland@DOS.MyFlorida.com]
Sent: Friday, October 19, 2012 1:51 PM
To: Matthew Sanderson
Subject: RE: Question on Ballot Certification

Matt:

Your interpretation is correct and the Secretary of State does not require any sort of evidence from the candidate other than the candidate oath or conduct any independent inquiry. The Secretary performs a purely ministerial role – *see* s. 99.061(7)(c), Fla. Stat.:

> (c) The filing officer performs a ministerial function in reviewing qualifying papers. In determining whether a candidate is qualified, the filing officer shall review the qualifying papers to determine whether all items required by paragraph (a) have been properly filed and whether each item is complete on its face, including whether items that must be verified have been properly verified pursuant to s. 92.525(1)(a). The filing officer may not determine whether the contents of the qualifying papers are accurate.

Also, the US Constitution, Art. II, s. 5, provides each House shall be the judge of the elections and qualifications of its members, so once elected, jurisdiction over the qualifications of the winning candidate rests solely with the U.S. House of Representatives.

Regards,

Gary J. Holland
Assistant General Counsel
Florida Department of State
R.A. Gray Building, 500 S. Bronough Street
Tallahassee, FL 32399-0250
Phone: 850-245-6536
Fax: 850-245-6127

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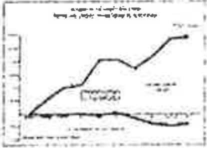

From: Matthew Sanderson [mailto:msanderson@capdale.com]
Sent: Friday, October 19, 2012 1:38 PM
To: Holland, Gary J.
Subject: Question on Ballot Certification

Mr. Holland:

My colleague Bryson Morgan worked with you on a recent Advisory Opinion Request. He gave me your contact information and mentioned that you were very helpful/knowledgeable.

I am emailing today because I have a brief question about the existing process conducted by the Secretary of State's office when certifying an individual for the ballot as a U.S. House of Representatives candidate. I understand, of course, that the U.S. Constitution, aside from age and citizenship, requires only that an individual be a Florida resident by Election Day in order to be qualified to hold the office of U.S. Representative. My question is—does the Secretary of State's office require an individual attempting to qualify for the ballot to submit any evidence that he/she will be a Florida resident by Election Day? If not, does the Secretary of State's office conduct any kind of independent inquiry into whether an individual will be a Florida resident by Election Day?

My understanding has always been that the Secretary's office relies only on the candidate's own declaration ("I am qualified under the Constitution and the laws of the United State to hold the office of which I desire to be nominated or elected") as part of the Oath of Candidate Form, and I wanted to confirm that was true.

Thank you for your help.

Best,

Matt

Matthew T. Sanderson
Caplin & Drysdale, Chartered
(202) 862-5046 (direct)
One Thomas Circle, NW
Washington, DC 20005
msanderson@capdale.com
www.capdale.com/msanderson/

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ATTACHMENT D

FEDERAL CANDIDATE OATH -

CANDIDATE WITH NO PARTY AFFILIATION

RECEIVED
12 JUN -5 AM 9:50
DIVISION OF ELECTIONS
SECRETARY OF STATE

OFFICE USE ONLY

OATH OF CANDIDATE

(Section 99.021, Florida Statutes)

I, Randall Terry
(PLEASE PRINT NAME AS YOU WISH IT TO APPEAR ON THE BALLOT * – NAME MAY NOT BE CHANGED AFTER THE END OF QUALIFYING)

am a candidate with no party affiliation for the office of US House of Representatives
(office)

20 ; I am qualified under the Constitution and the laws of the United States to hold the office to
(district #)

which I desire to be nominated or elected; I have qualified for no other public office in the state, the term of which office or any part thereof runs concurrent with the office I seek; and I will support the Constitution of the United States.

X Randall Terry	304-289-3700	1randallterry@gmail.com
Signature of Candidate	**Telephone Number**	**Email Address**

101 Cantwell Ct.	Purgitsville	WV	26852
Address	**City**	**State**	**ZIP Code**

Candidate's Florida Voter Registration Number (located on your voter information card): ____________

* Please print name phonetically on the line below as you wish it to be pronounced on the audio ballot for persons with disabilities (*see* instructions on page 2 of this form):

Randuhl Teree

STATE OF ~~FLORIDA~~ WV - West Virginia
COUNTY OF Hampshire

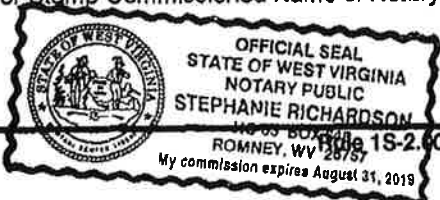
Sworn to (or affirmed) and subscribed before me this 4th **day of** June **, 20** 12

Personally Known: ________ or

Produced Identification: ✓

Type of Identification Produced: drivers license

Stephanie Richardson
Signature of Notary Public
Print, Type, or Stamp Commissioned Name of Notary Public



DS-DE 27B (Rev. 5/11)

Rule 1S-2.0001, F.A.C.

ATTACHMENT E

Matthew Sanderson

From: Holland, Gary J. [Gary.Holland@DOS.MyFlorida.com]
Sent: Wednesday, October 24, 2012 4:50 PM
To: Matthew Sanderson
Subject: FW: Question Regarding Application of Fla. Stat. Ann. § 99.012(2)

FYI

Gary J. Holland
Assistant General Counsel
Florida Department of State
R.A. Gray Building, 500 S. Bronough Street
Tallahassee, FL 32399-0250
Phone: 850-245-6536
Fax: 850-245-6127

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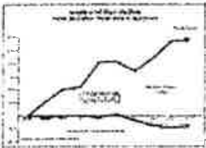

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From: Holland, Gary J.
Sent: Wednesday, October 24, 2012 4:49 PM
To: 'Patrick Purtill'
Cc: 'Wray Fitch'
Subject: RE: Question Regarding Application of Fla. Stat. Ann. § 99.012(2)

Dear Mr. Purtill:

I have learned that you provided the email that I provided you yesterday to the Federal Communications Commission to apparently bolster your position before that agency. Please understand that my email also contains the same caveat that this one contains:

> ***Note: This response is provided for reference only and does not constitute a formal legal opinion or representation from the Department of State or the Division of Elections. As applied to a particular set of facts or circumstances, interested parties should refer to the Florida Statutes and applicable case law, and/or consult an attorney to represent their interests before drawing any legal conclusions or relying upon the information provided.***

The email is what it is – my personal opinion only and does not represent the position of my employer. As you are aware, there is a process for obtaining a formal opinion from the Florida Division of Elections and while I may initially draft some of those opinions, I am not the signer or the final approval authority for them. There are certainly other interpretations that could be made concerning this matter based upon relevant

legislative history and statutory interpretations. The bottom-line: Reasonable persons can reasonably disagree over the same law and my interpretation should not be considered the position of the Florida Department of State/Division of Elections and it should not be relied upon as authoritative in any manner.

Regards,

Gary J. Holland
Assistant General Counsel
Florida Department of State
R.A. Gray Building, 500 S. Bronough Street
Tallahassee, FL 32399-0250
Phone: 850-245-6536
Fax: 850-245-6127

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From: Holland, Gary J.
Sent: Tuesday, October 23, 2012 2:47 PM
To: 'Patrick Purtill'
Cc: Wray Fitch
Subject: RE: Question Regarding Application of Fla. Stat. Ann. § 99.012(2)

Dear Mr. Purtill:

Section 99.012(2), Florida Statutes, as you quote in your email below, has no extraterritorial jurisdiction outside the state of Florida. Thus, the section essentially precludes a person qualifying as a candidate for two offices which will appear on the ballot in Florida. Because Mr. Terry will appear on the ballot only for the congressional race in Florida, he is not in violation of the statute. In fact, this conclusion is buttressed by section 99.021(1)(a)2., Florida Statutes, which contains the federal Candidate Oath, which indicates that "he has qualified for no other public office <u>in the state</u>…." The Candidate Oath is a required qualifying paper which Mr. Terry had to file to qualify to be a congressional candidate. He has only qualified for one office in the state, therefore the oath is truthful. Also, even if he had been untruthful, it could not preclude a filing officer from qualifying him – per s. 99.061(7)(c), Florida Statutes, a filing officer must accept qualifying papers at face value and may not determine the accuracy of their contents. A court order would be required to disqualify a candidate who lied on his qualifying paperwork. I am aware of no court order disqualifying Mr. Terry from being a qualified candidate in Florida; without such, he is a qualified candidate even if he is on the ballot in other states.

As an aside, if the TV station you mention below is truly concerned about persons qualifying for two offices, it would have to deny the Romney-Ryan campaign airtime since Mr. Ryan has qualified as a candidate on the Florida ballot and is also running for Congress in the state of Wisconsin. Again, the fact that Mr. Ryan is on the ballot as a vice presidential candidate in Florida and is on a ballot elsewhere for a different office shows that s. 99.012(2), Florida Statutes, only applies to situations when the candidate has qualified for two offices that appear on the Florida ballot.

Regards,

Gary J. Holland
Assistant General Counsel
Florida Department of State
R.A. Gray Building, 500 S. Bronough Street
Tallahassee, FL 32399-0250
Phone: 850-245-6536
Fax: 850-245-6127

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From: Patrick Purtill [mailto:PDP@GG-Law.com]
Sent: Tuesday, October 23, 2012 2:19 PM
To: Holland, Gary J.
Cc: Wray Fitch
Subject: Question Regarding Application of Fla. Stat. Ann. § 99.012(2)

October 23, 2012

Mr. Gary J. Holland
Assistant General Counsel
Florida Department of State
Division of Elections
R.A. Gray Building, 500 S. Bronough Street
Tallahassee, FL 32399-0250

Dear Mr. Holland:

Thank you for your help this afternoon. As we discussed, Mr. Randall Terry is on the ballot in the state of Florida as a candidate for the U.S. House of Representatives in Florida's 20th Congressional District. Mr. Terry is also a candidate for the Presidency of the United States and appears on the ballots of several states, but not Florida's ballot, for that office. Mr. Terry has requested several Florida broadcast stations to provide his Congressional campaign with reasonable access to advertising time as a candidate for Federal office under the Communications Act.

At least one station has denied Mr. Terry's requests citing Fla. Stat. Ann. § 99.012(2) which reads as follows: "No person may qualify as a candidate for more than one public office, whether federal, state, district, county, or municipal, if the terms or any part thereof run concurrently with each other." According to the station, Mr. Terry is not a legally qualified candidate for Congress in Florida under § 99.012(2) because his simultaneous candidacy for President of the United States in several other states. In Florida, Mr. Terry only appears on the ballot for the 20th Congressional District.

Could you please clarify whether § 99.012(2) would prevent a candidate from appearing on the ballot in Florida if he also appeared on the ballot of another state? Thank you for your help.

If you need any more information from you, please feel free to contact me. Thank you again for your help.

Take care,

Patrick Purtill

Patrick D. Purtill
Associate

Gammon & Grange, P.C.
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McLean, VA 22102
Phone: 703-761-5000 ext. 123
Fax: 703-761-5023
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