

★★★★★ Updated for the new campaign finance reform laws ★★★★★

**16<sup>th</sup> Edition**

**NATIONAL ASSOCIATION OF  
BROADCASTERS**



**POLITICAL BROADCAST  
CATECHISM**

# POLITICAL BROADCAST CATECHISM

16<sup>TH</sup> EDITION

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## ***FOREWORD***

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Welcome to the Sixteenth Edition of the NAB Political Broadcast Catechism, third printing. In recent years, the complexities of political advertising have increased. In 2003 the Supreme Court upheld all the major provisions of the Bipartisan Campaign Reform Act of 2002 (“BCRA”). In addition to the Federal Communication Commission’s (“FCC” or “Commission”) political broadcasting rules which remain in effect, there are new certification and sponsorship identification rules for federal candidates. Additionally, there are new public file requirements. This edition explains in detail these new regulations.

Readers will find that the Sixteenth Edition takes you from the first issues that determine whether the political rules apply in a specific situation, all the way through the process as stations encounter the myriad issues and questions presented during any campaign season. This edition also provides specific and detailed questions and answers topics, as well as “Quiz Yourself” sections to provide readers with a gauge of their knowledge of a particular area. This publication provides broadcasters with an easier way to make informed decisions regarding political broadcasting questions.

The FCC places great importance on broadcasters’ responsible execution of their obligations under the political broadcasting rules. NAB urges each station licensee to be sure its employees are thoroughly familiar with the station’s obligations. The Political Broadcast Catechism is an important tool to that end.

Stations should also be aware that the FCC might issue important new interpretations of its rules prior to the next revision of the Catechism. Station licensees and personnel handling political broadcast matters should stay abreast of these changes as they occur by reviewing memos and alerts from NAB and their own counsel.

Additionally, stations must keep in mind that the Catechism cannot set forth definitive conclusions on every possible issue or anticipate every issue that may arise. Campaign practices, broadcast station operations, and the rules themselves interrelate in an ever-changing fashion to produce new questions each campaign period. The Catechism should be viewed as a basic reference book for the station licensee and relevant employees. It also should serve to alert stations to any issues that require consultation with station counsel. It is not intended to impart legal advice on any circumstance particular to an individual station. Stations should consult with station counsel regarding how these rules apply to their specific situation.

Ann Bobeck, NAB Associate General Counsel, and Jerianne Timmerman, NAB Deputy General Counsel, updated and revised the Catechism.



## **PRE-ELECTION CHECKLIST**

Stations should prepare for an election cycle by taking several steps prior to each primary, general or special election. Below is a checklist to consider:

- ❑ **Read the Political Broadcast Catechism and review the rules.**
- ❑ **Determine election dates (for all primaries and the general election for both state and/or federal offices).**
- ❑ **Calculate the Lowest Unit Charge windows for primary, general and any special elections. See *infra* at 33.**
- ❑ **Identify which offices (both state/local and federal) are up for election.**
- ❑ **Determine which state/local races will have access. See *infra* at 21.**
- ❑ **Review disclosure statements and update so that they reflect current station policies for both the Lowest Unit Charge period and the comparable rate periods. See *infra* at 59.**
- ❑ **Organize the station's political file. Discard records that are over two years old and establish new files for current races. See *infra* at 75.**
- ❑ **Calculate the Lowest Unit Charges for each class of time available on the station. See *infra* at 33.**
- ❑ **Obtain an up-to-date copy of state election laws and review for any special provisions governing sponsorship identification and campaign spending different from the federal law.**
- ❑ **Obtain the PB-16 form from NAB Services (800-368-5644) to document candidate and issue buys and federal candidate certifications.**
- ❑ **Review political broadcasting rules with all station sales staff who will be handling political buys.**

**Review public file access rules with all station staff – including station policies regarding telephone access. See *infra* at 76.**



# **BROADCASTER PRE-AIRING CHECKLIST**

## **FEDERAL CANDIDATES**

- ❑ **Receive Signed Federal Candidate Certification Form At Time Programming is Purchased (applicable for all programming aired during the political windows).**
- ❑ **Verify that All Spots Meet FCC Sponsorship ID Requirements.**
- ❑ **Ensure Request for Time/Agreed Upon Schedule is Included in Political File.**

## **STATE/LOCAL CANDIDATES**

- ❑ **Verify that All Spots Meet FCC Sponsorship ID Requirements.**
- ❑ **Ensure Request for Time/Agreed Upon Schedule is Included in Political File.**

## **ISSUE ADVERTISEMENTS**

- ❑ **Verify that All Spots Meet FCC Sponsorship ID Requirements.**
- ❑ **Independently Verify that Spots Do/Do Not Communicate “*A Message Relating To A Political Matter of National Importance*”**
- ❑ **For All Spots That Do Communicate “*A Message Relating To A Political Matter of National Importance,*” Ensure that Request for Time/Agreed Upon Schedule (including rate information) Is Included In The Political File.**



# **RULES**

## **LEGALLY QUALIFIED CANDIDATES**

The Commission’s political rules apply to political ads for legally qualified candidates for public office. Determining a candidate’s status is very important because many political rules do not apply to ads about individuals who are not “legally qualified.”

### **Individuals Seeking Election to Office**

A candidate is “legally qualified” when he or she (1) has publicly announced his or her 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 or has publicly committed himself or herself to seeking election by the write-in method. 47 C.F.R. § 73.1940(a) & (b). If an individual is claiming candidacy as a write-in, he or she must be eligible under the applicable write-in law and make a substantial showing that he or she is a *bona fide* candidate for nomination or office. 47 C.F.R. § 73.1940(b)(2).

### **Candidates for President and Vice President**

Individuals seeking the office of President or Vice President will be considered legally qualified candidates only in those states or territories (or the District of Columbia) where they have publicly announced their candidacy, are qualified to hold the office, and have qualified for a place on the ballot (or as a write-in). Once qualified in 10 states (or 9 states and the District of Columbia), a person is a legally qualified candidate in all states, territories, and the District of Columbia. 47 C.F.R. § 73.1940(c).

### **Nominations by Convention or Caucus**

A person seeking nomination for any public office (except President and Vice President) by means of a convention, caucus, or other procedure is legally qualified when he or she has publicly announced his or her intention to run, is qualified to hold the office, and makes a substantial showing that he or she is a *bona fide* candidate for such nomination. However, a person shall not be considered legally qualified prior to the 90 days before the beginning of the convention, caucus, or similar procedure. 47 C.F.R. § 73.1940(d).

### **Nominations for the Office of President or Vice President**

Persons seeking nominations for the office of President or Vice President are legally qualified candidates only in those states or territories (or the District of Columbia) where they have publicly announced their intention to run, are qualified to hold the office, and have qualified for the primary or Presidential preference ballot in that state, territory, or the District of Columbia. 47 C.F.R. § 73.1940(e)(1). If the individual is not yet on the primary or preference ballot, he or she may be considered legally qualified if there is a substantial showing of *bona fide* candidacy for the nomination. 47 C.F.R. § 73.1940(e)(2). The individual is legally qualified for nomination if he or she qualifies to be on the primary ballot in ten (10) states (or nine (9) states and the District of Columbia). *Id.*

### **Substantial Showing**

An individual has made a substantial showing of *bona fide* candidacy when he or she has “engaged to a substantial degree in activities commonly associated with political campaigning.” 47 C.F.R. § 73.1940 (f). Such activities include, but are not limited to, making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee, and establishing campaign headquarters. Not all listed activities are necessary to demonstrate substantial showing of candidacy and other activities would also contribute to such a showing. *Id.*

The Commission has stated the burden is on the individual to prove he or she has made a substantial showing of campaign activities throughout the jurisdiction in which he or she seeks office. *Michael Stephen Levinson Against Television Station Licensees*, 87 FCC 2d 433 (1980)(Commission found that Levinson had not established a substantial showing to qualify as a write-in candidate for President in New York state because he had not engaged in campaign activities throughout the entire state).

### **Establishing “Legally Qualified” Status**

A candidate requesting access or equal opportunities of a licensee, or a candidate complaining to the FCC of a licensee’s non-compliance, has the burden of proving he and his opponent are legally qualified candidates. 47 C.F.R. § 73.1941(d). If a state attorney general or other appropriate state official having jurisdiction to decide a candidate’s legal qualification has ruled that a candidate is not legally qualified under local election laws, a station is not required to provide access or equal opportunities, absent a judicial determination of status. *Telegram to Ralph Muncy*, 23 FCC 2d 766 (1956); *Letter to Socialist Workers’ Party*, 40 FCC 280 (1956); *In re Lester Posner*, 15 FCC 2d 807 (1968).

## **Defining Public Office Elections**

The political rules only affect legally qualified candidates for public office. A public office is one where a caucus and/or election chooses the delegates, nominees, or the actual office holder. The FCC's political broadcasting rules do not apply to closed caucuses, closed party elections, union elections, Indian tribal elections, or elections in foreign countries.

## **Q&A ON LEGALLY QUALIFIED CANDIDATE RULE**

### **Q: Must a candidate be on the ballot to be legally qualified?**

**A:** Not always. The term “legally qualified candidate” includes persons not listed on the ballot if (1) they have committed themselves publicly to seeking election as a “write-in” candidate; (2) they are eligible under applicable law to be voted for by writing their names on the ballot, by sticker, or by other method; and (3) they make a substantial showing that they are *bona fide* candidates for election or nomination. *Legally qualified Candidates for Public Office*, 43 RR 2d 905 (1978); *Anthony R. Martin-Trigona*, C9-291 (September 25, 1986), C9-547 (October 16, 1986), *recon. denied*, 2 FCC Rcd. 109 (1987).

### **Q: May a person be considered a legally qualified candidate where he or she has made only a public announcement of his or her candidacy and has not yet filed the required forms or paid the required fees for securing a place on the ballot in either the primary or general election?**

**A:** It depends on state law. In some states the electorate may vote for persons whether or not they have gone through the procedures required for getting their names placed on the ballot itself. In such a state, the announcement of a person's candidacy – if determined to be *bona fide* – is sufficient. *Flory v. FCC*, 528 F. 2d 124 (7<sup>th</sup> Cir. 1975). In other states, candidates may not be “legally qualified” until they have fulfilled certain prescribed procedures. *Letter to Senator Earle C. Clements*, 23 FCC 2d 751 (1954); *Letter to Judy H. Hersher, Esq.*, 7 FCC Rcd. 4312 (1992).

### **Q: Are candidates for positions of authority in a political party considered candidates for public office?**

**A:** Candidates for the position of nominee of a political party for election to a public office are considered candidates for that office. *See Kay v. FCC*, 443 F. 2d 638 (D.C. Cir. 1970). A candidate for election to a party's county committee, however, is not seeking public office, but a party position. *Malcolm Cornell*, 31 FCC 2d 649 (1971). Whether the position of party delegate to a national party nominating convention is considered a public office is a question on which the Commission will give deference to the appropriate state officials. *See KNBC-TV*, 23 FCC 2d 765 (1968); *Russell H. Morgan*, 58 FCC 2d 964 (1976).

**Q: Is the subject of a recall election a candidate for public office?**

**A:** Where the ballot offers only the choice of recalling or not recalling an officeholder, the incumbent official is not a legally qualified candidate for public office. Where the ballot includes both the question concerning whether an official should be recalled and candidates to succeed the incumbent if he is recalled, the incumbent and all challengers will be considered legally qualified candidates. *KOAA-TV*, 68 FCC 2d 79 (1978).

**“QUIZ YOURSELF” ON LEGALLY QUALIFIED CANDIDATES**

(1) Where a name is on the ballot, it can be presumed that the individual is a legally qualified candidate for public office.

True                       False

(2) An incumbent announces his or her intention to seek reelection one year before the election. He or she is legally qualified.

True                       False

(3) A candidate is legally qualified if he or she announces their candidacy over the Internet.

True                       False

See page 113 for answers to the “Quiz Yourself” questions on Legally Qualified Candidates.

**NOTES:**

## “USE” OF A BROADCAST FACILITY

### Use Defined

A “use” is any “positive appearance of a candidate whose voice or likeness is either identified or is readily identifiable.” *Codification of the Commission’s Political Programming Policies*, 9 FCC Rcd. 651 (1994). A use, in conjunction with a campaign, triggers several things:

- Lowest unit charge (LUC) requirements (unless a federal candidate does not qualify for the LUC, *see infra* page 51 for a discussion on Federal Candidate Certification);
- Equal opportunities obligations;
- The prohibition on a station censoring a political spot or program; and
- Station protection against liability for libelous or defamatory statements that might occur in the spot or program.

The FCC's old definition of a “use” was *any* appearance by a candidate where the candidate's voice or likeness is either identified or readily identifiable. This broad definition covered a wide range of appearances and was too simplistic as the number of attack ads and buys made by political action committees and other non-candidates increased. So, the FCC fine-tuned its “use” definition.

**Thus, if a PAC or another candidate buys time to oppose a candidate and uses the opposed candidate’s voice or likeness in the spot, it is not a “use” by the candidate *being attacked* and does not trigger equal opportunities for the candidate’s opponents because it is not a “positive” appearance. The use, however, does not have to be under the control of the candidate.**

### Censorship of Candidate Uses

Whenever a legally qualified candidate for public office makes a “use” of a station – *i.e.*, the candidate’s recognizable voice or likeness appears in a positive manner – the “no-censorship” provision of the Communication Act applies. The station is not allowed to censor the candidate’s spot or program in any way. Thus, stations cannot alter or remove a spot or program containing a candidate’s use for any reason (*e.g.*, the material contains inaccuracies or has used copyrighted material without authorization). *See WMUR-TV, Inc.*, 11 FCC Rcd. 12728 (1996).

Due to this no censorship provision, stations cannot be held responsible for the content of the use. Stations are protected from libel and defamation liability, and therefore cannot require candidates to indemnify them against libel and defamation. *Farmers Educational and Cooperative Union of America, North Dakota Division v. WDAY, Inc.*, 360 U.S. 525, 535 (1959).

Remember, also, that once a station has agreed to air a schedule for a state or local candidate, it may not cancel the order based on the content of the spot or program.

### **Non-Candidate Statements**

Issue advertisements, party and political action committee (“PAC”) spots, and other spots in which persons other than the candidate appear in the spots or programs do not fall under the no-censorship provision. The station is liable for any libelous or slanderous statements contained in such advertisements. For example, suppose a chairman of a political party’s campaign committee, not himself a candidate, broadcasts a speech in support of a candidate. Since a station may censor the political speeches of persons other than legally qualified candidates, the licensee may be held liable for slanderous or libelous statements of the party chairman if the station does not require that the offensive statements be deleted. *Felix v. Westinghouse Radio Stations*, 186 F. 2d 1 (3d Cir. 1950), *cert. denied*, 314 U.S. 909 (1950).

### **Indemnification Agreements**

A licensee cannot require a candidate to sign an indemnification agreement. The Commission has ruled that in light of the Supreme Court’s decision in the *WDAY* case, a requirement for indemnification serves no purpose and may be inhibiting in the candidate’s use of a station. The Commission believes that “the courts would hold a licensee free from liability for any claim arising out of a ‘use’ by a candidate where a licensee was unable under the no censorship provision of Section 315 to prevent the act which gave rise to the claim.” *Humphrey Campaign*, 37 FCC 2d 57 (1972).

Also, a station cannot require indemnification for any liability arising from other aspects of the candidate's broadcast (*e.g.*, statements by supporters who appear with the candidate or background music for which the station is not licensed). The Commission has ruled that if a “use” is present, the no censorship provision of Section 315 applies “to all program material presented as part of the candidate's use...with no right of prior approval by the licensee.” *Gray Communications Systems, Inc.*, 19 FCC 2d 532, 535 (1969); *Humphrey Campaign*, 37 FCC 2d 576 (1972).

### **Candidate Speech in Programs**

As above, any "use" by a candidate prohibits a station from censoring it. This applies to all uses -- even where a candidate appears in a program length show. If the candidate's appearance is substantial and integral to the show, the entire show will be considered a "use." Thus, no part of the show may be censored (and the station has equal opportunities obligations to all opponents for the entire program length show). Otherwise, uses that are not substantial or not integral are

subject to calculation of time for the "use" based on a stopwatch approach (*i.e.*, counting the minutes the candidate appears).

For example, Candidate B made an agreement with a station that she would receive equal opportunities free because of a free appearance of Candidate A. Candidate B desired to have some high school students sing and entertain on the program she would broadcast under her equal opportunities rights. During the program, she also wanted to have the keys to a car presented to the winner of the automobile by a member of a merchant's association. In this instance, Section 315 would prohibit the station from restricting the appearance by Candidate B. Furthermore, if any of the persons appearing on Candidate B's broadcast utter libelous statements, Section 315 would guarantee immunity to the station from civil action based on these utterances, unless the persons appearing are not integral to the program.

Thus, a candidate's speech is not limited to subjects directly related to his or her candidacy. A candidate may use the time as he or she deems best. To deny a person time on the grounds that he or she was not using it in furtherance of his or her candidacy would be an exercise of censorship. *Letter to WMCA, Inc.*, 40 FCC 241 (1952). Further, if a station makes non-exempt time available to officeholder who is also a legally qualified candidate for reelection and the officeholder limits his talks to non-partisan and informative material, other legally qualified candidates who obtain time cannot be limited to the same subjects or the same type of broadcast. *Letter to Congressmen Allen Oakely Hunter*, 40 FCC 246 (1952).

### **Scripts and Tapes**

A station cannot *require* advance submissions of scripts and tapes. However, stations may request it from candidates. There are several reasons why a broadcaster may ask for an advance tape or script:

- To learn whether the broadcast would be a "use;"
- To learn whether a paid broadcast carries the proper sponsorship identification;
- To ensure that the broadcast is of the agreed upon length; and
- To ensure the tape is of broadcast quality and meets other technical and scheduling requirements.

When asking for a tape or script in advance, the broadcaster should clearly inform the candidate that licensees may not censor the content of a use. *Primer on Political Broadcasting and Cablecasting*, 100 FCC 2d 1476 1512 (1984).

### **Negotiating with Candidates Regarding Content**

Licensees may advise candidates to delete defamatory passages, but they must carefully avoid imposing any requirements that have a “chilling effect” on candidates’ rights to use broadcast facilities without censorship. For example, it may be permissible for a licensee to “educate” a candidate about the consequences (*e.g.*, a lawsuit) if he or she goes ahead and includes defamatory remarks in his or her use. However, if the candidate insists, the licensee must permit the candidate to broadcast the spot uncensored, regardless of the consequences for the candidate.

### **Abortion Spots/Indecent Material**

If a candidate’s spot or program contains material that might not be appropriate for children (*e.g.*, graphic scenes from abortions), stations may not channel the spot or program into a time period where children are not likely to be in the audience. In this instance, a station has two options to alert viewers:

1. A station may briefly air immediately before the spot that “*the following announcement is a paid political advertisement and this station is required to carry it by federal law*” (or words to that effect). In that instance, a station must place the same neutral warning before all candidate spots for that office; or
2. A station may carry a neutral advisory alerting parents that “*the following program or advertisement may not be suitable for children*” (or words to that effect). A station need only “tag” those spots the station believes are inappropriate for children.

Additionally, stations may discuss the legalities and issues surrounding the advertisements during their newscast, if they choose.

### **Exemptions to the No-Censorship Provision**

If there is no proper sponsor ID, stations must insert a proper ID, even if a station must obliterate part of the ad. *Joint Agency Guidelines for Broadcast Licensees*, 69 FCC 2d 1129, n.2 (1978); *Sponsorship Identification Recon.*, 7 FCC Rcd. 1616, 1618, n. 19 (1992). See *infra* page 63 for a discussion on Sponsorship Identification.

Also, the FCC staff has informally stated that broadcasters are not required to air candidate spots or programs that contain obscene material. Stations might not be immune from liability for airing such material. Therefore, stations may refuse such a spot or program.

### **Defining Readily Identifiable**

The candidate's voice or likeness must be identified or readily identifiable. If the voice or likeness is not identified, the station must make a reasonable judgment as to whether it is identifiable. The station must determine whether its average viewer or listener would be able to identify the candidate. Stations can ask the candidate or the agency to identify the candidate in the spot.

### **Fleeting Uses**

As a general rule, any on-air appearance by a candidate lasting four or more seconds constitutes a “use.” Appearances which are less than four seconds are considered fleeting. Fleeting uses are not considered “uses” and thus, they do not trigger equal opportunities requirements.

However, there may be some circumstances in which a candidate’s appearance lasts more than four seconds but is still considered fleeting. For example, suppose a station aired a taped public service television announcement featuring a singing group of about 100 people, many of whom were well known celebrities in various fields. The video was shot at long range, no one’s name was mentioned nor were any voices separately identifiable. One of the participants later became a legally qualified candidate for public office. In this instance, a candidate’s appearance is fleeting and it is not considered a “use” within the meaning of the Communications Act. *Letter to National Urban Coalition*, 23 FCC 2d 123 (1970).

### **“Uses” Exempt from Equal Opportunities**

Appearances by legally qualified candidates on specified types of news programs are deemed not to be a “use” of broadcast facilities. Therefore, equal opportunities provisions do not apply. In determining whether a particular program is within the scope of one of these specified news-type programs, the basic question is whether the program meets the standard of “*bona fide*.”

### **Defining Bona Fide**

To establish whether such a program is, in fact, a *bona fide* exempt program, the following considerations, among others, may be pertinent to some or all of the exemptions:

- The format, nature and content of the program;
- Whether the format, nature and content of the program are based on the broadcaster’s good faith journalistic judgment;
- Who initiates the program;
- Who produces and controls the program;
- When was the program initiated; and
- Whether or not the program is regularly scheduled.

## Types of Exempt News Programs

### Bona Fide Newscast

Programs must be of a *bona fide* news value – that is, designed to inform the public and not just further the candidate’s campaign – in order to qualify for the exemption. The FCC has held in staff rulings that nontraditional subject matter does not bar a program from newscast status. A program whose focus is entertainment news or religious news, for example, may be exempt if it has *bona fide* news value. *Paramount Pictures Corporation* (“*Entertainment Tonight/Entertainment This Week*”), 3 FCC Rcd. 245 (1988); *Paramount Communications Inc.* (“*Hard Copy*”), 5 FCC Rcd. 4627 (1990); *Fox Television Stations, Inc.* (“*Not Just News*”), 6 FCC Rcd. 7120 (1991); *Request of Access Hollywood*, 1997 FCC LEXIS 3419; *King World Productions* (“*Inside Edition*” and “*American Journal*”), 9 FCC Rcd. 6394 (1994).

The licensee does not have to produce the program in order for it to qualify as a *bona fide* news program. Also, the fairness doctrine is no longer applicable to news programs involving the discussions of candidate elections. *Lenora B. Fulani*, 3 FCC Rcd. 6245, 6246 (1988); *Letter to Carl E. Person, Esq.*, 6 FCC Rcd. 7477 (1991).

Finally, appearances by a candidate in press release-type tape, film clips, or audio tapes prepared and supplied by the candidate and broadcast as part of the station’s regularly scheduled newscasts are generally not considered “uses.” It is generally assumed that the broadcaster exercised some degree of journalistic discretion in the use of the material. However, because the clips and tapes were supplied by the candidate as an inducement to their broadcast, a sponsorship identification announcement that the film or tape was “furnished by” the candidate would be required under the Commission’s rules if the tape is used in its entirety. See *infra* page 63 for discussion on Sponsorship Identification rules.

### Bona Fide News Interview Programs

A *bona fide* news interview program must be regularly scheduled and the format, content, and participants must be based on good faith journalistic judgment and newsworthiness and not on an intention to advance an individual’s candidacy. *Multimedia Entertainment, Inc.* (“*Sally Jesse Raphael*”), 6 FCC Rcd. 1798 (1991).

The Commission has held that programs such as “*This Week with David Brinkley*” (now “*This Week with Sam Donaldson and Cokie Roberts*”) are *bona fide* news and news interview programs. Other *bona fide* news interview programs include “*Meet the Press*” and “*Face the Nation*.” Some programs containing both news formats and *bona fide* news interviews, such as the “*Today*” show and “*Good Morning America*” have been determined to be

exempt as *bona fide* news interview programs. *See also* In re request of Infinity Broadcasting Operations, Inc. for Declaratory Ruling, 18 FCC Rcd 18603, (2003) (Portions of the *Howard Stern Show* were held exempt from equal opportunities); *Infinity Broadcasting Corporation of Illinois*, 12 FCC Rcd. 773 (1997) (The Commission held a four-hour talk radio program exempt from equal opportunities.); and *Joyner Management Service, Inc.*, 11 FCC Rcd. 22360 (1996) (The *Tom Joyner Radio Program* was held exempt from equal opportunities obligations.).

As mentioned above, independently produced *bona fide* news interviews also qualify for the news interview exemption so long as they are conducted and broadcast in the exercise of the producer's and licensee's news judgment. The licensee is responsible for obtaining from the producer assurances that the programs are not designed to further the cause of any candidate and candidates have not played any role in the program's production. If the producer has obtained a declaratory ruling from the FCC that the program falls within the news interview exemption, the licensee can rely on that ruling. However, the licensee must still make an independent news judgment to air the programming. *Independently Produced News Interview Programs*, 7 FCC Rcd. 4681 (1992).

#### New News Programs

A news program scheduled to begin shortly before the start of or during a campaign qualifies as an exempt program so long as the broadcaster's decisions on the format are based on (1) good faith journalistic judgment; (2) not made with an intention to advance the candidacy of a particular person; (3) the selection of persons to be interviewed and topics to be discussed are based on their newsworthiness; and (4) the program is to be regularly scheduled. *See CBS, Inc. ("American Parade")*, 55 RR 2d 864 (1984); *NBC, Inc., ("Summer Sunday")*, 56 RR 2d 958 (1984).

#### Audience Participation

A news interview program in which interviewees and topics are selected strictly on the basis of newsworthiness, but also permits the audience and callers to make comments and ask questions of the interviewee, can be exempt as a *bona fide* news interview program so long as the producer and host exercise control over the program and prevent callers or members of the audience taking control over an interview. *Mutual Broadcasting System, Inc., ("Larry King Show")*, 56 RR 2d 956 (1984).

#### **Bona Fide News Documentary**

Long-form news documentary shows are exempt from the equal opportunities requirement. *Bona fide* news documentaries include both locally and nationally produced programming. Also, depending on

whether these programs include an on-air interview of a candidate, they may also fall under the *bona fide* news interview program exception.

### **On-the-Spot Coverage of *Bona Fide* News Events**

News events such as live coverage of a primary, caucus, party convention, as well as on-the-campaign-trail news coverage qualify as *bona fide* news events; therefore, they are also exempt from equal opportunities requirements. Any news event is eligible for on-the-spot coverage. The Commission looks to licensee reasonableness and good faith in determining what constitutes a *bona fide* news event. Reasonableness measures the method of coverage used by the broadcaster against the newsworthiness of the event being covered. Thus, broadcasters should not use broadcast coverage to favor a particular candidate.

#### Debates

Coverage of political debates is also exempt from the equal opportunities requirement as on-the-spot coverage of a *bona fide* news event. The station must make its determination to cover the debate based strictly on its judgment that the event is newsworthy. Furthermore, if the station hosts a debate between two opposing candidates, the debate is still considered on-the-spot coverage of a *bona fide* news event even though it is arranged and controlled exclusively by the station. *In re Petitions of Henry Geller*, 95 FCC 2d 1236 (1983), *aff'd sub nom. League of Women Voters v. FCC*, 731 F.2d 995 (DC Cir. 1984). The broadcaster has the discretion to select as participants those candidates who, in the exercise of its good faith news judgment, it deems most significant. *See Sonia Johnson and Richard Walton*, 56 RR 2d 1533 (1984), *aff'd sub nom. Johnson v. FCC*, 829 F.2d 157 (DC Cir. 1987); *Letter to Jim Trinity*, 7 FCC Rcd. 3199 (1992); *Ark. Educ. Television Com'n v. Forbes*, 523 U.S. 666 (1998).

Finally, a debate sponsored and controlled by the candidates themselves can be exempt from equal opportunities requirements. The Commission has held that the relevant factor is the newsworthiness of the event, not who sponsors and controls it. Further, the Commission noted that the broadcaster still has ultimate control over the type and amount of coverage the debate will receive. *WCVB-TV*, 2 FCC Rcd. 4778 (1987). *See infra* page 82 for a detailed discussion on Debates.

#### Delayed Broadcasts

Coverage need not be live; however, the event must be covered in its entirety. *In re Shirley Chisholm*, 38 RR 2d 1437 (D.C. Cir. 1976). If a debate is taped in its entirety and broadcast on a delayed basis, it is up to the broadcaster's good faith determination

to delay or rebroadcast a newsworthy debate and “judge the applicability of the exemption in terms of the current newsworthiness of the event.” *Delaware Broadcasting Co.*, 60 FCC 2d 1030 (1976), *aff’d sub nom. Office of Communications of the United Church of Christ v. FCC*, 590 F.2d 1062 (D.C. Cir. 1978); *In re Petitions of Henry Geller*, 95 FCC 2d 1236 (1983), *aff’d sub nom. League of Women Voters v. FCC*, 731 F.2d 995 (D.C. Cir. 1984).

#### Acceptance Speeches

Acceptance speeches by successful candidates for nomination for the candidacy of a particular party for a given office are generally not considered a “use” because they fall under the on-the-spot coverage of a *bona fide* news event exemption.

### **Q&A ON DEFINITION OF A “USE”**

**Q: If a candidate is identified or readily identifiable, but her appearance is solely limited to making the sponsorship identification announcement, is this sufficient to make the entire spot announcement a “use” by that candidate?**

**A:** Yes. The Commission has held whenever a candidate makes any appearance in a political spot announcement in which she is identified or readily identifiable by voice or picture, the entire announcement is a “use” by that candidate. *Letter to WITL*, 54 FCC 2d 650 (1975).

**Q: If a candidate appears on a variety program for a brief bow or statement, is the appearance a “use” by the candidate?**

**A:** Yes. Generally, if such an appearance lasts for at least four seconds, it is a “use” of a station’s facilities. Remember that a record of the appearance must be placed in the station’s political file. However, in some circumstances, an even longer appearance could be considered a “fleeting use.” *See supra* page 9 on fleeting uses.

**Q: Is it a “use” where during a non-exempt program, a non-candidate reads a political script while the candidate is shown either on silent film or by a photograph over the screen?**

**A:** It depends. If the appearance is positive in nature, that is, it casts the candidate in a favorable light, the candidate’s appearance is a “use.” If, however, the script opposes the candidate, the appearance is outside the definition of what constitutes a “use.”

**Q: A television station uses a booth announcer to supply the audio portion of station identification announcements, public service announcements, and commercial announcements. The announcer is always “off-camera” and never identifies himself/herself. If the announcer were to become a legally qualified candidate for city council, would this be a “use?”**

**A:** As long as the announcer’s identity is not well known or familiar to listeners, the announcer’s voice-overs for commercials, public service and station identification announcements would not constitute a “use.” *Letter to WNEP*, 40 FCC 431 (1965). However, if the announcer is identified by name or his or her voice is identifiable due to listener familiarity, the announcer’s appearance would constitute a “use” under Section 315. *Letter to KUGN*, 40 FCC 293 (1958); *Letter to KTTV*, 40 FCC 279 (1956). The question of whether the announcer’s voice is in fact so well known that it is identifiable to the general public is a matter for the licensee’s reasonable good faith judgment. *Letter to A.W. Davis*, 17 FCC 2d 613 (1969).

**“QUIZ YOURSELF” ON “USES”**

(1) A legally qualified candidate for public office appears in a broadcast in a capacity other than as a candidate (*e.g.*, as a movie actor). The candidate’s opponents are entitled to equal opportunities for such appearances.

True                       False

(2) A coalition named “Citizens against Candidate Smith” runs a series of ads which Candidate Smith’s voice or likeness appears in several occasions. The candidate’s opponents are entitled to equal opportunities for these advertisements.

True                       False

(3) My news/talk format radio station has an “open mike” program in the morning during which guests answer questions on whatever topic listeners call in about. The host asks no questions himself. If a candidate appears on the program, his opponents are not entitled to equal time because this is an exempt news interview program.

True                       False

See page 113 for the answers to the “Quiz Yourself” questions on Uses.

## **FEDERAL CANDIDATE ACCESS: REASONABLE ACCESS**

### **Application of Reasonable Access**

Legally qualified federal candidates must be provided reasonable access to use broadcast stations during their candidacies. Reasonable access only applies to “uses” by federal candidates. *See supra* page 5 for the rules regarding what constitutes a use.

The rule of reasonable access applies to federal candidates only (*i.e.*, those seeking the office of President, Vice President, U.S. Senator, and U.S. Congressman). All other offices are considered state or local. *See infra* page 21 for a discussion on State and Local Candidate Access. *See infra* page 71 for the rules regarding access for Issue Advertising.

Stations must provide access to federal candidates where the station’s primary contour (0.5 mV/m for AM; 1 mV/m for Fm; Grade B for TV) covers at least one county or parish in the district the candidate is seeking office unless the coverage is *de minimis*.

### **When Reasonable Access Applies**

Reasonable access applies throughout the entire campaign, not just during the lowest unit charge “windows.” If the campaign is underway, reasonable access must be given. The FCC will decide when statutory obligations attach. It will consider factors such as announcements of candidacy, establishment of campaign organizations, fund raising activities, endorsements, media coverage, and (where applicable) the progress of the delegate selection process or the delegate selection process. *Carter/Mondale Presidential Committee, Inc.*, 74 FCC 2d 631 (1979), *recon. denied*, 74 FCC 2d 657 (1979), *aff’d sub nom. CBS v. FCC*, 629 F. 2d 1 (D.C. Cir. 1980), *aff’d*, 453 U.S. 367 (1981). Thus, once the campaign is underway, stations cannot refuse a federal candidate’s access request simply because the station believes it is too early in the campaign to accept advertising. At a minimum, reasonable access must be provided at least 45 days before a primary and at least 60 days before a general or special election. *Political Programming Policies*, 7 FCC Rcd. 678, 681 (1991).

### **Defining Reasonable Access**

The concept of “reasonable access” is difficult to define because it depends on the specific circumstances surrounding each individual federal candidate and station. In evaluating reasonable access requests, stations must use four factors (“*Carter/Mondale* factors”):

- (1) How much time the candidate has already bought;
- (2) The amount of disruption the buy would create;

(3) The potential for equal opportunities demands from other candidates;  
and

(4) The timing of the request. *See CBS, Inc. v FCC*, 453 U.S. at 387.

For example, a station providing time for only a few campaigns for federal office would be expected to provide greater access to each federal candidate than a station covering numerous campaigns for federal office with a multiplicity of candidates. *See Public Notice*, 43 RR 2d 1353, 1395 (1978).

Stations may not set up-front limits on the amount or type of time a federal candidate can purchase, but they can negotiate with federal candidates and are not required to fulfill all of their requests. What is reasonable depends on the circumstances, including the particular needs of a candidate. Stations must provide access to all time classes and amounts of time. For example, federal candidates cannot be excluded from sports programming, even if a contract with the sports network may prohibit such ads.

Stations should keep in mind that federal candidates do not have an absolute right of access. They cannot demand access to a specific program, day or daypart. *Primer on Political Broadcasting and Cablecasting*, 100 FCC 2d 1476, 1524 (1984). Thus, they cannot demand spot placement in this week's *ER* or demand their ads run on Thursday or demand Thursday prime time placement. Other issues regarding reasonable access for federal candidates include:

#### **Program Length Time**

Federal candidates must be provided access to program length time – even in prime time – regardless of whether the station provides program length time to commercial advertisers. *Political Programming Policies*, 7 FCC Rcd. 678, 681 (1991). Reasonable access imposes an affirmative obligation on licensees independent of their commercial practices. *D.J. Leary*, 69 FCC 2d 1265 (1978). Thus, if a station regularly airs half-hour programs, it must offer half-hour program time to federal candidates at a reasonable rate – even in prime time. The FCC has stated informally that a station that does not normally sell program time must price such time “in accordance with standard industry practice.” Generally, this could include determining a price for the total airtime plus the potential losses in advertising during the candidate's program as well as considering potential revenue losses to adjacent programming.

The Commission has recognized that there may be situations where the number of candidates in a federal election may make it impossible for a station to make prime time program time available, and the Commission will continue to make exceptions to the prime-time program time policy where circumstances dictate. *Public Notice*, 69 FCC 2d 2209, 2289 (1978); *Primer on Political Broadcasting and Cablecasting*, 100 FCC 2d 1476, 1524 (1984); *Political Programming Policies*, 7 FCC Rcd. 678, 681 (1991).

### **Prime Time Spots**

Commercial stations must make prime time spot announcements available to federal candidates. *Public Notice*, 69 FCC 2d 2209, 2289 (1978); *Political Programming Policies*, 7 FCC Rcd. 678, 681 (1991). “Prime time” for purposes of enforcement of the reasonable access rule means the part or parts of the day in which the audience is likely to be largest. For TV, the 7 – 11 PM period is recognized as prime time in the Eastern and Pacific time zones, and the 6 – 10 PM period in the Central and Mountain time zones. For radio, prime time usually means “drive time,” the periods when most persons are driving to and from work.

### **Newscasts and All Other News Programming**

Stations may exclude political spots from newscasts and all other news programming. *Political Programming Policies*, 7 FCC Rcd. 678, 682 (1991). Stations have the discretion to exclude federal candidates from all news programming, from only the evening news or even parts of news programming (*i.e.*, allowing access to weather and/or sports, but not to other sections of the newscast, or allowing access to the *Today Show* but not the newscasts).

Stations that do not sell political advertising during news programs are not required to create a “news adjacency” class of time. If they have such a time slot, or create one, the station must not charge more than the lowest unit charge for the same type of time that otherwise would be offered during the news program itself *only* when candidates are banned from news and the news adjacency is a separate class of time. *Political Programming Recon.*, 7 FCC Rcd. 4611, 4612 (1992). If advertising time during news adjacencies is sold as part of a regular program rotation (*e.g.*, a prime time rotator or a 10-11 PM slot), candidates may be charged the lowest unit charge that applies to that class of time. *Political Programming Recon.*, 7 FCC Rcd. 4611, 4612 (1992).

### **Non-Standard Spot Requests**

In 1999, the Commission overturned its prior policy regarding candidate requests for non-standard length time periods. In re Petition for Reconsideration by People for the American Way and MAP of Declaratory Ruling, Memorandum Opinion and Order, FCC 99-231 (Sept. 7, 1999); *recon. denied*, In re National Association of Broadcasters, FCC 03-279 (Nov. 12, 2003). Prior to 1999, the Commission had allowed stations to refuse requests for “non-standard” spots (*e.g.*, 5 minutes or a length not typically sold to commercial advertisers). Under the new policy, stations must now evaluate any “non-standard” request using the *Carter/Mondale* factors (*see supra* page 15 –16). Stations no longer may have a blanket ban against such requests merely because the station does not normally sell or program such time. As with any other reasonable access request, the station must evaluate it on a case-by-case basis.

### **Evaluating Requests For Equal Opportunities**

The Commission expects stations to act reasonably and in good faith when dealing with federal candidate access. It suggests that stations meet with federal candidates before the campaign begins in full swing to work out any reasonable access issues. *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 536 (1972). Stations may reject any requests by federal candidates that are unreasonable, but should counter-offer. *See e.g., Ross Perot against ABC, CBS, NBC and Fox Broadcasting Co.*, 11 FCC Rcd. 13109 (1996). Again, stations must evaluate the reasonableness of the request by considering the four *Carter/Mondale* factors (*See supra* pages 15 – 16).

To this end, the Commission has stated:

Congress clearly did not intend, to take the extreme case, that during the closing days of a campaign, stations should be required to accommodate requests for political time to the exclusion of all or most other types of programming or advertising. Important as an informed electorate is in our society, there are other elements in the public interest standard, and the public is entitled to other kinds of programming than political. It was not intended that all or most time be preempted for political broadcasts. *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 536 (1972).

### **Free Time and Reasonable Access**

A station may provide free time to federal candidates or permit the purchase of reasonable amounts of time as part of its reasonable access obligation. If a station makes reasonable amounts of time available for purchase by federal candidates, it is not required to also provide them with news coverage. *Kennedy for President Committee v. FCC*, 636 F. 2d 432 (D.C. Cir. 1980).

On the flip side, if a station provides reasonable amounts of free time to federal candidates, it may not be required to provide for the purchase of time. The Commission has stated, “if a commercial station chooses to donate rather than sell time to candidates, it must make available to federal candidates under the reasonable access statute free spot time of the various lengths, classes and period which are available to commercial advertisers.” *Public Notice*, 69 FCC 2d 2209, 2288 (1978).

The Federal Election Commission may treat the provision of free time to federal candidates as a corporate contribution from the licensee to the candidate in violation of the Federal Election Campaign Act. However, in 1996 and 1998, various free time arrangements were provided to federal candidates, and were deemed exempt. Stations should consult with their counsel before taking such action.

### **Weekend Access**

A station must provide federal candidates with access to the station to place orders or change copy during the weekend prior to an election if, during the year prior to the election period, the station has provided such weekend access to any commercial advertiser. *Political Programming Policies*, 7 FCC Rcd. 678, 683 (1991). The FCC has stated that a station's weekend obligation to a federal candidate is "proportional" to the weekend access afforded commercial advertisers. Thus, if a station has provided such access, but only for a limited purpose, such as changing or deleting copy, it is required to provide access to federal candidates only for the same limited purpose. *Political Programming Recon.*, 7 FCC Rcd. 4611, 4612 (1992).

### **Q&A ON REASONABLE ACCESS FOR FEDERAL CANDIDATES**

**Q: Does reasonable access apply to a spot purchased by a third party that contains a "use" by a federal candidate?**

**A:** It depends. If the third party is an authorized committee of the federal candidate, it would likely be afforded reasonable access rights (in addition to the other right of paying the lowest unit rate). If the third party is merely a supporter of the federal candidate – but not authorized – there is no right of access. *See infra* page 71 for a discussion on Issue Advertising.

**Q: Does a station have to provide access to an individual to announce their candidacy for federal office?**

**A:** No. If an individual is not yet legally qualified for federal office, they do not have a right of reasonable access to a station. *See supra* at 1 for a discussion of when a person is a "legally qualified candidate."

### **"QUIZ YOURSELF" ON REASONABLE ACCESS FOR FEDERAL CANDIDATES**

(1) My station's signal can be viewed in an adjacent state. A candidate for Congress calls wanting to buy time. My station can be seen in one county in his district, but only because it is carried on the cable system. I must sell him time.

True

False

(2) I air my local college's football games. All of the ads in all of the games are sold out before the season begins. A candidate for U.S. Senate is requesting time during football games. I can reject his request because all of the avails are sold out.

True

False

(3) During the past year, I allowed a local department store to change its ad copy and ad schedule over a weekend because its "White Sale" was beginning on a Sunday. The FCC requires me to let federal candidates do the same the weekend before an election.

True

False

(4) I have a policy for all advertisers that I will only sell them one spot per daypart. I can apply that policy to federal candidates.

True

False

(5) My network sells a half-hour program to a third-party candidate for President. If I preempt that program, I may have to sell the candidate the same amount of time anyway.

True

False

(6) The longest "pod" I have on my television station is three minutes. A congressional candidate wants to buy a five minute spot. I can turn him down.

True

False

(7) I can decide to keep candidates out of my evening news, but sell spots to them during news breaks in the *Today* show and in my late news.

True

False

See page 114 for the answers to the "Quiz Yourself" questions on Federal Candidate Access.

## STATE AND LOCAL CANDIDATE ACCESS

### No Right of Access

Unlike federal candidates, state and local candidates have no right of access. *Political Programming Policies*, 7 FCC Rcd. 678, 682 (1991). Broadcasters may provide them access, or not, as they wish. A station may do any of the following:

- Take ads from some races, but not others;
- Limit the number of ads candidates in a given race may run;
- Exclude them from some dayparts.

For example, Station A may allow access for all state and local candidates, or it could limit access to *specific* state or local races. Station A may choose to run mayoral candidate spots, but refuse access to city council and gubernatorial spots or vice-versa. Furthermore, Station A could limit the airing of such candidate spots to the afternoon, primetime, overnight, or any combination thereof. Station A could impose a five, ten, twenty, thirty, etc. spots-per-candidate ceiling, or it may allow unlimited access. In sum, stations have broad discretion in allowing or limiting a state or local candidate's access. However, a station must treat all candidates in the same race equally.

While a station may choose to reject all advertising by state and local candidates, NAB suggests that, at a minimum, broadcasters at least provide some access for candidates in the most important races.

### If Access Is Provided

Once a station allows access by candidates in a state or local race, most of the other rules governing political broadcasting kick in:

- The candidates must be offered all discount classes, including run-of-schedule (ROS).
- They have equal opportunities rights. *Political Programming Policies*, 7 FCC Rcd. 678, 682 (1991). *See infra* page 23 for a discussion on Equal Opportunities.
- They must be given the lowest unit charge (LUC) during the political window. *See infra* page 33 for a discussion on LUC.
- Their spots are protected from station censorship, if they include a "use." Once a station agrees to sell time to a candidate, it cannot rescind that offer based on the content of the candidate's spots. *See supra* page 5 for a discussion on censorship.

### **Changing Access Policies**

During the political season, a station is free to amend its policies concerning access to state and local candidates. As discussed above, state and local candidates have no right of access. No exception to this rule is created simply because a station has previously allowed access for state or local candidate advertisements. For example, suppose that during the 45-day primary window, Station Q allows all state and local candidates access to political advertising. However, three months after the airing of the primary ads, Station Q determines that due to the sheer number of requests it is receiving from federal candidates, it will cease to air local candidate spots. Station Q may do so at its discretion. However, a caveat to this no-right-of-access rule is if a station has provided access to a state or local candidate, it must allow his or her opposing candidates the right to exercise his or her equal opportunities rights. *See infra* page 24 for a discussion on the timing of Equal Opportunities requests.

### **Sponsor ID Rules and Disclosure**

The FCC's sponsor ID rules also apply to state and local candidates, although state law may impose additional requirements (such as the name of an officer of the campaign committee) on advertising by state and local candidates. *See infra* page 63 for a discussion on Sponsorship Identification rules.

A station also must make all the disclosures to state and local candidates to whom it is granting access, *i.e.*, rates, packages and station sales practices, that the FCC requires to be disclosed to federal candidates. *See infra* page 59 for a discussion on Disclosure.

### **Weekend Access**

Unlike federal candidates, state and local candidates do not have a right to weekend access to change copy, even if the station provides such access to commercial advertisers

### **Party Advertisements**

A station's policy regarding state and local candidate access is not deemed waived by the airing of a party advertisement that contains a use by a state or local candidate (unless it is an authorized ad by the candidate). For example, Station XYZ has a policy which precludes access to state candidates. Candidate A, who is running for state senator, appears on an advertisement sponsored by her political party where she is featured along with the federal candidates from her party. This political advertisement does not alter Station XYZ's policies regarding state candidate access. Thus, Candidate A is not entitled to air her own spots if the station does not wish to allow her access, even though her appearance in the party advertisement would constitute a "use." Opponents of Candidate A would be allowed to invoke their equal opportunities rights for those "uses" in which candidate A appears; however, no further right of access would be required. *See infra* page 23 for a discussion on Equal Opportunities.

## EQUAL OPPORTUNITIES

The political broadcasting rules require stations to provide equal opportunities to opposing candidates whenever a legally qualified candidate “uses” the station. *Political Programming Policies*, 7 FCC Rcd. 678, 683 (1991). *See supra* page 5 for discussion on “Uses.”

### Defining Equal Opportunities

The term “equal opportunities” means that opposing candidates must be provided the opportunity to purchase comparable time at an equal rate, if the first candidate purchased time. If Candidate A purchases time, then opposing Candidate B has equal opportunities to purchase the same amount of time. Stations are only required to provide free time as part of an equal opportunities obligation when a free “use” is made. For example, an employee-candidate’s use would trigger equal opportunities rights for opposing candidates to free comparable time.

### “Paid For” Equals “Paid For”

Stations are not required to provide free time as part of an equal opportunities obligation if the opposing candidate cannot pay for the time. Likewise, a station does not have to halt sales to one candidate because he or she is buying more time than his or her opponent. The Commission’s rules only require that all candidates be afforded equal opportunities to use the station. *Letter to Mrs. M.R. Oliver*, 40 FCC 253 (1952).

Additionally, if a third party pays for a political ad that is a use by a candidate, the opposing candidate only has the right to purchase comparable time. If a station receives payment from any third person, regardless of the nature of the third party or its relationship to the candidate, for the time in which a candidate appears, that constitutes paid time and opponents of that candidate are entitled to purchase time, not receive it free. *Carter/Mondale Reelection Committee, Inc.*, 81 FCC 2d 409 (1980). For example, where a political committee organization, such as a union, purchases time specifically in support of a candidate, opposing candidates are not entitled to free time. The station, however, would be obligated to sell the opposing candidate time if the union’s advertisement was a use. *Telegram to Thomas J. Dougherty*, 40 FCC 426 (1954). *See supra* page 5 for a discussion on “Uses.”

### Meeting Equal Opportunities Obligations

In determining whether equal opportunities obligations have been met, stations must consider the desirability of the time segment as well as the amount of time. While a station is not required to provide Candidate B with the same time of day on exactly the same day of the week as Candidate A, it must offer time segments that can be expected to reach an audience of a comparable size. Stations are not required to provide time in the same program or one with similar demographics. However, a station may be faced

with a situation where it must preempt a commercial advertiser in a specific program to provide equal opportunities for a candidate if there is no other program that can deliver the same audience size to the opposing candidate.

### **Use of Facilities**

A station must treat opposing candidates the same with respect to the use of its facilities. If it permits one candidate to use production facilities over and beyond the microphone, it must permit a similar usage by the other qualified opposing candidates. *Letter to D.L. Grace*, 40 FCC 297 (1958). Also, a station may not insist on a live appearance of the candidate. Candidates have the option of participating on tape. Requiring a live appearance would constitute censorship – which is prohibited by statute. *Letter to WOR-TV*, 40 FCC 376 (1962).

### **When Equal Opportunities Must Be Given**

The equal opportunities provisions are applicable to both primary and general elections for public offices. Equal opportunities must be given to all candidates when their opponents use the station.

Unlike the lowest unit charge provisions, there is no “window” for the equal opportunities rules. Equal opportunities must be provided to an opposing candidate whenever a legally qualified candidate makes use of a station.

### **Seven-Day Rule for Requesting Equal Opportunities**

An opposing candidate only has one week (7 days) from an initial use to request his or her equal opportunities rights. This does not mean the opposing candidate must use the station in seven days; he or she merely must notify it of their intention to exercise their equal opportunities rights. The candidate has a reasonable amount of time to use his or her equal opportunities right. If the opposing candidate fails to request his or her rights within the seven day period, the rights disappear.

However, if a station fails to promptly place notification of a use in the political file, the seven day period may be extended (or tolled) due to lack of proper notice. Thus, stations are reminded of the importance of placing all documentation in the public file immediately after the use is made to ensure proper notification and compliance with the FCC rules. *See infra* page 75 for discussion on Record Retention.

Further, if the person was not a candidate at the time of a first prior use by his or her opponent, his or her request must be made within one week of the first subsequent use after he or she became a candidate.

### **Requests for Future Uses**

Generally, candidates also may not demand equal opportunities based on “all future appearances of candidate X.” Such blanket requests would probably

lack the specificity to be treated as a valid request for equal opportunities. However, the Commission has always considered an equal opportunities request valid if the request is based on a specific future use that is known or announced prior to the actual broadcast. *Letter to Socialist Workers' Party*, 15 FCC 2d 96 (1968). Thus, where a station allows a candidate to use its facilities in a "fixed and continuing pattern," such as the sale of a spot announcement schedule, an opponent's equal opportunities request will cover the seven days prior to the request and all later uses already scheduled. *KLAS-TV*, 42 FCC 2d 894 (1973).

### **Eleventh-Hour Rule**

The Commission has indicated that a station may be justified in denying the purchase of time equal to that used by an opposing candidate if a candidate waits until a day or two before the election to use their equal opportunities time. In such cases, the Commission will consider that a station has provided "equal opportunities" if it affords less than precisely equal time to the candidate making the last minute request.

Thus, a station will not be expected to accommodate last minute equal opportunities requests made by parties (1) that have sat on their rights and where granting the request would seriously interfere with the station's duty to program in the public interest or (2) where it would give the last minute purchaser an unfair advantage over candidates by allowing them to saturate broadcast time right before the election.

## **Where Equal Opportunities Applies**

### **Candidates in Same Race**

Stations must provide equal opportunities to candidates who are running against one another in the same race. The Commission has held that, while both primary elections or nominating conventions and general elections involve the same "race," the primary elections or conventions held by one party are considered separately from the primary elections or conventions of other parties. Therefore, equal opportunities need only be afforded legally qualified candidates for nomination for the same office at the same party's primary or nominating convention. *Letter to KWFT*, 40 FCC 237 (1948); *Letter to Arnold Peterson*, 40 FCC 240 (1952); *Letter to WCDL*, 40 FCC 259 (1953); *Letter to Richard B. Kay*, 24 FCC 2d 246 (1970). So, during a primary election, the Republican candidates are opposing one another, as are the Democratic candidates. Once the primary election is completed, the Republican and Democratic (and any third party) candidates are opposing candidates.

In situations where candidates are unopposed in the primary election, a station's equal opportunities obligations depend on state law as to when a candidate is deemed nominated. For example, if a state has a provision to the

effect that all persons designated for uncontested offices in a primary election will be deemed nominated without balloting, the two candidates of opposing parties would become opposing candidates before the ballots were cast in a primary election. However, the FCC has interpreted one such situation in New York and refused to grant equal opportunities since at the time the candidate used the station's facilities it was still possible under New York law to file petitions requesting the opportunities to write in the name of an undesignated candidate, and thus the candidates were not deemed nominated. *Letter to Mrs. Eleanor Clark French*, 40 FCC 417 (1964); *Letter to Martin R. Fine*, 24 FCC 2d 464 (1970).

### **Employee Candidates**

On-air station employees who run for office create equal opportunities problems. Nearly all on-air appearances by employee candidates – in newscasts, commercials, PSAs and even station promos – present equal opportunities situations because they are used by legally qualified opponents. The same holds true for independent contractors (*e.g.*, sports play-by-play announcers; news stringers; program hosts) who are on the air. The equal opportunities law does not apply to station personnel who do not appear on the air.

The equal opportunities obligation covers only the amount of time the employee is actually on the air (unless he or she appears in spot announcements). For example, a disc jockey who is running for office would obligate the station to equal opportunities only for the actual time that his/her voice is on the air (introducing records, reading news or weather copy, etc.). Any commercials or promos on which the employee-candidate appears create equal opportunities obligations to legally qualified *opponents for the length of the entire spot*. If the employee appears in a paid-for spot, the station is not obligated to provide free time to the employee's opponents.

Stations should emphasize to on-air employees the need to inform management *immediately* upon deciding to run for office. At that point, management must decide what to do. The station has three options:

- Keep the employee on the air and run the risk of having to comply with an equal opportunities request;
- Take the employee off the air; or
- Seek a waiver from the employee's opponent(s), who would agree not to exercise their equal opportunities rights so long as the employee does not discuss campaign issues on the air.

### **Equal Opportunities Obligations for Non-Employee-Candidates Who Appear in Spots**

The same rules that apply to employee-candidates apply to advertisers who appear in their own commercials who are candidates for public office.

### **Bona Fide News Programming Exemptions**

Stations are not required to provide equal opportunities for candidate appearances that are part of *bona fide* newscasts, news events, news interview programs, and news documentaries. *See supra* page 10 for details on these types of “uses.”

### **Notification of Equal Opportunities Rights**

It is the candidate’s obligation to determine his or her equal opportunities rights. A station does not have to notify candidates by mail or phone that time has been sold or given to their opposition. It should be noted again that a station is required to keep a public record of all requests for time by, or on behalf of, political candidates, together with a record of the disposition and the charges made, if any, for each broadcast. 47 C.F.R. § 73.1943. This information must be maintained and updated in the political file. *See infra* page 75 for discussion on Record Retention.

If a station chooses to advise a candidate of the sale of time to his or her opposition, it must provide the same information to the candidate’s opponents. The licensee is not permitted to discriminate between the opposing candidates in any way.

The same type of notification applies where free non-exempt time has been provided to candidates. The station must document the free time in the political file and the candidate has the responsibility of reviewing the file.

If the station told the candidates that time would not be sold on Election Day and then sold or gave time on that day to a candidate, it would be obligated to notify opposing candidates sufficiently in advance to give them a reasonable opportunity to request equal opportunities. *Letter to Leonard A. Bolton*, 5 FCC Rcd 5584 (1990). In all other cases, it is the candidate’s obligation to derive from the station’s public file information concerning time sold or given to other candidates.

## **Waiver of Equal Opportunities**

A station may make an offer of a block of time for use by candidates contingent on all candidates agreeing to appear or to waive their rights to equal opportunities. It further may ask the candidates who agree to appear on the program to waive any rights to equal opportunities if, for any reason, they are subsequently unwilling or unable to appear on the program. It would then be up to the candidates to determine whether to waive or make some other decision based on their rights. Waivers given with full knowledge of the relevant facts concerning the broadcast generally would be binding, assuming that the disclosed broadcast conditions occurred.

If one or more of the candidates will not waive their rights or wishes to attach other conditions, the matter then becomes one for the station's judgment of what, under the circumstances, best would serve its area's needs. For example, in some circumstances, because of the importance of the race in its area, a station might decide that it would continue to be worthwhile to present the program and then afford one candidate time at a later date. *Letter to Kirkland, Ellis, Hudson, Chaffetz & Masters*, 5 FCC 2d 479 (1966).

Stations may withdraw an offer of time if a particular candidate refuses to sign a waiver. However, the Commission has stressed that any candidate who does not agree to the terms of the station's offer is exercising rights expressly bestowed upon him by Congress. It therefore would be inappropriate for the station to blame such a candidate, or to indicate that the candidate was acting improperly. A licensee could not properly use a threat to blame failure of the negotiations on a particular candidate as a means to dictate the format of the program. *Letter to Kirkland, Ellis, Hudson, Chaffetz & Masters*, 5 FCC 2d 479 (1966).

Stations should keep in mind that if the program is a debate, it would ordinarily be exempt from equal opportunities if at least two candidates take part. *See infra* page 82 for a discussion on Debates. The same would be true of programming that qualifies as on-the-spot coverage of a *bona fide* news event. *See supra* page 10 for a discussion on news events.

## **Q&A ON EQUAL OPPORTUNITIES**

**Q: An announcer-candidate conducted a 45-minute interview program Monday through Friday. His opponent requested equal opportunities in the form of spot announcements equal to the total on-air time of the announcer-candidate. Was the opponent entitled to the spot announcements?**

**A:** No. The opponent was technically entitled to the same amount of free time in comparable time periods to those used by the announcer-candidate. The FCC noted, however, that in such complex circumstances it will leave working out the mechanics of the problem to the parties subject to the rule of reason. *Letter to RKO General, Inc.*, 25 FCC 2d 117 (1970). Note that as a

general matter, the opponent of an announcer-candidate will only be entitled equal opportunities for the amount of time the announcer-candidate is actually on the air, not the entire length of the program on which he or she appears. *Alan Y. Naftalin (WNEP-TV)*, 40 FCC 431 (1965). See *supra* page 26 for further discussion on employee candidates.

**Q: A station offered broadcast time to all the candidates for a particular office for a joint appearance. If one candidate rejects the offer and the other candidates accept and appear, would the first candidate be entitled to equal opportunities because of the appearance of those candidates who accepted the offer?**

A: Yes, provided the request is made by the candidate within the one-week period specified by the rules and the program is not exempt from equal opportunities under one of the news program exemptions. Debates, for example, are exempt from equal opportunities.

**Q: If Candidate A is found to be credit-worthy under the station's customary credit policies, but opposing Candidate B is not, is it a denial of equal opportunities to grant credit to Candidate A but deny it to Candidate B?**

A: No. So long as the station's policies are not designed as a subterfuge to favor particular candidates and are applied evenhandedly to all, impermissible discrimination does not occur. *Beth Daly*, 7 FCC Rcd. 5989, 5991 (1992).

**Q: Suppose an employee candidate anchors a newscast that would normally be exempt from equal opportunities requirements. Does the fact that the employee candidate anchors the program somehow negate the exemption and therefore reinstate equal opportunities?**

A: Yes. The employee candidate's opponents would be entitled to equal opportunities. *Letter to Congressman Clark W. Thompson*, 40 FCC 328 (1962); *Letter to Congressman Clem Miller*, 40 FCC 353 (1962); *William H. Branch*, 101 FCC 2d 901 (1985), *recon. denied*, FCC 86-134 (1986), *aff'd*, 824 F. 2d 37 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). See also *Political Programming Policies*, 7 FCC Rcd. 678, 685 (1991).

**Q: If a person who is a candidate for both governor and state senator appears in a broadcast promoting his race for the governorship, is his senatorial opponent entitled to equal opportunities?**

A: Yes. Any non-exempt use by a candidate would require that equal opportunities be accorded all legally qualified candidates who are opposing him for either office, even though his appearance was allegedly as a candidate for governor and was devoted to that contest. *Letter to KATC*, 28 FCC 2d 403 (1971).

**Q: Where a candidate for office in a state or local election appears on a national network's non-exempt program, is an opposing candidate for the same office entitled to equal opportunities over stations which carried the original program and serve the area in which the election campaign is occurring?**

**A:** Yes. Under such circumstances an opposing candidate would be entitled to time on such stations. *Letter to Senator Mike Monroney*, 40 FCC 251 (1952).

**Q: Two weeks before a primary election, a station broadcasts promotional announcements for a special news program. A legally qualified candidate who appears in the program also appears in the promotional announcements. Is the candidate's opponent entitled to equal opportunities for the promotional announcements?**

**A:** It depends. If the candidate's appearance in the promotional announcements is a use – in that it is positive in nature and not fleeting – the FCC staff informally has stated that promotional announcements – even for exempt programs – are not exempt from equal opportunities. However, *see supra* page 9 for information regarding “fleeting uses.”

**Q: May a station deny a candidate equal opportunities because it believes that the candidate has no possibility of being elected or nominated?**

**A:** No. Stations may not make a subjective determination with respect to a candidate's chances of nomination or election. *Letter to CBS, Inc.*, 40 FCC 244 (1952). But those issues may be relevant to whether a particular candidate is invited to participate in a station-sponsored debate or town meeting. *See Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666 (1998).

**Q: Must a person prove his or her legal qualifications as a candidate prior to the date set for nomination or the actual election?**

**A:** Yes. However, once the date of nomination or election has passed, it cannot be said that a person is still a candidate. The holding of the primary or general election terminates the possibility of affording equal opportunities, thus mooting the question of rights the candidate may have had before the election. *Letter to Socialist Workers' Party*, 40 FCC 281 (1956), *appeal dismissed sub nom. Daly v. U.S.*, No. 11,946 (7<sup>th</sup> Cir.), *cert. denied*, 355 U.S. 826 (1957). In any event, all requests by political candidates for equal opportunities must be submitted within one week of the day on which the first prior use occurred. This is not to suggest that a station can avoid its statutory obligation by waiting until an election has been held and only then disposing of demands for equal opportunities.

**Q: A United States Senator, an unopposed candidate in his party’s primary, had been hosting a weekly program entitled “Your Senator Reports.” If he becomes opposed in his party’s primary, would his opponent be entitled to request equal opportunities with respect to all broadcasts of “Your Senator Reports” since the time the incumbent announced his candidacy?**

**A:** No. A legally qualified candidate announcing his candidacy for the above nomination would be entitled to equal opportunities only for the broadcast of “Your Senator Reports” that was aired from the time the opponent became a legally qualified candidate. *Letter to Senator Joseph C. Clark, 40 FCC 332 (1962).*

### **“QUIZ YOURSELF” ON EQUAL OPPORTUNITIES**

(1) The incumbent governor of my state is a Republican. Although he is running for reelection, he has no opponents for the Republican nomination. Four Democrats are battling in the Democratic primary. The governor now is appearing in a series of PSAs on my station, and the four Democrats are demanding equal time. I can turn them down.

True                       False

(2) Candidate A, in a bitterly contested Senate primary, is outspending his opponent by 4:1. The opponent demands free spots to respond, claiming that she has rights under the reasonable access and equal time rules. I have to give her some free spots.

True                       False

(3) Candidate A has bought an ROS schedule. One of her spots cleared in morning drive. Her opponent demands equal time. I have to sell him a morning drive spot at my ROS rate.

True                       False

(4) The local Ford dealer uses an employee as the spokesman on its spot. The employee now is running for school board. His opponents are not entitled to equal time because the Ford dealer’s spots do not deal with the election.

True                       False

See page 115 for the answers to the “Quiz Yourself” section on Equal Opportunities.

**NOTES:**

## **LOWEST UNIT CHARGE**

Calculating the lowest unit charge (“LUC”) can, at times, be a daunting and complicated task. Stations may have several different rates, packages and incentives for their advertising clientele. Thus, a station may have to calculate several LUCs. Stations are responsible for providing political candidates with a clear understanding of a station’s rates and pricing practices. Therefore, it is very important for stations to become familiar with the ins-and-outs of the LUC.

Reminder! Under BCRA, in order for a federal candidate or the candidate’s authorized committee to receive the LUC, the candidate or the candidate’s authorized committee must provide a signed certification to the station at the time programming is purchased. *See infra* page 51 for a complete discussion on Federal Candidate Certification.

### **Lowest Unit Charge (LUC) Defined**

What a station may charge a political candidate during the 45 or 60-day statutory period (“window”) is limited. Simply put, the “lowest unit charge” (LUC) is the lowest rate “of the station for the same class and amount of time for the same period.”

- The term “class” refers to categories such as fixed-position, non-preemptible, immediately preemptible, preemptible with notice, and run-of-schedule.
- The term “amount of time” refers to the unit of time purchased, such as 30 seconds, 60 seconds, 30 minutes or an hour.
- The term “same period” refers to the period of the broadcast day such as prime time, drive time, class A or any other system of classification established by the station. Special categories of programs such as the World Series or the Superbowl can be separate periods of time.
- The “lowest unit charge” allows a candidate the benefit of all discounts, frequency and otherwise, offered to the most favored commercial advertiser for the same class and amount of time for the same period, without regard to the frequency of use by the candidate.

Again, because stations sell time to commercial advertisers in many different ways, stations will not have one LUC, but instead different LUCs depending on the type and classes of time a station sells and what a candidate buys.

### **Fixed vs. Preemptible Classes**

A station may offer candidates “non-preemptible” time and “fixed position” time as separate classes, provided that the station clearly explains the differences between these classes and offers such classes to commercial advertisers. These classes should provide candidates with benefits not available from the purchase of lower-priced preemptible time. In other words,

if a cheaper class of time would give candidates virtually the same chance of clearing as the non-preemptible or fixed class, then the station must make that fact clear to candidates. So long as there are (a) identifiable differences between preemptible and non-preemptible time and (b) these are in fact regularly offered to commercial advertisers, a station may offer non-preemptible time to candidates, even if commercial advertisers only rarely purchase it.

### **Preemptible Classes**

Stations may establish reasonable classes of “preemptible” time, so long as these classes are distinguishable in terms of benefits to candidates, such as varying levels of preemption protection, scheduling flexibility or time-sensitive make good benefits. *Political Programming Recon.*, 7 FCC Rcd. 4611, 4615 (1992). The station must disclose the likelihood of clearance for each class of preemptible time, and classes must be distinguished by differences other than price.

Once a candidate has full disclosure as to the benefits and differences in the classes of preemptible time and the candidate has subsequently purchased time, that candidate is not entitled to a rebate should another class of time (commercial or political) clear at the same daypart as the candidate’s spot or spots. For example, suppose Candidate A purchases a run-of-schedule (“ROS”) spot at \$100 and Candidate B purchases a “fixed position” spot for \$300. Both spots are aired during the same week during the same daypart. Candidate B is not entitled to a \$200 rebate because Candidate A’s ROS spot clears in a preferable daypart. Candidate B purchased at a higher rate to guarantee a fixed spot; Candidate A’s spot could have cleared at any time during the schedule. Thus, the difference in price reflects the different level of preemption protection or scheduling flexibility that a candidate chose to purchase. *Political Programming Recon.*, 7 FCC Rcd. 4611, 4616 (1992).

### **Run-of-Schedule Spots**

To the extent a station makes ROS spots available to commercial advertisers, it must also make ROS available to: (1) legally qualified candidates for federal office, and (2) candidates in those state and local races for which it is selling time. In 1981, the United States Court of Appeals for the District of Columbia determined that ROS spots were a form of discount and that the lowest unit charge entitled candidates to the purchase of ROS spots if the station sold ROS spots to commercial advertisers. With respect to federal candidates, ROS spots must be made available to the extent available to commercial advertisers.

The FCC staff states that to provide for equal opportunities for either federal or state and local candidates, the station must permit an opposing candidate to buy a spot in the same time period the ROS spot of his or her opponent runs, or to purchase ROS time. However, an opposing candidate cannot buy ROS

time and demand the same placement as the other candidate if the first candidate's ROS spot cleared in a more desirable daypart (e.g. Candidate A buys ROS and it clears in primetime. Candidate B has an equal opportunity right to ROS wherever it clears – even if it clears in a different daypart than Candidate A).

### **Non-Preemptible Candidate-Only Class**

A station may offer a non-preemptible candidate-only class of time at a “discount” even though it does not sell non-preemptible time to commercial advertisers. The Commission requires that this rate should be priced below that station's effective selling level for preemptible time. The FCC says the rate will be considered legitimate “so long as:

- (1) The station can show that a commercial advertiser buying preemptible time at the same rate runs a genuine risk of preemption;
- (2) Commercial advertisers cannot buy any time that is, in reality, the functional equivalent of the station's ‘special’ non-preemptible candidate-only class of time; and
- (3) The station discloses and offers all preemptible rates to candidates, describing the likelihood of preemption for other preemptible rates.”

*Political Programming Recon.*, 7 FCC Rcd. 4611, 4614-16 (1992).

### **Spot Rotations**

The FCC views weekly rotations as “classes of time” or as “periods.” “Distinctly different” rotations, based on the value to advertisers, constitute separate classes of time or periods for purposes of calculating the LUC for weekly rotations on a weekly basis during pre-election periods. The LUC for preemptible time sold by a station using weekly rotations is the lowest price that any advertiser paid in a particular rotation during a particular week. *Political Programming Policies*, 7 FCC Rcd. 678, 693 (1991); *Political Programming Recon.*, 7 FCC Rcd. 4611, 4619 (1992).

### **Weekends, Weekdays – Variable Rates**

The LUC can vary with the day of the week on which a candidate uses a station, so long as the rates vary in accordance with the station's ordinary business practices. For example, a television station might charge commercial advertisers more for spots between 7:00 and 7:30 p.m. on Sunday and than it does for such spots Monday through Friday; and the charges on Monday through Friday might exceed the charges for such spots on Saturday.

In the example given above, the station could sell time to a candidate on Sunday between 7:00 and 7:30 p.m. at rates exceeding the lowest unit charge for Saturday night. If a station does not vary its charges to commercial advertisers with the day of the week or from week to week, it may not do so with candidates for public office. *Use of Broadcast and Cablecast Facilities*

by *Candidates for Public Office*, 34 FCC 2d 510, 524-25 (1972); see also *Political Programming Policies*, 7 FCC Rcd. 678, 693-94 (1991).

### **When Lowest Unit Charge Applies**

Certain circumstances must co-exist in order to trigger application of the LUC:

- (1) The actual use of broadcast time must occur within the 45 days before a primary or primary run-off election or within the 60 days before a general or special election;

Note: The FCC has informally stated that stations selling political spots during/on election day must give the candidates the LUC.
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- (2) The use must involve a “use” by the candidate through a positive appearance where he or she is identified by his or her voice or image;
- (3) The spot must be “in connection with” the candidate’s campaign (*See* 47 C.F.R. § 1942); and
- (4) Federal candidates must sign the federal candidate certification at the time programming is purchased. *See infra* page 51.

### **Ads Not Sponsored by Candidates**

Political broadcasts by groups, organizations, or persons other than those authorized by the candidate are not entitled to the LUC. Similarly, if an independent political action committee (“PAC”) or an individual unaffiliated with a candidate purchases time for ads supporting a candidate, the ad is not eligible for the LUC, even though the candidate’s voice or likeness may appear on the spot. Stations are not required to take “PAC” ads, and should make an independent judgment about their broadcast. *See infra* page 71 for a discussion on Issue Advertising.

The status of ads run by political parties is more complex. In the past, the FCC viewed party ads as equivalent to candidate ads, and thus entitled to LUC. Following a 1996 Supreme Court decision holding that party expenditures could be independent of the candidates they supported, the FCC opined that, if a party expenditure is independent of the candidate, stations do not have to give the party the LUC. If the party is an authorized committee of the candidate, the LUC applies to the party ads. Stations can request parties that claim the LUC give them written documentation that they are an authorized candidate committee.

### **Caucus**

Where there is an open meeting at which members of the general public at large express their preferences for specific candidates by selecting delegates to attend a nominating convention (even if the meeting is limited to the same political party members), the LUC applies to a candidate for the office at issue who wants to influence the public to select delegates favorable to him/her. *See Reagan for President Committee*, 80 FCC 2d 225 (1980); *Jan Crawford and Associates*, C9-1

(released September 23, 1983); *Colorado Precinct Caucuses*, C2-407 (released March 17, 1986).

## **How to Determine the Lowest Unit Charge (LUC)**

### **What's Included in the LUC**

Stations must include in their determination *every rate that is in effect* on the station during the 45 or 60-day window, including all packages, annual agreements, bonus spots, frequency discounts, and TAP plans. These rates must be included in calculating the LUC even if the advertiser is not running spots during the window.

Stations are not required to include rates just outside the window; however, stations should not schedule a long standing agreement around the window (*i.e.*, schedule the spots before and after the window, with none running during the window). To do so may give the appearance that the station is circumventing the LUC rule.

### **Bonus Spots**

Bonus spots, *whether or not aired during the window*, affect the lowest unit charge. For example, if a station sells 10 spots for \$100, its lowest unit rate per spot is \$10. If it gives 6 bonus spots, the lowest unit rate per spot is lowered to \$6.25. *See Letter to Mike Barnhart*, 7 FCC Rcd. 4333 (1992). Stations should be careful to assign a value to bonus spots. *See infra* page 40 for discussion on Documenting Spot Values.

If bonus spots are given in a time period different from that of the paid spots (*e.g.*, the buyer of 20 paid spots in prime time is given three free spots overnight), the station should place a value on the overnight spots, which will reduce the value of the paid spots.

The LUC, however, is not affected by situations when an advertiser is not charged an amount for *any* of his announcements. *Letter to KRSN*, 35 FCC 2d 663 (1972); *Letter to Fred Fickenwirth*, 7 FCC Rcd. 4311 (1992).

### **Frequency Discounts**

Set forth below are three examples of the manner in which discounts are taken into account in determining the LUC:

- (a) A licensee sells one fixed-position, one-minute spot in prime time to commercial advertisers for \$15. It sells 500 such spots for \$5,000 (\$10 per spot) to a different advertiser. A candidate is entitled to purchase one spot at the \$10 rate.

- (b) A licensee's best rate per spot for run-of-schedule (ROS), one-minute spots is 1000 for \$1,000. Its rate for one ROS spot is \$5. It must sell one such spot to a candidate for \$1. *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 524 (1972).
- (c) A licensee has provided a long-standing advertising client with a special \$2,500 500-time rate for 30 second spot announcements in drive time. It must sell one such spot to a candidate for \$5.

#### Packages and TAP Plans

If a station offers a special package plan that includes a selection of spot announcements distributed over different time periods, the station must sell the candidate one such spot at the applicable LUC. Packages are treated as "volume discounts." Therefore, a broadcaster must make a good faith judgment to determine the value of each spot contained in a package (both paid and bonus spots). *Political Programming Recon.*, 7 FCC Rcd. 4611, 4617 (1992). Should that rate from a package be the lowest unit rate for a particular period, program, or class of time, the rate must be given to candidates, even when the candidate doesn't purchase the entire package or a pro-rata portion of the package. This allows a candidate to "cherry pick" the best rates from any package. Broadcasters should take special care when assigning values to spots, including bonus spots; the value attributed to the remaining spots must be reduced proportionately.

#### **What's Excluded From the LUC**

The following is a list of advertising arrangements that do not have to be included in calculating the LUC. Stations may have other advertising packages not listed below, and should consult with counsel to determine appropriate valuations.

##### (1) Trade Outs, Barters & Per Inquiry Spots

Although stations engage in trade outs, barter and per inquiry advertising arrangements in dealing with advertisers, only transactions involving sale of time for monetary consideration are to be used as the basis for calculating the LUC. *Primer on Political Broadcasting and Cablecasting*, 100 FCC 2d 1476, 1517 (1984). Thus, while a pure barter transaction will not affect the LUC, a transaction involving cash as well as barter will be considered. The FCC staff has indicated informally that the station must place a value on the barter, combine it with the cash to reach the value of the contract, and then determine the value for each spot. Additionally, spots sold on a per inquiry basis are not included in the calculation of the LUC.

## (2) Merchandising and Promotional Incentives

Noncash merchandising and promotional incentives (e.g., billboards, sponsorships, and merchandising) which are offered to commercial advertisers as a part of a package need not be factored into LUC calculations. Generally a station must make all noncash merchandising and promotional incentives available to candidates on the same terms as to a commercial advertiser unless:

- (1) They are *de minimis* in value (e.g., coffee mugs or billboards that are 10 seconds or less); or
- (2) They reasonably imply a relationship between the station and the advertiser. For example, remote broadcasts or program sponsorships by candidates might imply an endorsement of the candidate.

Similarly, billboards need not be provided to candidates because they meet both exceptions described above. *Political Programming Policies*, 7 FCC Rcd. 678, 694-95 (1991); *Political Programming Recon.*, 7 FCC Rcd. 4611, 4616-18 (1992).

## (3) Web Services

The FCC regards Internet services like any other non-cash incentives. If web services are part of a package that includes on-air spots, stations generally should provide web site access or other Internet services to candidates on the same basis as they are provided to commercial advertisers. If, however, a banner ad or other web site presence would imply an endorsement of the candidate, stations may decline to offer them.

## (4) Charges for Production

The LUC applies only to the purchase of time. It does not cover additional charges customarily made by a station for other services (e.g., production oriented services) such as charges for use of a television studio, audio or video taping, or line charges and remote technical crew charges when the broadcast is to be picked up outside the station. *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 530 (1972). Stations must offer free production to political advertisers on the same basis as they do to commercial advertisers. Thus, if free production is predicated on a minimum buy for commercial advertisers, the same rule applies to political advertisers. *Letter to Randy Rich*, 7 FCC Rcd. 1959 (1992).

## (5) Bonus Spots for Non-Profit Organizations and the Government

The FCC has informally stated that bonus spots provided to non-profit organizations as part of a paid-for spot package do not have to be

counted in calculating the LUC. This includes all charitable organizations, non-profit organizations, and governmental agencies. *See In re Liability of Vista Point Communications Inc.*, 14 FCC Rcd. 140 (1999) (Bonus spots provided to NRA did not need to be considered in the LUC because the NRA is a non-profit organization).

### **Documenting Spot Values**

The price for each spot in a commercial package must be allocated to that spot. The Commission states that this may be done on the contract, on the invoice, or in a separate, internal document that is prepared contemporaneously by the station. *Political Programming Recon.*, 7 FCC Rcd. 4611, 4625 n.97 (1992). These commercial documents do not have to be made public, but must be retained by the station to document its commercial rates if there is a candidate complaint to the FCC or there is an independent FCC inquiry. The station must determine whether the rates charged in the package affect the LUC for each particular type of spot. If the station does not allocate costs in one of the methods approved by the Commission, all spots in the package will be deemed to have an equal value for purposes of determining their impact on the LUC.

### **State Statutes**

Finally, if a state statute, rather than the station, sets the rates for legal notices, they are not used for calculation of the LUC for candidates. *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 532 (1972).

### **Charging Less than the LUC**

Stations are free to charge less than the LUC provided that they give the same low rate to all candidates purchasing the same class and amount of time for the same period. For example, the Commission has ruled that a station may not charge candidates from outlying portions of its service area less than its LUC while continuing to charge “close in” candidates its full LUC. *Marmet Professional Corp.*, 40 RR 2d 1219 (1977). The Federal Election Commission has not determined whether such below-LUC sale of advertising constitutes an illegal contribution from a corporate station owner to federal candidates. Check with station counsel before offering such rates to federal candidates. *See also infra* page 51 for a discussion on Federal Candidate Certification. Additionally, some states and localities may also take this position with regard to elections for state and local office. Check with your state and local election officials regarding any restrictions.

### **“Sold Out” Situations and Perpetual Auction**

The Commission has ruled that when a station has sold out all time in a particular preemptible class, the station may state that such preemptible time is “sold out.” The station may then require the candidate to purchase a higher class of

preemptible time, or fixed time if there is no higher preemptible class, in order to obtain clearance. *Political Programming Recon.*, 7 FCC Rcd. 4611, 4616 (1992).

Also, if a station sells time on a non-preemptible basis only, and all the time within a program has been sold, it may tell the candidates that the program is sold out. *Political Programming Recon.*, 7 FCC Rcd. 4611, 4616 (1992); *Conway Collis, et. al.*, 13 FCC Rcd. 8741 (1997). Nonetheless, a station should note that it may in certain circumstances be necessary to preempt some non-preemptible spots sold to commercial advertisers in order to provide ‘reasonable access’ to candidates for federal office or to fulfill equal opportunity obligations.

However, if the station sells time in what amounts to a perpetual auction – where an advertiser that pays an incremental increase clears his or her spot – the station may not say all time is “sold out,” since a higher offer than what is currently on the books would enable a spot to air.

### **Charity Auctions**

If a station donates time to a charity auction in which a legally qualified candidate is the successful bidder, the sponsorship identification should state that the station provided the time and the candidate’s opponents would be entitled to free time in the same amount. This situation, if it occurs, could imply an endorsement by the station of the candidate. In order to avoid such a situation, a station should prohibit the successful bidder from using the donated spots for political broadcasts.

### **Station Combinations**

Station combinations can have several LUCs if the group sells in combination. There will be a rate for each individual station and a combination (“combo”) rate. For example, suppose a licensee owns an AM and 2 FM stations in a market, and they sell ad time on these stations as a combination package. There will be four LUCs – one for each individual station, and an LUC for the combo rate for all stations.

Thus, the combo rate is calculated separately and does not affect the LUC for each individual station. In that circumstance, the combo would have to make separate disclosures of sales practices and rates at all of the stations. The FCC staff has stated informally that no matter how a station internally allocates combo sales to multiple stations, the combo rate is still a unique charge.

### **Make Goods**

Generally, make goods are not factored into the LUC. If the value of the make good is equal to that of the other spots in the time period in which it runs, it will have no effect on the LUC. However, if the make good runs in a time period in which some of the other spots running were sold at a higher rate than the spot for which the make good is being given, the make good will reduce the LUC for that period to the rate originally paid for it. Any political advertiser who paid a higher

rate for time in the period in which that make good is aired must be given a rebate. *Political Programming Policies*, 7 FCC Rcd. 678, 697 (1991).

A station must provide make goods to candidates before the election if it has provided time-sensitive make goods to any commercial advertiser purchasing the same class of time during the year preceding the applicable election period. *Political Programming Policies*, 7 FCC Rcd. 678, 696-97 (1991); *Political Programming Recon.*, 7 FCC Rcd. 4611, 4618 (1992).

If a make good is being furnished to meet contracted-for promises of audience size, demographics or ratings, that make good will not affect the LUC. *Political Programming Policies*, 7 FCC Rcd. 678, 697 (1991). The benefits for such audience guarantee policies must be made available to candidate advertisers. The FCC requires that if a station will not know until after the election whether audience guaranty make goods might be due a candidate, this fact should be disclosed to the candidate, and an alternative, such as post-election cash rebate or a credit toward a future election should be negotiated. *Political Programming Recon.*, 7 FCC Rcd. 4611, 4618 (1992); *see also Zell Miller and Guy Millner Against Station WALB-TV*, 12 FCC Rcd. 10550 (1997).

The FCC staff has stated informally that a make good given due to technical problems when the spot was originally scheduled will not affect the LUC in the time period in which the make good runs.

### **Spot Separation Policies or “Pod Exclusivity”**

The Commission has held that stations are not required to guarantee spot separation or “pod exclusivity” to candidates. Such guarantees are different from make good or preemption policies because they do not significantly affect the value of particular classes of time. *Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith Against Station WCIZ-TV 1 Miami, Florida*, 12 FCC Rcd. 12248 (1997).

### **Agencies and Sales Representatives**

If a candidate purchases time from a station through an agency, the station may include the agency commission in the LUC. However, if the candidate purchases time directly from the station without the use of an agency, the LUC must exclude the amount usually paid for an agency commission. For example, if a 30-second spot announcement costs \$100 and an agency is allowed \$15, a candidate placing a spot through an agency must pay \$100. If the candidate places the spot directly with the station without the use of an agency, the candidate pays only \$85.

A candidate who purchases time directly from the station without the use of an agency can be charged for any production costs incurred by the station in preparing the spots or programs. However, the candidate cannot be charged for any station services that are provided free of charge to commercial advertisers

who do not use an agency. *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 530 (1972).

Conversely, station representative firms are customarily viewed as agents of the station and not of the advertiser or advertising agency. Commissions to representatives are similar to the compensation paid to employees or sales staff of the station and are viewed as the station's own cost of doing business. *Letter to Eugene T. Smith*, 34 FCC 2d 622 (1972); *WPSD-TV*, 34 FCC 2d (1972).

*Note:* The FCC staff has informally stated that if a station sells political time through a rep, the rep must make the required disclosures. The stations will be held responsible for the failure of the rep to make the disclosures correctly. Further, stations cannot force candidates to buy political time through a rep. It must be possible for a candidate to buy time directly.

### **Rebates**

If a spot has "cleared" in a program or time period at a lower rate than a political spot of the same length and class, the station must promptly rebate the overcharge to the candidates. The FCC requires a station to review program logs periodically during the election period to determine whether any rebates to candidates are required. A station must make every effort to do so prior to an election. As election day draws near, rebates should be paid as quickly as possible. *Political Programming Policies*, 7 FCC Rcd. 678, 694 (1991).

### **Purchase of Network Time**

Although the Communications Act does not specifically refer to networks, the provisions are intended to apply to purchase of network time. A network is selling time on behalf of station licensees, and the Commission interprets LUC rules as applying to the combination of licensees in the network as well as to the individual licensees. Thus, charges to legally qualified candidates purchasing network time may not exceed the LUC for the same class and amount of time for the same period of the broadcast day on a network. Also, candidates are entitled to the lowest unit rate regardless of the number of times they use the network. *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 525-26 (1972).

The compensation an affiliate receives from a network is not considered in computing the affiliate's LUC to candidates. *Primer on Political Broadcasting and Cablecasting*, 100 FCC 2d 1476, 1514 (1984). This principle applies to "non-wired networks" as well as to interconnected networks. *Id.*; *Letter to Robert L. Olender*, 61 FCC 2d 694 (1976). Thus, if a "national time sales organization" which "does not sell time on individual stations" and does not "function as a national representative of any station" purchases time on a "defined group of stations" at a special rate, that transaction would not affect an individual station's LUC. *Letter to Michael H. Bader*, C8-431 (October 3, 1975). The FCC staff's

views on treatment of a non-wired network may turn on the specific facts of the case, and a broadcaster should consult with counsel.

### **Seasonal Rate Change – Increase**

Suppose that during the 60-day political window preceding a general election, the rates of a station (pursuant to normal business practices) change seasonally from a lower to a higher rate. Candidate A buys time for broadcast during the window, prior to the rate increase. Candidate B then makes a valid “equal opportunities” request for broadcast use after the station has switched to its higher rates. As discussed in the Lowest Unit Charge Section, (*supra* page 33), normally the LUC for candidates using the station *prior* to the seasonal rate change is based on the *lower rates*, and for those using the station *after* the change is based on *higher rates*. However, when Candidate B seeks equal opportunities, he or she is entitled to be charged the same lower rate as Candidate A (the person to whom he or she is responding).

Likewise, if Candidate A purchased 50 spots in prime time to be aired before the rate change, and Candidate B makes a timely “equal opportunities” request to respond to Candidate A, asking for 100 spots in prime time to be aired after the seasonal rate change, Candidate B would be entitled to 50 such spots at the rates charged to Candidate A to satisfy the “equal opportunities requirement.” Candidate B would be charged the lowest unit rate based on the higher rates for the additional 50 spots. It should be noted that the sale to Candidate B of 50 spots at the lower rates to satisfy the “equal opportunities” requirements does not affect the rates to be charged her or other candidates using the station after the change to the higher rates on other than an “equal opportunities” basis. *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 527-28 (1972).

### **Seasonal Rate Change – Decrease**

In contrast to the above example, suppose instead that during the 45-day window preceding a primary election, a station’s rates (pursuant to normal business practices) change from spring rates to lower summer rates. Assume that the LUC is lower in the summer rates than in the spring rates. Candidate A buys time during the window while the spring rates are in effect. Candidate B makes a valid “equal opportunities” request during the window, but after the lower summer rates are in effect.

If no “equal opportunities” were involved, the LUC for candidates using the station prior to the seasonal rate change would be based on *higher* spring rates, and for those using the station after the rate change it would be based on *lower* summer rates. Here, even when “equal opportunities” is involved, the result is the same. Candidate A is to be charged based on the spring rates and Candidate B is to be charged based on the summer rates. (This is contrary to the summer-fall rate example). The reason for the result lies in the fact that Section 315(b)(1) of the law states that, during the statutory period, the charges made for the use of any

broadcasting station by a candidate shall not exceed the LUC for the same class and amount of time for the same period. If Candidate B were charged the same spring rate as Candidate A, this would exceed the summer LUC prevailing at the time of Candidate B's use. Thus, the law serves to set a ceiling on the rate that Candidate B can be charged.

#### Audience Surveys

The above examples of "equal opportunities" in the context of seasonal rate increase/decreases are also applicable to rate changes based on audience surveys. Thus, when a candidate buys time for a broadcast use to occur during the political rate window, and his or her opponent makes an "equal opportunities" request within the same window, both candidates will be charged the same rate based on the LUC prevailing at the time of the first candidate's broadcast use *unless* at the time of the opponent's broadcast use, the station's rates have decreased as a result of seasonal rate changes or audience surveys thus creating a more favorable LUC; the opponent then by law has the benefit of that new more favorable LUC.

### **Q&A ON LOWEST UNIT CHARGE**

**Q: A state law requires stations to provide the lowest unit charge 90 days prior to elections. Which rule should a station follow, the state law or the federal law requiring the lowest unit charge 45 days before primaries and 60 days before general election?**

**A:** Stations must comply only with the federal law. The federal law preempts state requirements concerning political broadcast advertising rates. *KVUE v. Moore*, 709 F. 2d 922 (5<sup>th</sup> Cir. 1983), *aff'd. mem.*, 465 U.S. 1092 (1984). This does not necessarily mean that federal law preempts every state requirement concerning political broadcasting. For example, states may impose additional sponsorship identification requirements on non-federal candidate ads. States may also regulate contributions to non-federal candidates.

**Q: A general election is to be held on November 2. As required by Section 315(b), the LUC must be provided to candidates during the preceding 60 days, commencing on September 3. Pursuant to normal practices, a station on September 20 changes from its summer rates to its higher fall rates. Is the LUC during the entire 60-day window preceding the election based on summer rates?**

**A:** No. From September 3 to September 20 the LUC is based on summer rates. On and after September 20, the fall rates are used as the basis for computation of the LUC. *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 532 (1972); *Lawton Chiles, et. al.*, 10 FCC Rcd. 7310 (1995). For many stations, however, the LUC may be

established by rates in long-term packages that would not be affected by the rate change.

**Q: A radio station sells most of its time under various TAP plans where advertisers buy five spots per day in different dayparts for a total of \$1,000. Must a political candidate buy the same five spots in order to get the benefit of the TAP rate?**

**A:** No. The FCC views all package plans as volume discounts. Stations must allow candidates to obtain the benefit of a package price even though they buy only one spot. Stations have to allocate the price of a package among the spots in the package, or the FCC will assume all of the spots are of equal value.

**Q: A station has an annual contract with a large advertiser under which it gives the advertiser a large number of bonus spots. If a station schedules all of the bonus spots to air outside of the political window, will the bonus spots affect the political rates?**

**A:** Yes. Bonus spots for all commercial advertisements running within the political window will affect the LUC because the bonus spots reduce the price for paid-for spots that may be in effect during the LUC window. Stations cannot manipulate their political rates by placing the bonus spots outside the window.

**Q: Suppose a station sells a five-minute advertisement to a political candidate. How should a station determine the LUC if it does not sell non-standard length ads to commercial advertisers?**

**A:** If a station has no established rate for a non-standard advertisement, the station has the discretion to establish a reasonable rate. The FCC has informally stated that, in above instance, a reasonable rate could be either the LUC of a 30-second ad multiplied by ten or the LUC of a 60-second ad multiplied by five.

## **“QUIZ YOURSELF” ON LOWEST UNIT CHARGE**

- (1) Lowest unit charge requirements apply only to candidates for federal office, and stations can charge for state and local offices their full commercial rates.

True

False

- (2) I have a very good, long-term advertiser who buys time at a low preemptible rate, but I informally guarantee him that all of his spots will clear. That guarantee will affect the rates I have to offer candidates.

True

False

- (3) All of the spots on my station are immediately preemptible. An advertiser buys at any price, and higher priced spots will always preempt lower priced spots. In one time period this week during the political window, we have sold spots ranging from \$100 to \$400, with an effective selling level of \$300. A candidate offers \$400 for a spot to ensure that his spot will clear. After the spot airs, the candidate demands a rebate of \$250 because one spot did clear at \$150. I have to give the candidate the rebate he demands.

True

False

- (4) I have the same structure as the previous question, but the highest preemptible rate is \$350, and the \$400 rate is sold to advertisers as fixed and non-preemptible. If a candidate buys the \$400 spot, I don't owe him any rebate.

True

False

- (5) Sometimes a good advertiser will tell me that she was disappointed with the results of a buy and I will offer her some additional spots for free. That doesn't affect my political rates.

True

False

- (6) I sell all of my time as one preemptible class. If all the spots in a program are sold, I can tell candidates that the program is sold out.

True

False

- (7) I offer advertisers who buy more than \$10,000 of time bumper stickers with the advertiser's logo and the station's call sign. I have to make the same offer to candidates or reduce my political rates by the cost of the bumper stickers.
- True  False
- (8) My state's Republican Party wants to run ads in favor of the Republican candidate for U.S. Senate which include the candidate's picture. These ads are entitled to the LUC.
- True  False
- (9) Budweiser buys a flight on my station under which it will buy 500 paid spots if I agree to run 100 "Friends know when to say when" PSAs for free. The PSAs will affect my political rates.
- True  False
- (10) I have a deal with a local business under which I provide spots in exchange for both barter and cash. The FCC requires me to assign a value to the spots and add it to the cash to determine whether this sets my LUC.
- True  False
- (11) I had a lousy second quarter in 2003. To bring in some cash, I sold a year-long schedule beginning on May 1, 2003 to an advertiser for very low rates. The political window for my state's primary runs from April 15 until the end of May, 2004. That low rate will depress my political rates for the entire window.
- True  False
- (12) I have a deal with commercial advertisers under which they get \$1 in bonus spots for every \$2 of spots they run. During the political window, I have to give candidates the same number of free spots in every time period in which bonus spots air.
- True  False

(13) My station is in a metered market. I offer commercial advertisers audience delivery guarantees, buy only based on Nielsen survey results. A candidate insists that I provide him with a rating point guarantee based on overnight ratings since the election will be over before the next Nielsen book. I can turn him down.

True

False

(14) If an advertiser buys more than \$50,000 of time on my station in one year, I invite him or her to send two people on a station-sponsored trip to London. A candidate who buys more than \$50,000 of time this year is entitled to the trip.

True

False

(15) All of the rates for commercial advertisers on my station are preemptible. I can offer candidates fixed time during the political window at a ten percent premium above the highest preemptible rate.

True

False

*See page 115 for the answers to the “Quiz Yourself” questions on Lowest Unit Charge.*

**NOTES:**

## FEDERAL CANDIDATE CERTIFICATION

Prior to the Bipartisan Campaign Reform Act of 2002 (BCRA), the distinction between federal and non-federal candidates lay solely in the right of reasonable access. After BCRA, there are additional distinctions: candidate certification and sponsorship identification. *See infra* page 63 for a discussion on Sponsorship Identification. To avail themselves of a station's Lowest Unit Charge, federal candidates or their authorized committees must provide a broadcast station with a **written certification at the time programming is purchased.**

A federal candidate must certify whether or not the programming refers to another candidate for the same office. If the programming *does refer* to an opposing candidate, the certificate must state that the programming will contain the following:

### **For Radio**

During the political programming, a candidate is required to include an audio statement voiced by the candidate identifying him or herself, the office being sought, and that the candidate has approved the broadcast.

### **For Television**

At the end of a political spot, and for a minimum of four seconds, there must be a clearly identifiable photographic or similar image of the sponsoring candidate while simultaneously a clearly readable printed statement is displayed. The printed statement must identify the candidate, state that the candidate approved the broadcast and that the candidate and/or the candidate's authorized committee paid for the broadcast.

Congress' intent in passing this provision was to limit the number of "attack ads" being placed by opposing candidates. The provision, however, broadly applies to any mention of an opposing candidate, whether or not the spot attacks the opposing candidate, praises the opposing candidate or merely refers to the opposing candidate in a neutral manner.

Failure to adhere to these certification requirements means that the candidate forfeits all rights to the LUC for *all* programming aired during the remainder of the political window (45 days before a primary, 60 days before a general election).

Additionally, the Federal Election Commission has not addressed the issue of stations giving LUC to federal candidates who do not provide candidate certification as required under BCRA. The Federal Election Commission may treat this as a corporate contribution from the licensee to the candidate in violation of the Federal Election Campaign Act. Stations should consult with their counsel before taking such action.

## **Q&A FEDERAL CANDIDATE CERTIFICATION**

**Q: If a federal candidate refuses to provide a written candidate certification, does the candidate forfeit the right to LUC for *all* broadcast stations in a given market?**

A: In the absence of clear guidance from the Federal Election Commission, the FCC has informally stated that a candidate will only forfeit the right to LUC for the station in question. Further, this forfeiture does not apply to spots that have previously aired.

## **“QUIZ YOURSELF” ON FEDERAL CANDIDATE CERTIFICATION**

(1) A federal candidate wants to buy time on my station during the window, but his representatives say they “won’t sign any piece of paper.” I have to sell the ads at my lowest unit charge.

True

False

See page 117 for the answer to the “Quiz Yourself” question on Federal Candidate Certification.

## **OTHER RATE ISSUES**

### **Comparable Rate Charges Outside LUC Windows**

The provision in the law for “charges made for comparable use” applies to all broadcast uses by legally qualified candidates for public office which occur *outside* the 45 or 60-day statutory period (“window”). A candidate’s broadcast appearance that relates to a forthcoming election more than 45 days (for primary elections) or more than 60 days away (for general elections) would receive a charge based on a comparable rate.

A station may not charge premium rates to political broadcasts. Section 315(b)(2) expressly states that that charges made for the use of a station by a candidate outside the statutory period “shall not exceed the charges made for comparable use of such station by other users thereof.”

### **What a Station Must Disclose**

A station must make a disclosure to candidates of the ways in which it sells time during comparable rate periods. The FCC has stated that “because the obligation to disclose is inherent in the broadcaster’s duty to ‘make available’ to candidates, on equal terms, all rates and discount privileges offered to commercial advertisers, we believe that disclosure to candidates of available rates and discount privileges is required on an ongoing basis, so that candidates can ensure that they receive either comparable rates or the lowest unit charge guaranteed by Section 315(b).” *Political Programming Recon.*, 7 FCC Rcd. 4611, 4620 (1992). *See infra* page 59 for a discussion on Disclosure.

### **Local Versus National Rates**

A station may not charge a candidate more than the rate the station would charge if the candidate were a commercial advertiser promoting its business within the same area as that the election is being held. *Letter to Waldo E. Spence*, 40 FCC 392 (1964). Therefore, a station cannot charge a candidate for local office its national rate.

### **Discounts**

Political candidates are generally entitled to the same discounts as non-candidates; political candidates are also entitled to such special discounts for programs coming within Section 315 as the station may choose to give on a nondiscriminatory basis. *Letter to Waldo E. Spence*, 40 FCC 392 (1964). However, note that discounts given a candidate for federal office which are greater than those given commercial advertisers during the same period might be treated by the Federal Election Commission as an illegal campaign contribution

from a corporate station owner. A similar problem may exist in states and localities that limit corporate political contributions.

Legally qualified candidates are also entitled to take advantage of reduced rates, such as discounts for spots purchased on a bulk time sales contract. *Letter to Senator Mike Monroney*, 40 FCC 252 (1952). But, during the comparable rate period, they would be required to buy the same number of spots as a commercial advertiser in order to obtain the bulk rate.

**Outside the LUC window, stations are required to make available discount privileges to each legally qualified candidate on the same basis.** For example, if Candidate A purchases ten time segments from a station which offers a discount rate for purchase of that amount of time, Candidate B is not entitled to the same discount rate if she purchases less time than the minimum to which the discounts are applicable. If during the LUC window, Candidate B would have the right to the discount rate under the LUC rules.

### **Pooling**

Where a group of candidates for different offices pool their resources to purchase a number of spots at a discount, and an individual candidate opposing one of the group seeks time on the station, he or she is entitled to be charged the same per spot rate as his or her opponent, since the provisions of Section 315 run to candidates themselves, and each is entitled to be treated equally with his or her individual opponents. *Amendment of the Rules Governing Broadcasts by Candidates for Public Office*, 40 FCC 1075 (1954).

### **Advertising Agency Commissions Outside the LUC Window**

Unlike a candidate who purchases time during the 45 or 60-day window, a candidate seeking to purchase time outside the window and directly from the station is not entitled to subtract the agency commission. For example, if Candidate A buys a spot for \$100 through an advertising agency (which receives a 15 percent discount), Candidate B, who doesn't use an advertising agency must also pay \$100. The law requires that each candidate be afforded time upon equal terms. If a station is following its customary practice of accepting A's time through a recognized agency, the fact that the station only receives \$85 has no bearing on the fact that the cost to A was \$100. Again *this result is directly opposite of that achieved in a situation when the lowest unit charge applies*. See *supra* page 42 for agency commission rules during the LUC window.

There is no Commission rule or regulation that prevents or forbids a political candidate from using the services of his or her advertising agency. *Letter to Jason L. Shrinsky*, 23 FCC 2d 770 (1966). Also, a political candidate who purchases time through an ad agency which he or she heads is entitled to share in the profit of the 15 percent agency commission. The commission is not considered to be a rebate.

Another situation involves a licensee who has both adopted and consistently maintained a policy whereby agency commissions are not paid in connection with political advertising placed by recognized advertising agencies on behalf of candidates for local office or for local commercial advertising. The station's most recent local retail rate card indicates that its established policy is "all rates net to the station." Therefore, a candidate who utilized an advertising agency would pay the same station rate as one who did not, but the advertising agency would charge its client-candidate the station rate plus a 15 percent agency commission. This policy is consistent with Section 315 of the Act and FCC rules because the rate policy is applicable to both commercial and political advertising.

However, were the station to provide the commercial advertiser with services normally performed by ad agencies, it must also provide the same services to political advertisers in order to comply with Section 315(b) of the Act and FCC rules. Benefits accruing to a candidate from the use of an ad agency are not considered remote, intangible or insubstantial, thus political advertisers are entitled to equal treatment vis-à-vis commercial advertisers. *Letter to Marcus Cohn, Esq.*, 40 FCC 388 (1964).

#### **Seasonal or Periodic Rate Changes Outside the Political Window**

If Candidate A purchases time prior to a rate increase (which is part of the stations normal business practices) and Candidate B makes a timely request for "equal opportunities" after the rate increase, Candidate B is entitled to A's lower rate. The rate charged opposing candidates must be the rate charged their political opponents. Therefore, B should pay the rate in effect before the price change.

#### **One in, One Out of the Window**

As discussed above, ordinarily when a candidate makes a request for "equal opportunities," he or she is entitled to the same amount of time upon the same rate terms as his or her opponent received. However, the Communications Act may (in certain instances) change this result insofar as the rates are concerned. For example, suppose Candidate A purchases time for broadcast appearances to occur prior to the 45-day window prior to a primary election and pays for the time on the basis of "comparable use." Candidate B makes a timely request to purchase spot announcements on an "equal opportunities basis;" however, these announcements will air during the 45-day window where the LUC normally applies.

If Candidate B's broadcasts are to take place during the time in which the LUC applies, Candidate B will be charged on the basis of the LUC prevailing at the time of his or her broadcast use. Although the Commission's rules provide that "no licensee shall make any discrimination between candidates..." 47 C.F.R. § 73.1941(e), the difference in rates charged Candidate A and B does not amount to discrimination under the Commission's rules since the difference is a result of rates set by statute. *Use of Broadcast and Cablecast Facilities by Candidates for*

*Public Office*, 34 FCC 2d 510, 527 (1972). Thus, Candidate A may be charged a higher rate than Candidate B.

### **Contracts**

A candidate may, during the 45 or 60-day window, enter into a contract that specifies no set rate to be charged, but instead provides that the rate to be charged will not exceed the LUC being made for the classes, lengths, and time periods on the date(s) contracted for. However, once the contract rate has been established, the station should make the proper notation in its political file.

### **Q&A ON OTHER RATE ISSUES**

**Q: If a candidate and her immediate family own all the stock in a corporate licensee and the candidate is president and general manager, can she pay for time on the station from which she derives her income and have the station licensee make a similar charge to an opposing candidate?**

**A:** Yes. The fact that a candidate has a financial interest in a corporate licensee does not affect the licensee's obligation under Section 315. Thus, the rates which the licensee may charge to other legally qualified candidates will be governed by the rate which the stockholder candidate actually pays to the licensee. If no charge is made to the stockholder candidate, it follows that other legally qualified candidates are entitled to equal time without charge. *Letter to Charles W. Stratton*, 40 FCC 228 (1957). However, if the candidate is running for federal elective office, the failure to charge her for spot time may be treated by the Federal Election Commission as an illegal corporate contribution to the campaign. (This is an unsettled area of the law.) Further, political editorials and commentary regarding the campaign of a station owner or others to whom she is politically rated are likely to be considered campaign contributions and expenditures under Section 431 (9)(B)(1) of the Federal Election Campaign Act and FEC Regulations, 11 C.F.R. §§ 100.7(b)(2) and 100.8(b)(2).

**Q: Time is sold to Candidate A for a "talkathon." Candidate B demands an equal allotment of time, and arrangements are made to sell comparable time to her at the same rate as it was sold to A. B uses part of her time and then cancels her order for the remainder. When billed for time, B insists that she was under no obligation to pay for unused time on the theory that the station has suffered no loss because, under Section 315, the station was required to keep time available to her on call. Is B correct?**

**A:** No. It is true that a station having sold time to one candidate should stand ready to sell comparable time to his or her opponent. But it does not follow that a candidate, having committed herself to paying for the use of specific time, can break a contract and renege on the ground that the station was obligated to hold it open to her. Under these circumstances,

the station is not obligated to hold any specific time segment open and is entitled to require the same contract and the same provisions for cancellations as in the case of commercial users.

**NOTES:**

## DISCLOSURE

Disclosure is one of the most important aspects of the political broadcasting rules. Stations are required to inform all candidates – federal and non-federal – of their political rates, their time classes, their sales practices, and any other information that may be relevant to the purchase of time on the station. *Political Programming Policies*, 7 FCC Rcd. 678, 688 (1991).

### Disclosure Statements

Although the FCC rules do not require a written disclosure statement, every station should have one ready to provide to every candidate or agency requesting political time. Stations do not have to ensure that candidates read the statement; only that they receive it. *Political Programming Policies*, 7 FCC Rcd. 678, 689 (1991). The disclosure statement is a living document – it should change during the political season as rates or sales practices change. Disclosure statements will vary from station to station due to their different sales practices, but at a minimum, statements should include:

- A description and definition of each class of time – such as immediately preemptible, preemptible with notice, or ROS – available to commercial advertisers, which is complete enough to allow candidates to identify and understand what specific attributes apply to each class;
- A complete description of the lowest unit or “comparable rate” charges and related privileges, including priorities against preemption and the station’s make good policies for each class of time offered to commercial advertisers;
- A description of the station’s method of selling preemptible time (if any) based on advertiser demand, commonly known as the “current selling level,” with the stipulation that candidates will be able to purchase at these demand-generated rates in the same manner as commercial advertisers;
- An approximation of the likelihood of preemption for each kind of preemptible time (which, of course, will vary during the political season);
- An explanation of the station’s sales practices, if any, that are based on audience delivery;
- Discount and value-added privileges, if any; and
- Rotations.

*See Political Programming Policies*, 7 FCC Rcd. 678, 689 (1991).

Stations should also list any other sales practices that are relevant, such as how much time in advance it requires for copy to be at the station before airing, advance payment policies, or charges for use of station facilities.

### **When Disclosures Are Made**

Stations must make these disclosures for both the 45- and 60-day “lowest unit charge” periods. Additionally, a similar disclosure must be made for “outside the LUC window” periods when comparable rates are charged to candidates. Therefore, once a campaign season begins, stations should have current disclosure information available at all times for candidate buyers.

Once disclosure is made to a particular candidate or his or her buyer, the station is required to update or modify the information provided previously as necessary, but the station need not repeat every detail of disclosure in subsequent conversations with that candidate or buyer if the candidate or buyer does not desire it. Stations are advised to retain some form of documentation verifying the extent of disclosure provided.

### **Station Representatives**

The FCC staff has informally stated that if a station sells political time through a rep, the rep must make the required disclosures. The station will be held responsible for the failure of the rep to make the disclosures correctly. Further, stations cannot force candidates to buy political time through a rep. It must be possible for a candidate to buy the time directly from the station (even in circumstances where a station’s time is being marketed through an LMA).

### **Time Brokerage Agreements**

When a station is subject to time brokerage agreements, it is important to remember that a licensee must ensure that disclosure is made to political candidates. Licensees should consider prohibiting a broker from selling political time within the brokerage agreement. However, the licensee would still be required to provide access to federal candidates during the brokered time, if requested. Retaining control over all political broadcasting will help ensure the licensee remains in compliance with the rules.

## **Q&A ON DISCLOSURE**

**Q: A station’s policy is to require candidates to sign a statement acknowledging receipt of the disclosure statement. Must the candidate comply?**

**A:** A station cannot require that a federal candidate sign an acknowledgement of receipt of disclosure as a condition of access. Such a condition also may not be imposed on a state or local candidate if it would interfere with the candidate’s right to equal opportunities. *Political Programming Policies*, 7 FCC Rcd. 678, 698 (1991); *Political Programming Recon.*, 7 FCC Rcd. 4611, 4619-20 (1992). However, a station may require a federal candidate to sign a candidate certification in order to receive LUC. *See supra* page 51.

**Q: Can a station use the same disclosure statement from the previous election cycle?**

**A:** A disclosure statement is intended to reflect the actual selling practices of the station during the current election cycle. Stations should review and update the disclosure statement before each new election. Additionally, sample or “boilerplate” disclosure statements may not be effective disclosure because each station may have a different manner in selling time or have special policies.

**“QUIZ YOURSELF” ON DISCLOSURE**

(1) I have over 400 different packages now in effect on my station. The FCC requires that my disclosure statement include each one of them.

True

False

*See page 118 for the answer to the “Quiz Yourself” section on Disclosure.*

**NOTES:**

## **SPONSORSHIP IDENTIFICATION**

The Bipartisan Campaign Reform Act of 2002 (BCRA) ushered in a new era of complex sponsorship identification requirements. Although the FCC has not promulgated new rules to address these changes, the following section contains (1) a comprehensive explanation and (2) an at-a-glance reference to help stations navigate two federal agencies' regulations for ensuring proper sponsorship identification compliance.

### **The Current FCC Rule and Regulations**

Stations must ensure that all political programming aired meets the requirements set forth in the FCC's sponsorship identification rule and established regulations. This applies to both political announcements and programs. The rule requires the specific identification of the person or group sponsoring the political announcement or program. 47 C.F.R. § 73.1212. Merely announcing that "this is a paid political broadcast" will not fulfill the requirements of the rule.

The political programming must explicitly state that it was "paid for" or "sponsored by" the entity purchasing the time. The name of the sponsoring entity must appear at the same time. The sponsorship ID must appear once – either at the beginning or the end of a spot. Political spots (or issue ads) that are five minutes or longer must have a sponsorship identification at both the beginning and the end. Note that the new disclosure requirements for federal candidate television programming that refers to an opposing candidate must be placed at the end of the spot.

Television spots must have a visual ID with letters that constitute at least four percent of the vertical picture height (20 scan lines) and must air for at least four seconds. The FCC staff has stated that each line of type must meet the four percent requirement, and that if upper and lower case type are used, the four percent requirement applies to the lower case (smaller) type. The ID must be set against a background that does not reduce the announcement's legibility. *Political Programming Policies*, 7 FCC Rcd. 678, 686 (1991).

### **Federal Candidates – Federal Election Commission**

In the case of political programming *which advocates the election or defeat of a federal candidate or that solicits any political contributions*, BCRA amends the Federal Election Campaign Act to require stricter sponsorship identification requirements. **These new sponsorship identification rules will be enforced by the Federal Election Commission and at this point, stations are not required to ensure candidate compliance with the new rules.** For political spots which are authorized by a federal candidate and/or the candidate's authorized committee, the following sponsorship identification rules will apply:

### ***For Radio***

The advertisement must include an audio statement by the candidate identifying himself/herself and stating that the candidate approved the broadcast and that the candidate and/or the candidate's authorized committee has paid for the broadcast. (if the broadcast refers to an opposing candidate *in any manner*, it must also identify the office being sought).

### ***For Television***

As with radio broadcasts, the political programming must identify the candidate on whose behalf time was purchased, state that the candidate approved the broadcast, and state that the broadcast has been paid for by the candidate and/or the candidate's authorized committee. This can be achieved by one of two ways:

- 1) The candidate making the statement in an unobscured, *full-screen* view (at least 80%); or
- 2) A candidate voice-over, accompanied by a clearly identifiable photograph or similar image of the candidate.

There must also be a written presentation of the same statement at the end of the political programming "in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least four seconds."

**Important! BCRA does not require that a federal candidate or his/her authorized committee provide written certification for sponsorship identification compliance for: (1) programming that solicits political contributions (both television and radio); or (2) that the voice-over for programming which advocates the election or defeat of a federal candidate is included (television only).**

### ***Station Review of Sponsorship Identification***

*Radio.* Radio stations may request – but not require – that political ads be submitted sufficiently far in advance to allow review for sponsorship identification. However, if a candidate refuses to allow previewing, the station should presume that it is responsible for adding the sponsorship identification as required under the FCC's rules. *Political Programming Policies*, 7 FCC Rcd. 678, 687 (1991). Stations may also alert federal candidates that the additional BCRA sponsorship identification requirements have not been met, though at this point stations are not required to ensure candidate compliance with these new requirements.

*Television.* The Commission believes that television stations should have the right to pre-screen ads for sponsorship identification compliance due to the specific visual requirements for TV spots. *Sponsorship Identification Recon.*, 7 FCC Rcd. 1616 (1992). In circumstances where there is not sufficient time for a TV station to pre-screen a spot and still get it on the air as requested by the candidate, the ad may be run once without the station being subject to sanctions if the sponsorship ID is inadequate. Once the ad has aired, the TV licensee will be responsible for complying with the FCC's sponsorship identification rules. *Sponsorship Identification Recon.*, 7 FCC Rcd. 1616 (1992). Stations may also alert federal candidates that the additional BCRA sponsorship identification requirements have not been met. Again, at this point stations are not required to ensure candidate compliance with these new requirements.

*Both radio and TV stations* may add the proper FCC sponsorship identification within the ad itself. This is an exception to the no-censorship requirements. *Joint Agency Guidelines for Broadcast Licensees*, 69 FCC 2d 1129, n. 2 (1978). See *supra* page 5 for the censorship rules. Alternatively, stations may add the required ID at the end of a spot and charge candidates for the extra time.

### **Political Ads Sponsored by Third-Parties**

The Federal Election Campaign Act and the Federal Election Commission's rules require that whenever any person makes any expenditure or solicits any contribution for the purpose of financing communications expressly advocating either the election or the defeat of a "clearly identified" candidate for federal office through any broadcasting station, such communications must make clear whether the broadcast was authorized by a particular candidate or not authorized by any candidate. *Joint Public Notice of FCC and FEC*, 69 FCC 2d 1129 (1978). If an announcement is both paid for and authorized by a candidate or his or her committee, a "paid for" or "sponsored by" tag is enough. However, if a third party pays for a program or announcement, the identification line must say, "paid for (or sponsored by) [name of sponsor] and [authorized or not authorized] by [name of candidate or committee]." State election laws affecting political broadcasts by candidates for state or local office vary from state to state. Broadcasters should check with their state election officials.

The Commission's rules require stations to maintain in their public files a list of the names of the officers of organizations or groups, other than candidates and authorized committees, which sponsor political programs or announcements, but do not require the announcement of the officers' names. See *infra* page 71 for a discussion on Issue Advertising.

Some state and local jurisdictions, however, do require the announcement of such information in political advertising for non-federal candidates or for ballot issues. The constitutionality of stricter state sponsorship identification requirements for state and local political broadcasts has been upheld. *KVUE v. Moore*, 709 F.2d

922 (5<sup>th</sup> Cir. 1983) *aff'd mem.*, 465 U.S. 1092 (1984). Stations should check with state election officials for specific state or local requirements. Keep in mind that the FCC and the FEC have preempted state laws that attempt to impose stricter requirements on political advertising by candidates for federal office.

**Political Ads Sponsored by Third-Parties That Advocate the Election or Defeat of Federal Candidate(s) or Solicit Any Political Contributions**

The FEC now requires that for political programming *that advocates the election or defeat of federal candidates or solicits any political contributions*, but is not authorized by a federal candidate or his/her authorized committee, must:

- 1) State that the programming is not authorized by any federal candidate; and
- 2) Include the aural statement: “\_\_\_\_\_ is responsible for the content of this advertising.”

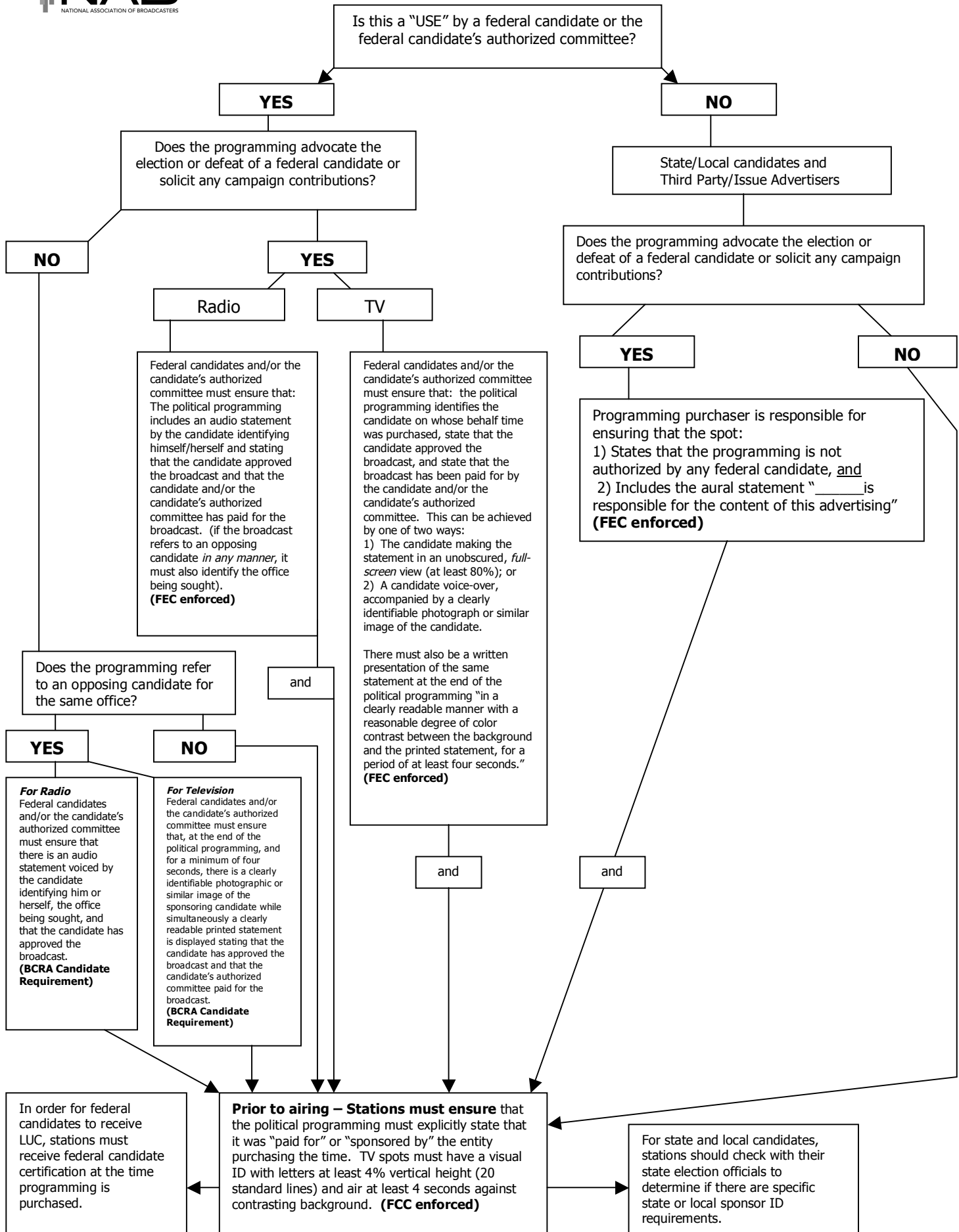
The blank must be filled in with the name of the political party, committee or person paying for the broadcast, the name of any connected organization of the payor, and a permanent street address and telephone number. For television, this statement is required to be made in “an unobscured, full-screen view of a representative of the political committee or other person making the statement, or by a representative of such committee or other person in voice-over, and shall also appear in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds.” This new sponsorship identification rule will be enforced by the Federal Election Commission and is also applicable to *any electioneering communication*. See *infra* page 81 for a discussion on Electioneering Communications. At this point stations are not required to ensure third party/issue advertiser compliance.

**Use of Candidate-Supplied Material in Newscasts or Other Programming**

In the case of any programming about political races or controversial issues for which any records, transcriptions, talent, scripts, or other material or services were provided to the station, stations must announce that the material was provided as an inducement to the broadcasting of such programming. However, the Commission has ruled that with respect to the use of candidate-supplied material in *bona fide* newscasts, it will apply the rule only to tape or film furnished by the candidate. The rule will not be applied to printed matter, such as news releases or advance copies of speeches. *First Report*, Docket No. 19260, 35 FCC 2d 40 (1972).

**The Following Page Contains An At-A-Glance Summary Reference Guide For Sponsorship Identification Requirements.**

# Sponsorship Identification at-a-glance



## **Q&A ON SPONSORSHIP IDENTIFICATION**

**Q: Do the following announcements satisfy the sponsor ID rules: “State Citizens for Smith” and “Authority of Smith Committee”?**

**A:** No. Paid political announcements must contain the required “paid for” or “sponsored by” language. Thus, the above announcements should read “Paid for by State Citizens for Smith” or “Sponsored by the Smith Committee.” On a television spot, the words “paid for” or “sponsored by” cannot be abbreviated. *Letter to Dalton Moore, 7 FCC Rcd. 3587 (1992).*

**Q: Is the announcement “Paid for by a lot of people who want to see Sam Smith elected to the U.S. Senate” sufficient?**

**A:** No. The language is too general, unless that is the official name of the Smith Campaign Committee. The public must be informed that the sponsor is a specific person or entity, where the announcement is not clear otherwise. *Letter to KOOL Radio-Television Inc., 26 FCC 2d 42 (1970).* The example above does not convey to listeners and viewers that the announcement is sponsored by a specific entity.

**Q: In the case of a third-party advertisement, is a station required to verify the accuracy of the entity sponsoring the ad?**

**A:** There is no requirement that a station verify the accuracy of the sponsorship identification for a third party. However, if a station becomes aware that the identification may not be accurate, it should take steps to investigate and correct it.

**Q: Should the sponsorship identification announcement be computed as commercial time and, thus, included within the candidate’s spot or program time?**

**A:** If the sponsorship identification announcements are ordinarily considered to be part of the time bought by a regular commercial advertiser, they can also be treated as commercial time and counted in a political candidate’s spot or program time. Stations are reminded that they may not discriminate among candidates in this respect.

## **“QUIZ YOURSELF” ON SPONSORSHIP IDENTIFICATION**

(1) I am running some issue ads for a group called “Citizens for Good Government.” I now find out that all or most of the funds for this group come from the National Rifle Association, and the only officials of the group are the

NRA's paid lobbyists in my state. Despite these facts, I don't have to change the ID on the spots.

True                       False

(2) A candidate submits an ad in which the sponsor is identified as "A lot of people who like Joe Smith," which is not the official name of the campaign committee. I must require the candidate to change the ID or insert another ID over the spot.

True                       False

(3) An ad for a federal candidate attacks another candidate. The ad includes a picture of the candidate airing the spot and a written statement that she approved the ad, but no voice-over by the candidate. I do not have to make her add the voice-over.

True                       False

*See page 118 for the answers to the "Quiz Yourself" questions on Sponsorship Identification.*

**NOTES:**

## **ISSUE ADVERTISING**

Issue advertising generally applies to ballot issues or advertisements that involve a controversial issue of public importance, including ads about elections that are not sponsored by candidates' official committees. In the last few election cycles, the use of issue advertising has increased dramatically. In addition, the Bipartisan Campaign Reform Act (BCRA) expanded broadcasters' existing public file requirements for issue advertising that "*communicates a message relating to any political matter of national importance.*" See *infra* page 78.

### **Applying the Political Broadcasting Rules**

Generally, issue advertising is not subject to the political broadcasting rules. It is at the discretion of the station whether to accept the advertising at all, and stations are not required to air ads on both sides of an issue. *Political Programming Policies*, 7 FCC Rcd. 678, 685 n.54 (1991). Additionally, issue advertisers are not entitled to the lowest unit charge during the LUC windows. *Id.* However, stations are liable for any false and/or slanderous material. Stations should review non-candidate ads before airing, and if a station is notified of a possible problem, it must take steps to rectify the situation because it is not protected by the "no censorship" provision that applies to candidate ads. See *supra* page 5 for discussion of the no censorship provisions.

### **Issue Ads that Contain Uses by Candidates**

In situations where an issue advertiser makes an ad a "use" by adding a legally qualified candidate's voice or likeness the equal opportunities rule applies. See *supra* page 5 for discussion on "Uses." See also *supra* page 23 for the rules on Equal Opportunities.

### **Record Retention for Issue Advertising**

If an issue advertisement does not communicate "a message relating to any political matter of national importance," then stations are not required to maintain the same records for issue ads as with candidate ads. If stations accept issue advertising, the fact that ads were aired about an issue must be shown in the public file. In addition, a list of the chief executive officers, executive committee or board of directors of the sponsoring group must be maintained in the public file for two years. 47 C.F.R. § 73.1212 (e). For issue advertising that "communicates a matter of national importance," see *infra* page 78.

### **Sponsorship Identification**

See *supra* page 63 for discussion on Sponsorship Identification.

## **Q&A FOR ISSUE ADVERTISING**

**Q: Are stations required to announce the names of the officers of organizations or groups which sponsor political programs or announcements?**

**A:** No. While the sponsorship ID rules require stations to maintain in their public file a list of the names of the officers, the FCC rules do not require any announcement of their names. Some state and local jurisdictions, however, do require the announcement of such information in political advertising for non-federal candidates or for ballot issues. The constitutionality of stricter state sponsorship identification requirements for state and local political broadcasts has been upheld. *KVUE v. Moore*, 709 F.2d 922 (5<sup>th</sup> Cir. 1983) *aff'd. mem.*, 465 U.S. 1092 (1984). Stations should check with state election officials for specific state or local requirements.

**Q: Are there any special requirements for advertising that addresses state or local ballot or legislative issues?**

**A:** No. The FCC only requires that the advertisement states that the spot is “paid for” or “sponsored by” and clearly identifies the entity buying the time. State election laws affecting broadcasts concerning ballot issues vary from state to state. Broadcasters should check with state election officials. Programming that addresses federal legislative issues is subject to new disclosure requirements. *See infra* page 77.

## **“QUIZ YOURSELF” ON ISSUE ADVERTISING**

(1) My state’s Republican party wants to run ads in favor of the Republican candidate for U.S. Senate that include the candidate’s picture. These ads are entitled to the lowest unit charge.

True                       False

(2) My state has a controversial issue on the ballot. If I sell time to one side, I do not have to give free time to the other to respond.

True                       False

(3) A labor union buys a schedule of spots that claim that the local Congressman voted to “cut” Medicare. The Congressman demands that I stop running these spots because all he did was vote to reduce future increases in Medicare costs. The FCC requires me to stop running the spots unless I am satisfied that all of the statements made by the union are true.

True                       False

*See page 119 for the answers to the “Quiz Yourself” questions on Issue Advertising.*

**NOTES:**

## **RECORD RETENTION – THE POLITICAL FILE**

### **What Records Must Be Kept**

Stations must keep and allow public inspection of all requests for political time made by or on behalf of candidates (local, state, and federal) in the political file. Mere inquiries as to rates need not be recorded. This rule requires the file to include the disposition/history of the candidate's request by the station and must include:

- Whether the station accepted or rejected the request (in whole or in part);
- Schedule of time provided or purchased;
- Spot length;
- Classes of time;
- Rates charged;
- The name of the candidate and the election/office to which the programming refers (if applicable);
- When each spot actually aired;
- The name, address and phone number of a contact person for the candidate and/or candidate's authorized committee purchasing the programming. In addition, the authorized committee treasurer's name must be listed; and
- Rebates paid, if any, and the amount, date and order to which they are paid.

When free time is provided, a record of that time must also be placed in the file. A formal request for time should be documented and immediately placed in the file. The FCC has stated that "in the usual case" it would expect the station to place a copy of the contract between the station and the candidate, which would contain this information, in the political file as soon as possible, which means "immediately." *Political Programming Policies*, 7 FCC Rcd. 678, 698 (1991).

In addition, because the FCC requires that the political file contain the actual times the spots air, that information should be included in the file as soon as possible. If that information is only generated monthly, the file should include the name of a contact person who can provide the times specific spots aired.

The FCC has stated that in addition to the information described above, which is required by the FCC rules, "if the station provides candidates with a written disclosure form or statement, it may be advisable to maintain a copy of that form in the political file. In some circumstances it may also be advisable for a station to include a description of particular sales practices that would be significant for

candidates, and how they would apply to candidates. Given the vast variation in sales practices from station to station, it is not possible to provide here an exhaustive list of all things that could be included in a political file.” *Political Programming Recon.*, 7 FCC Rcd. 4611,4621 (1992).

### **Orderly Manner**

Individuals should be able to discern the information on candidate schedules and rates with little trouble. It may be best to maintain political materials in separate folders by office and/or candidate.

After a 1990 audit, the FCC fined several stations \$5,000 and two others \$2,000 for political file violations. The fines were given largely because the information contained in the files was not maintained in a form that allowed the FCC inspectors to easily discern the rates that the stations had charged.

### **Blind Orders**

Stations should refuse to respond to requests for avails or time from agencies and others who refuse to identify the candidate(s) for whom they are purchasing time. The political file rule requires that the name of any candidate seeking time must be noted in the public file, in order to put opposing candidates on notice of their equal opportunities rights. By taking “blind” orders for candidates, a station would be in violation of the rule.

### **Length of Retention**

Records must be retained for two years. *Political Programming Policies*, 7 FCC Rcd. 678, 698 (1991); *Political Programming Recon.*, 7 FCC Rcd. 4611, 4621 (1992). Stations should establish a policy under which all political file records that are not the subject of a pending dispute with a candidate are purged at the end of the required two-year retention period. Stations may, however, wish to retain logs or other information proving that the ads were aired until the statute of limitations on contract claims in their state has expired in case of any dispute with a candidate. However, after the two-year period, those records do not need to be kept in the public file.

### **Public Inspection**

Requests and disposition of requests for political broadcast time are subject to public inspection and copying during normal business hours in accordance with the Commission’s public file rules. Stations may charge a reasonable amount for copying.

The FCC specifically exempted the political file from the telephone access provisions it applied to stations locating their main studios outside the city of license. Thus, stations do not have to provide political broadcast file information by telephone or by mail unless they choose to do so. If they do, they must furnish such information on a non-discriminatory basis to all candidates or their official representatives.

Remember, because it is part of the public inspection file, the political file must be accessible by all members of the public – not just candidates or their representatives – during normal business hours. Stations can require someone seeking access to the public file to identify themselves, although individuals cannot be asked to identify who they represent or what part of the public file they want to see.

### **Scripts and Tapes**

FCC does not require stations to keep scripts or recordings of political announcements nor make them available to anyone. Stations may wish to keep recordings or scripts, however, as a safety factor in the event of a complaint or controversy involving a political announcement or program. FCC rules do require that scripts or summaries of editorials endorsing opposing political candidates be made available to opposing candidates. *See* 47 C.F.R. § 73.1930.

**PB-16 Form. While stations may use any form they desire, NAB’s political broadcast agreement form (PB-16) is a handy means of providing all of the information candidates and issue advertisers need and the FCC requires, including the federal candidate certification. To purchase the form, call NAB Services at 800-368-5644.**

### **New Public File Requirements For Certain Issue Advertisements**

**The Bipartisan Campaign Reform Act (BCRA) expanded broadcasters’ existing public file recordkeeping requirements. Although the scope of this definition has not been clarified, for any paid political programming that “*communicates a message relating to any political matter of national importance,*” a broadcaster must keep in the political folder of the station’s public file:**

- 1) A record of each request to purchase time;
- 2) Whether the station accepted or rejected the request (in whole or in part);
- 3) The rate charged for the programming;
- 4) The date and time on which the programming is aired;
- 5) The class of time purchased;
- 6) The issue to which the programming refers
- 7) The name of the candidate and the election/office to which the programming refers (if applicable); and

- 8) The name of the purchaser, the name, address and phone number of a contact person for the purchaser, and a list of chief executive officers/board of directors of the purchaser.

Programming that “communicates a political matter of national importance” includes, at least, the following: (1) references to a legally qualified candidate; (2) any election to Federal office; and (3) a national legislative issue of public importance.

**This is a significant change because it requires disclosure of rate and other information for certain issue ads which are not subject to the access, equal opportunities, and lowest unit charge rules applicable to candidate ads.**

Broadcasters must continue to comply with the FCC’s preexisting recordkeeping requirements for the political programming of *all* legally qualified candidates (local, state and federal).

**IMPORTANT! If an Issue Advertiser certifies that the programming does not communicate “a message relating to any political matter of national importance,” stations must nonetheless independently verify that no such messages are communicated in the programming. Stations are required to ensure compliance in order to properly disclose rates and times aired in the public file.**

## **Q&A ON RECORD RETENTION**

**Q: If a candidate, or his or her representative, requests from a station the political disclosure statement and rate card, must a station document such requests in the political file?**

**A:** No. Although stations are required to keep and allow public inspection of all requests for political broadcast time made by or on behalf of a candidate in a political file, mere inquiries regarding rates need not be recorded.

**Q: Suppose a candidate’s representative, having then received the station’s rate card, calls back and begins inquiring as to available times and package deals. No ad time is purchased, but the candidate’s representative has indicated that she will be purchasing time “sometime in the near future.” Should a station then keep a record of this telephone inquiry in its political file?**

**A:** Probably yes. Although this is not a formal request to purchase time, the second call by the candidate’s representative may be construed as an initiation of the negotiating process to buy ad time. Therefore, a station should document such requests for avails in its political file.

## **“QUIZ YOURSELF” ON RECORD RETENTION**

(1) I keep my public file in the public library in my city of license. The FCC allows me to update it once a week during the political season.

True                       False

(2) A candidate’s campaign manager calls my station and demands to be told over the phone what spots opposing candidates have bought. I do not have to give him this information over the telephone.

True                       False

(3) A general sales manager from a competing station wants to inspect my political file. I do not have to give him access to my political file.

True                       False

(4) A candidate comes to the station and wants to review the copy of his opponents’ spots. I have to give him the tapes or transcripts.

True                       False

(5) I am running an issue ad that requests listeners to “Call Congress and Tell them to Vote ‘No’ on the Medicare Reform Bill.” Because it is an issue ad, I do not have to disclose the number of times the spot airs or the rate I charged.

True                       False

*See page 119 for answers to “Quiz Yourself” questions on Record Retention.*

**NOTES:**

## **OTHER POLITICAL BROADCASTING ISSUES**

### **ELECTIONEERING COMMUNICATIONS**

In addition to the candidate certification requirements and new public file and sponsorship identification requirements, BCRA prohibits certain entities (*i.e.*, corporations and labor organizations) from making electioneering communications. **Electioneering communications are any broadcast, cable or satellite programming that refer to a federal candidate, are aired within 60 days prior to a general or within 30 days prior to primary election and reach 50,000 or more persons.**

On September 26, 2002, the Federal Election Commission (FEC) issued rules governing electioneering communications and expressly stated that any reporting obligations lie with the person or entity making the electioneering communication and, thus, not with the broadcaster airing the communication. Stations may, however, be asked by potential advertisers whether their electioneering communications will reach an audience of 50,000 or more persons.

Nearly five years later, the Supreme Court issued a decision affecting some “electioneering communications.” In *Federal Election Commission v. Wisconsin Right To Life, Inc.*, 551 U.S. (2007), the Court held that while BCRA could constitutionally ban “express advocacy” (**ads that expressly advocate the election or defeat of a candidate for federal office and the “functional equivalent” of such ads**), it found unconstitutional a ban on issue ads that did not contain express campaign speech.

Subsequently, the FEC implemented new regulations in late 2007. Electioneering communications by incorporated entities and labor unions will now be permitted, so long as they may reasonably be interpreted as something other than an appeal to vote for or against a specific candidate. For example, including the phrase Call Congressman X and tell them to vote on Bill Y in an issue ad, would no longer be subjected to a ban.

#### **Public Service Announcements**

On January 20, 2006, new rules governing “electioneering communications” went into effect. Previously, the Federal Elections Commission (FEC) had limited its regulation of “electioneering communications” to those distributed for a fee. In response to a recent court decision, however, the FEC now includes in its definition of “electioneering communications” **all** programming that is not covered by a press exemption (*i.e.*, news story, commentary, or editorial distributed through the facilities of any broadcasting station unless such facilities are owned or controlled by any political party, political committee or candidate).

This includes Public Service Announcements (PSAs) and other communications made by non-profit/section 501(c)(3) organizations.

Thus, stations should immediately put in place measures that prevent PSAs and other communications referring to (promoting, supporting, opposing, attacking) or featuring federal candidates from airing during the applicable periods.

**In addition, incorporated broadcasters may be in violation of federal election law if they air a free PSA that qualifies as an “electioneering communication.”**

**Broadcaster Tip:** The FEC encourages section 501(c)(3) organizations to provide broadcasters with either an expiration date or some indication that the PSA should not run in the applicable 30 and 60 days periods if the PSA features a federal candidate.

### **Electioneering Communications Database**

To assist in this determination, the FCC has created an Electioneering Communications Database that is available on the FCC website at <http://gullfoss2.fcc.gov/e.cd> or, alternatively, <http://svartifoss2.fcc.gov/e.cd>. The Database enables a user to determine whether a communication sent via broadcast station, cable system and/or satellite system can or cannot reach 50,000 people or more in a particular Congressional District or State.

## **CREDIT AND ADVANCE PAYMENT**

### **Credit Policies**

A broadcaster is required to extend credit to a political advertiser *only* if, under the station’s policies, the station would extend credit to a similarly situated commercial advertiser. A station can require advance payment from a political advertiser if the station’s credit policies require advance payment from a commercial entity that (1) has been established only for a temporary time or purpose; (2) has an uncertain credit history with the station; or (3) has an unstable financial condition. *Request for Ruling on Advance Payment of Political Advertising of Beth Daly, Great American Media, Inc.*, 7 FCC Rcd. 5989, 5990 (1992).

If a station extends credit to commercial advertisers no matter what their nature, credit history, or financial condition, then the station would be required to extend credit to political candidates. Also, a station can be required to extend credit to an advertising agency with respect to a candidate's account only if the agency has

accepted legal responsibility for payment of that account and the agency qualifies for credit under the station's credit policies. *Beth Daly*, 7 FCC Rcd. at 5990.

### **Advance Payment Policies**

#### **Federal Candidates**

A station may require advance payment from a federal candidate no more than seven days in advance of the airdate of the first spot in a schedule. Stations also cannot require advance payment for an entire flight of ads, so long as payment is made at least seven days before each spot is aired. This seven-day requirement, however, should not be used to prohibit federal candidate from buying time less than one week in advance if such a policy would abrogate their reasonable access or equal opportunities rights.

If a station has a policy requiring less than seven days advance payment for commercial advertisers who do not receive credit, this policy should be applied to federal candidates. *Beth Daly*, 7 FCC Rcd. at 5991.

#### **State and Local Candidates**

Non-federal candidates may be required to pay in advance in accordance with the station's normal practices for commercial advertisers to whom it does not extend credit. However, as above, a station's advance payment policies cannot prevent a state or local candidate from purchasing time as part of their equal opportunities rights.

## **GUIDE TO POLITICAL DEBATES**

### **Introduction**

The 1858 Lincoln-Douglas senatorial debates marked the first time that opposing major candidates debated in public. They met six times, using a format described by Douglas in a letter to Lincoln: "I agree to your suggestion that we shall alternately open and close the discussion. I will speak . . . for one hour, you can reply, occupying an hour and a half, and I will then follow for half an hour. We will alternate in like manner in each successive place."

The Lincoln-Douglas debates did not receive notoriety because of brilliant rhetoric or the arguments put forth by the candidates. They became famous because the mass media – telegraph wires and newspapers – provided them with a national audience. Two years later, both men opposed each other for the presidency. They held no debates. In fact, no debates of any national significance occurred for nearly a century.

That all changed with the 1960 Kennedy-Nixon TV/radio debates. (And it pointed out some of the unique differences between media: Radio listeners

believed Nixon beat JFK; TV viewers widely credited Kennedy with being the “winner.”)

Broadcast political debates have become a vital fixture in the American political process over the past four decades. Indeed, on all levels, close elections have sometimes been decided on the basis of well-publicized debates reaching large segments of the electorate via broadcast stations. Broadcasters have become leaders in their communities by sponsoring debates as a public service (which also often generates hard news and resources for later news and other programming).

While there are no fixed formulas for political debates, there are several useful points to consider while planning them for broadcast and news coverage. The following provides an overview for broadcasters on both the basics and specifics of successful sponsorship, format, and pre- and post-debate activity. Much of this chapter serves as a checklist – and an incentive for creativity – to enable broadcasters to become better able to generate practical information and background useful to the American voter.

Many broadcasters – regardless of the size and funding of their news and public affairs departments – already have experience in arranging and producing local, and perhaps state and regional debates. Individual markets, of course, have their own idiosyncrasies and their own specific problems and advantages. The points raised here are not intended necessarily to apply to all broadcasters at all times.

Whether a broadcaster is a seasoned veteran of political debates or is just beginning to feel his or her way into a new and rewarding challenge, there is at least one paramount point to remember: a well-executed debate on any level may directly affect the political opinions and perceptions of the community. Over the years, several surveys have indicated that many voters base their opinions primarily on what they hear and see from broadcast debates. Thus, the responsibility of broadcasters in today's political process is substantial. The rewards of well-managed and balanced debates can be great both for the voter and the broadcaster.

### **Broadcasters As Sponsors**

Today, broadcast stations are free to arrange, sponsor, and broadcast candidate debates with only limited government restriction.

#### ***How We Got Here***

In 1975, broadcasters were permitted to cover debates exempt from the equal opportunities restrictions, provided that the debate was arranged and sponsored by a third party (such as the League of Women Voters), and the debate was broadcast in its entirety within 24 hours of its occurrence. (This made possible the 1976 and 1980 presidential debates, as well as broadcast coverage of many debates on the state, congressional district, and local levels.)

In November 1983, the FCC expanded the Aspen Rule exemption to allow broadcasters to air debates that are not sponsored by a third party. This remains the rule today. As long as the debate is broadcast in its entirety (except, of course, for news), it may be arranged and produced by the broadcaster in the broadcaster's own studios. The only requirement is that the broadcaster must reasonably ensure that the debate is nonpartisan. It may not be structured to favor any candidate(s). Broadcasters need not air the debate live or within 24 hours. The debate will be “exempt” from equal opportunities requirements if it is broadcast within a “reasonable” time after it occurs. However, most broadcasters agree that airing a live debate makes the broadcast more interesting for audiences, most spontaneous and is just better programming.

Note that late in 1987, an FCC staff ruling held that even the broadcast of a debate sponsored and controlled by the candidates themselves can be exempt from equal opportunities requirements.

### **Why Broadcasters Should Sponsor Debates**

A wide variety of institutions – civic groups, newspapers, public stations, commercial broadcasters – have successfully sponsored or co-sponsored debates. A sponsoring group must be able to accomplish two objectives: to elicit meaningful commitments from candidates, and to stage a fair and informative debate. While no sponsor – broadcaster or nonbroadcaster – is necessarily better or worse than the other, broadcast sponsors offer unique advantages.

Two major reasons candidates cite for NOT agreeing to debate are lack of confidence in available sponsors and insufficient media interest in the proposed event. However, an invitation to debate from a sponsoring broadcaster often automatically eliminates both problems at once. (In fact, groups which have unsuccessfully tried to arrange debates often blame lack of guaranteed broadcast coverage as a chief “culprit.”)

Technologically, broadcasters are experienced at producing live programming, both remotes and studio-based. They have the technical knowledge and equipment necessary for participation in temporary “networking” for gubernatorial, senatorial, and other statewide contests.

Broadcast news departments are respected for their integrity and objectivity. They are a logical first choice for sponsoring debates, by both campaign groups and audiences.

Broadcasters have built an admirable tradition of serving their communities and regions, often in cooperation with many civic and public interest organizations. Even when broadcasters sponsor debates, they still often call upon other groups for participation and publicity.

## **Debate Formats**

When considering formats, consider a broad definition of “public interest.” Basically, the definition is fulfilled by merely seeing the candidates side by side and in a format that generates useful information about their character, policy positions, priorities, and philosophies. For the sake of maximum integrity and, quite frankly, more spontaneous responses, few debate formats include allowing candidates to know specifically (such as the questions themselves) what they will be questioned on before the debate begins. Although specific time allotments are not pertinent to several formats, fairness – both real and perceived – dictates that each candidate be given roughly equal amounts of time to make his or her points. (In less formal formats, such as roundtables, this will mean the moderator will have to exercise his or her skills at guiding the discussion among all the candidates without appearing to be either rude or obtrusive.) Regardless of the particular format chosen, remember to give audiences the specifics, briefly, of what the format will be and what other rules will apply, along with who had a part in determining those rules.

There is no single entity known as a “debate.” And as long as the debate involves a confrontation between two or more candidates and is described as a “debate” by the organizers, it will ordinarily be exempt from Section 315 equal opportunities requirements. However, there are traditional debate formats (although this should not restrict broadcasters) which have proved to be best under different circumstances and, in some cases, meet the criteria set down by candidates, panelists and sponsors.

### **The Basics**

*Collegiate.* In a classic collegiate debate, a controversial proposition is introduced. One team of speakers offers supporting proof, the other team argues against. Although each side has a chance to rebut the other, there is no direct questioning and no speaker is ever interrupted.

*Oregon Style.* The first televised debate in a presidential campaign established this Oregon formula: During the 1948 GOP Oregon presidential primary, New York Governor Thomas Dewey and former Minnesota Governor Harold Stassen each made 20-minute opening statements and followed with 8 1/2 minute rebuttals. Discussion was limited to one topic – “Whether Communism should be outlawed.”

*Presidential.* In 1960, 1976, and 1980, this format defined presidential debates. A panel of questioners interrogated candidates, with provisions made for brief opening and closing statements. It should be noted that solely the participating candidates, not the non-broadcast sponsors, chose this format. Candidates applied one basic test which often dominates debates: Which format is the “safest?”

### **Choosing the One Right for You**

When it comes to imparting useful information to the electorate, experience clearly indicates that debates with different formats can have the same results. Conversely, debates with identical formats can have very different results. The all-important variable is the candidates themselves. Regardless of format, moderator, and panelists, candidates who do not wish to engage in a lively and informative debate cannot be forced into doing so. Frustrating as it may be at times, formats and prebroadcast arrangements have only a limited effect on how informative and interesting a debate will actually be. Still, depending on a broadcaster's specific situation, the chosen format and moderator/panelists can make an otherwise dull, uninformative debate a more useful, lively program (and vice versa).

### **Panels of Questioners**

This is the most widely recognized of current formats, since it is used in the most heavily watched events of its kind - the national presidential debates. Remember, however, some of these basic “rules:”

- Having too many panelists often creates a scattered effect, and panelists will sometimes find themselves competing for time. Three to five panelists seem to work very well. Of course, the number of panelists, plus a moderator, should be considered with the number of candidates appearing. Too many participants, especially on radio, could confuse audiences and leave too little time for substantive dialogue.
- Although candidates will often seek a voice in both the selection of formats and panelists, which is understandable, they should not be given veto authority over questioners. (Common sense dictates that panelists should be chosen that both parties – sponsors and candidates – agree upon.) Some broadcasters have found it useful to submit a list of potential questioners to choose from, with broadcasters (if they are the sponsors) making the final determination. In any case, remember to provide the audience with the information on how panelists were chosen.
- At the risk of losing some spontaneity, it may be advisable for panelists to meet prior to the debate to ensure that questions are not repetitious, yet will cover most or all of the important points for the audience. Such a meeting is in no way designed to be a type of pre-debate rehearsal, and that should be made clear to panelists beforehand. Even if general questions are not reviewed, panelists should get together to review the debate's structure and format.
- Simply put, many broadcasters usually find that broadcast and print journalists make the best questioners. That should not rule out the use of civic and other non-professional questioners, and many successful

debates – from the vantage points of information and programming – have used non-journalists. But reporters usually have a better working knowledge of a broad range of issues, since their jobs require it. Others, including experts in a particular field, often have little knowledge of specific issues outside their particular area of expertise. Journalists usually ask their questions in more succinct terms. However, it all comes down to the particular people broadcasters may have to choose from in their markets. Mixed panels of both journalists and civic leaders are not a good idea, largely due to the inconsistencies listed above between both groups.

- Whether or not the panelists are journalists, remember to include women, minorities, and any other key participants, depending on the makeup of your particular audiences. Broadcast sponsors should make this a key provision for selecting panelists and make it clear when providing candidates with a possible list of panelists, if applicable. Otherwise, candidates may present those stipulations to broadcasters.
- Do not allow candidates to “let’s turn that around for a moment” with panelists, especially since candidates and panelists will often know each other personally. Questioners ask the questions; candidates answer them.
- Panelists’ follow-up questions are nearly always useful. Candidates may also be given the chance to ask follow-ups of each other, to offer rebuttals or even to have a few moments for counter-rebuttals. (The most lively and sometimes most useful portions of a debate come during these rebuttals, when a candidate must depart from standard answers.) Each candidate should be afforded the opportunity to answer any question asked of his or her opponent(s).

### **The Moderator**

Once on the air, the moderator is the captain of the ship. A good moderator can make a poor debate better and a good debate excellent. If a debate is broadcast-sponsored, it is usually advisable to designate a qualified broadcaster as moderator. Using a broadcaster as moderator will further ensure smooth sailing. A moderator usually works better alone; more than one moderator creates unnecessary, confusing, and sometimes ego-oriented problems for everyone. A lone moderator can play several roles: ask lead-off questions; guide discussions; police both candidates’ and panelists’ participation; seek clarification of positions and note distinct differences between candidates; use audience-submitted questions, if applicable; and set the tone, style, and degree of desired formality to the entire event.

A moderator may also be used as a conduit between candidates who may not wish to address especially strong remarks to one another directly. Some stations have chosen to use their most popular on-air personalities,

who may or may not be journalists, as moderators. Just remember that a moderator should have a broad knowledge of issues that could be raised in a debate. How he or she handles the role will reflect directly on your station.

### **The Candidates**

A campaign staff of a potential debate candidate will quite naturally seek the format it thinks is best suited to its candidate. Some candidates will do better than their opponents in more informal situations, where off-the-cuff and other ad-lib remarks are more possible than in more formal settings. Some candidates may feel they will come across better either on radio or TV, depending on their appearance, voice and ease before mikes, cameras and perhaps, live audiences. Choosing a format best suited for all candidates collectively, regardless of individual preferences, is the responsibility of the sponsors, which is another reason why broadcaster-sponsors work well. Broadcasters are best able to address the technical and editorial needs of candidates and of their audiences.

### **The Clock**

There simply is no set rule. There appears to be no clear relationship between the time allocated for a debate and its usefulness and information content. Longer debates do not necessarily provide better forums for audiences than shorter ones. Thirty minutes (for radio or TV) may provide ample opportunity for two or even three candidates to express their views on some key issues. Hour or 90-minute formats may also prove ideal, especially with more participants. What may be more useful for audiences, which broadcasters sometimes ignore, is not how long a debate is but *when* it is broadcast. A half-hour inside your prime time will reach far more people than two hours early Sunday morning. Broadcasters' individual programming agendas, marketplace competition and public service priorities will naturally dictate time-of-debate and length-of-debate. (However, do not make the mistake of assuming that a lengthy debate is necessary in order to cover "all the important issues." In most debates of any length, relatively few issues can ever be covered adequately.)

### **Opening and Closing Statements**

These statements can be used with virtually any format, or combination of formats, and provide each candidate with the opportunity to provide a theme for comments to follow, and to wrap-up or re-emphasize previous comments at the end of the debate. (Furthermore, if such statements are not allowed, a skilled candidate will use an early or late question to provide his "statements" anyway.) The length of such statements varies widely, from one to five minutes. Of course, determination of a specific time should correspond with the length of the entire debate. One minute for opening/closing statements makes more sense with a half-hour debate

than with a two-hour broadcast. (Three candidates, given one minute each at the top and bottom of a half-hour debate, for example, already use more than six minutes, or 20 percent of the entire debate.)

### **Public Participation, Live Audiences**

Regardless of what format is chosen for one's particular needs, a broadcaster or outside sponsor may want to incorporate public participation into the event. Public participation does not necessarily necessitate a live audience. It can be accomplished by conducting a scientific public opinion poll relating to the candidates, asking voters to send in debate questions (this can be risky if letter-writing is organized by a candidate's supporters or detractors), or simply seeking publicity for the debate through a network of civic groups, private companies and others.

Live audiences come with built-in advantages and disadvantages:

***The advantages:*** A live studio or auditorium audience can create a mood of greater importance for the debate and make it more interesting for audiences; it can provide good PR for the sponsoring broadcaster, who will literally be seen demonstrating his or her public service to the community; many candidates “perform” better before a live audience; it may necessitate leaving the confines of the studio and using a more visible, interesting debate site, such as a shopping mall, school auditorium, a hotel, theater, civic center or outdoors, downtown, during lunch hour.

***The disadvantages:*** Regardless of any ground rules laid down prior to the debate, a live audience can become a disruptive influence, especially in controversial and hotly contested races; remote sites can complicate technical production and increase chances for potential problems, especially if the broadcast is live; many TV and radio studios are not built and equipped to accommodate live audiences; some candidates may attempt to “use” a live audience to their advantage; it can be very difficult to provide a balanced, unbiased audience, even with the cooperation of trusted civic groups.

### **How Many Debates?**

For major offices, a series of debates is generally most effective, if possible, to permit fuller discussion and minimize the likelihood that any one debate will have overstated, even artificial, impact. A “series” may be as few as two, to five or more, at least a week apart. A series of debates, especially among major office seekers, should be planned many weeks, perhaps months, in advance of intended airdates.

Another form of debate series consists of one debate each for several offices, with debates spaced evenly throughout the campaign season and aired at the same times. Such a series could attract considerable attention, since it encourages the establishment of a “debate audience” through the campaign.

### **Topics**

Under certain circumstances, especially if a series of debates is planned, outlining specific subject matter (but not specific questions) may help produce a more focused, informative debate. Topics such as “law and order” or “quality of public education” should provide more useful information than a more general debate. Or, should two or more candidates clearly hold widely differing opinions on a topic of public interest, the issue could be raised as a proposition which could be part of a debate, or a debate unto itself. (If there is only one major debate, it can be divided into topic subsections.)

### **Live Broadcasts**

Regardless of the pros and cons of having an audience, live broadcasts create an irreplaceable sense of immediacy, while contributing to the debate's impact and newsworthiness. Even when candidates cannot appear physically side by side (Kennedy and Nixon were 3,000 miles apart during one 1960 encounter), live is always better. Live is “as it’s happening,” “anything can happen,” “no one knows whether a candidate might make it or break it with a worthy quote or slip of the tongue.” Live makes the debate an event. Tape-delayed makes it a program, often where any highlights have already been fully reported in the press. A delayed debate is better than no debate. A live debate is best.

### **Candidate Participation**

Major candidates are obvious; including or excluding minor and/or independent candidates may be the broadcaster's most difficult (and important) decision. Basically, there are no simple rules or guidelines to determine whether or not a certain candidate should be included in a debate with major party candidates (or with other minor candidates), if at all. Making the decision whether to include a minor candidate is made especially difficult by the fact that many of these candidates assert that the only real access they have to the electorate *are* broadcast debates. At the same time, if they are invited to participate with major candidates, many of them use that factor as an indication of their “significance” as a candidate. A good faith journalistic decision on the part of a broadcaster is unlikely to be overturned by the FCC.

In some states, a candidate must receive a certain number of petition names in order to appear on the ballot. “Appearance on the ballot” is often used by broadcasters as a determining factor.

If minor party or independents are not invited to appear with “major” candidates, a separate debate can be aired, featuring the minor candidates. Although these candidates may wish to be included with the major ones, too many candidates in

one debate is a problem, and a separate debate still may provide minor candidates with the largest audience they will enjoy at any time during the campaign.

## **Negotiations: Setting It Up**

### **Scheduling the Debate**

There is little evidence to suggest that any particular days are better than others for a broadcast debate. However, the time of day you schedule it will be an indication to many of how committed your station is to providing this special programming to the greatest number of people. Although mornings are widely considered prime time for radio, and evenings for TV, stations who have sponsored several debates in past years have reported good audience response by airing debates at a variety of times, especially when vigorously promoted. Favorite times for radio appear to be noon and early- to mid-evening weekdays, and any time weekends other than very early morning and very late night. For television, just prior to or just inside prime time evening hours, weeknights and weekends are better times. There will be exceptions depending on local competition and market rates.

Be aware of voter registration deadlines; at least one major debate prior to the deadline may be beneficial. (In most states, registration is allowed until about one month before Election Day.) In any case, timing is everything and debates should always be conducted in a timely manner to complement election year activities. Although candidates' schedules and station programming will play a major role in determining optimum air times, planning as far in advance as possible will help ensure different options. And remember, the candidates usually want a time that will reach the greatest number of voters.

### **Flexibility**

Circumstances can change very quickly in any campaign on any level and sponsors must recognize the candidates' legitimate concerns as well as their own. Whether or not to debate, and under what specific circumstances, may be the most important decision a candidate will make until Election Day. Traditionally, candidates wish to pursue predictability and avoid unnecessary risks, embarrassment and negative publicity.

Many candidates will prove to be tough bargainers, and as in many political environments, campaigns may provide broadcast sponsors with a set of "giveaways," which they will be more than willing to abandon for "compromises" they really do want. When the public interest and journalistic integrity are not at stake, the broadcast sponsor should leave all non-essential matters for the candidates themselves to agree upon. This may include such details as whether to permit notetaking, use of charts and documents on-air, the order of participation and the use of TelePrompters for TV.

### **Ground Rules**

Ultimately, broadcast sponsors must set the ground rules and control events, in the public interest. The broadcast sponsor should make major decisions, where there may be conflict. This may include whether to include a studio or remote site audience, whether to allow follow-up, attempted restrictions on subject matter and who will moderate. In any case, ground rules should always be agreed upon as far in advance of the debate as possible, so that in allowing or disallowing certain requests, a broadcaster will not appear to be taking sides.

Take note: One key point that requires clarification during negotiations is whether candidates will be allowed to use excerpts from the debate itself in later paid campaign commercials. (Some candidates may even request purchasing time to rebroadcast the entire debate.) Be certain these and other points of interest are fully examined and ruled upon as part of the early ground rules. The decision on possible use of debate material by a candidate should be consistent with your news policy for all other news events, and most news policies would forbid such usage.

Should a candidate back off a commitment to appear, especially at the last minute, it is not advisable to bring too much pressure to either push, coerce or shame a candidate back into the debate. Some may view such “coercion” as an undesirable intrusion into the electoral process. Furthermore, it is not the duty of a broadcast sponsor to push anyone into a debate that he or she, for whatever reason, refuses to participate in, or even withdraws from. (Yet remember that should a candidate refuse to appear in a debate after conscientious efforts are made to satisfy the candidate’s needs, the absent candidate has no legitimate claim to “equal opportunities” so long as what airs is still a “debate,” with more than one candidate participating.) As a precaution, always have back up programming ready for broadcast, should technical or other reasons necessitate an unforeseen postponement or cancellation of the debate.

### **Good Rapport from the Start**

The most effective way to elicit meaningful debate commitments as the broadcast sponsor is to win the candidates' trust from the very beginning. Contacts with respective campaign staffs should begin well in advance of a desired debate date, and all parties in negotiations should be kept regularly informed of developments, options and other details. If campaign staff trust a broadcast sponsor - which is not always the case at first - many problems can be avoided quickly and relatively painlessly. The line of authority should be clearly drawn at the first meeting of the minds. Candidates must know who is calling the shots and to whom to speak when questions and potential problems arise.

To be better attuned to what may be required or demanded by participants, sponsors should begin with their own basic assessment of the political situation: Is the election close? Is there a wide gap in name recognition? Have there been previous debates, perhaps not aired or sponsored by a broadcaster? Is an incumbent perceived as popular enough that *not* to debate may be his or her initial strategy? Is there competition from other potential sponsors for similar debates? How much public interest is there in the contest?

## **Community Outreach**

### **Before the Debate**

Depending on station resources and market size, there are numerous ways to generate interest (that is, an audience) and favorable PR for your station as sponsor prior to the debate itself. Some controversial or particularly interesting races will generate their own publicity through the normal course of news coverage and other general media attention. Get the word out – to other media, schools, civic groups, and political organizations – as soon as possible of the specifics of your station's debate plans. And, of course, on-air promos and print advertising will further heighten awareness. Publicize the debate as much as possible outside routine channels, to pick up non-regular station audiences.

In addition, outreach programs, such as education packets for elementary and high school students, can be valuable. Lesson plans, activities based on elections and citizenship, critical viewing guides, questions for discussion and reading lists can be included. The major expense is the printing itself, in most cases, for which federal candidate debates can be shared or paid for by local (unincorporated) companies, non-partisan civic groups, and/or others wishing to promote election-year education and civic participation. (With regard to debates involving candidates for federal office, the FEC advises that corporations, national banks, and labor unions may contribute funds for such activities outlined in this paragraph only so long as the debate is sponsored by a non-partisan, non-profit organization and funds are contributed directly to the sponsoring group.) Check to see if there are state laws restricting the sources of financial support for debates.

### **Day-of-Debate Media Coverage**

Encourage competing broadcast and print media to cover the debate at the debate site itself, since on-site coverage often leads to more coverage, especially when other media have access to the candidates following the broadcast. When reporters cannot make it to the debate site, provide them with the specifics to allow them to watch or listen to the broadcast. Coverage of “your” debate, even if competing media play down sponsorship, will be coverage of your station's community involvement. The credibility that comes with such coverage can never be purchased or achieved through self-promotion. (Remember: more people will hear or see highlights of debate via

collective news coverage from competing media than will actually see or hear the debate itself.)

### **Day-of-Debate Specifics**

- Provide multiple boxes for audio, camera platform or designated area for TV and still cameras, and arrange to provide media access to the candidates *after* the broadcast. Avoid allowing media meetings with candidates just prior to the broadcast and do not permit videocam or still photographers to roam throughout the studio or remote site while the debate is being aired. If you, as the sponsoring station, provide tape of the debate to another station for news purposes, require “on-air station attribution.”
- If a studio or remote site audience is part of the game plan, have the audience in place at least 30 minutes prior to airtime, and brief them on ground rules both for the candidates and themselves – avoid moving around, leaving, talking, applauding, etc. – during the broadcast.
- When possible, the moderator, director, or producer should provide a last-minute briefing of ground rules for candidates *away* from the audience, should any problems arise that discussing them in front of the audience might be uncomfortable to handle.
- Whether you plan a studio or remote site debate, you may wish to employ some type of low-key but noticeable security, such as off-duty uniformed police officer(s).
- For radio debates, avoid using stand mikes; use suspended mikes, whenever possible, and have carpeted or felt-covered tables. Both precautions will help avoid audio problems. Candidates have been known to fidget with mike stands and tap their fingers on acoustically untreated tabletops.
- Use a station banner, logo, or other fixture to enhance chances of newspaper and TV pictures picking up your call letters or logo in subsequent news coverage. Remember to use mike flags.
- When possible, provide a room adjacent to the set, studio or remote site for use by candidates' staff and media, preferably within visible range of the debate itself. (For radio, only on-air participants and perhaps a director and/or a station "troubleshooter" should be inside the studio.)
- For radio, avoid placing candidates directly side-by-side, since they may have a tendency to turn to speak directly to someone and be off-mike. Participants who will usually be addressing certain other participants should be able to see one another without turning their heads.

### **After the Debate**

Do not be hesitant to provide complete news highlights of a station-sponsored debate. Treat it as any other news story or debate from another source.

Consider re-broadcasting the entire debate, should the debate itself prove to be controversial or of unusual interest after the fact. Also, if the debate is broadcast live at a time less desirable than preferred, consider repeating the debate at a better time, even if it is within the same broadcast day. (For example, a live one-hour debate at noon may reach a larger and different audience if re-broadcast at 7 p.m. that night.)

Audio/video tapes of the debates (and, when possible, transcripts) should be either kept in station archives or library, and perhaps donated to a local library and/or university. Data from public opinion polls and other debate-related activities can also be included.

## **NON-COMMERCIAL STATIONS**

### **Equal Opportunities**

Non-commercial stations must provide equal opportunities to candidates in the same manner as commercial stations. *See supra* page 23 for a discussion on Equal Opportunities.

### **Non-Commercial Educational Stations**

Under provisions of the Commission's rules, non-commercial educational stations operating on channels reserved for non-commercial educational use are not permitted to charge for time – for political broadcasts or otherwise.

In 2000, Congress exempted non-commercial stations from the reasonable access requirement. Specifically, Congress amended Section 312(a)(7) of the Communications Act to include the following provision “The Federal Communications Commission shall take no action against any non-commercial educational broadcast station which declines to carry a political advertisement.”

### **Non-Commercial Stations and/or Nonprofit Stations**

Non-commercial stations that are operating on unreserved channels and nonprofit stations that are not educational (*e.g.*, those offering religious broadcasting) may charge for political broadcast time if their charters or articles of incorporation permit them to make time charges, although it is their policy normally not to charge for any time.

If they do charge, notice must be given to the Commission of this change in operation. The lowest unit charge provisions cannot apply to such stations because they have no rates on which to base such a charge. However, any

charges made must be reasonable when viewed in light of charges made by commercial stations in the same broadcast service licensed to serve the same community. If the charges made by nonprofit stations are unduly high, it is conceivable that they might be construed as an attempt to circumvent the reasonable access provisions.

Note that the implications of switching to commercial operation to sell time are unclear. Such changes may subject stations to all regulations applicable to commercial stations. The FCC does not appear to have ruled on this issue. Stations are urged to consult with their own attorney before engaging in such changes.

### **Charges for Production-Oriented Services**

Non-commercial educational stations and nonprofit stations, whether giving free time for political broadcasts or charging for such time, may make necessary charges for production-oriented services. Typically, these types of charges are for use of a television studio, audio or video taping, or line charges and remote technical crew charges when the broadcast is to be picked up outside the station. *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 530 (1972).

## FAIRNESS DOCTRINE AND ZAPPLE DOCTRINE

### **Fairness Doctrine**

The Fairness Doctrine obligated broadcasters to afford reasonable opportunity for the discussion of conflicting views on controversial issues of public importance. The FCC in 1987 decided to no longer enforce the Fairness Doctrine, concluding that it violated the First Amendment and did not serve the public interest. *See In re Syracuse Peace Council*, 2 FCC Rcd 5043 (1987), *affirmed*, *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

In addition, two remnants of the Fairness Doctrine – the Personal Attack Rule and the Political Editorial Rule – were repealed in 2000 by court mandate. The personal attack rule required that “[w]hen, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall” provide the person or group attacked a tape or transcript, and a reasonable opportunity to respond. 47 C.F.R. § 73.1920 (1999). The political editorial rule mandated that “[w]here a licensee, in an editorial, [e]ndorses or [o]pposes a legally qualified candidate or candidates, the licensee shall” provide the other qualified candidates for the same office with a tape or transcript, and a reasonable opportunity to respond. 47 C.F.R. § 73.1930 (1999).

NAB began in 1980 an effort to obtain repeal of the Personal Attack and Political Editorial rules. After 20 years, the federal appeals court in Washington, D.C. ordered the FCC to repeal those rules. *See RTNDA and NAB v. FCC*, 229 F.3d 269 (D.C. Cir. 2000). The FCC complied with this order and repealed the two rules on October 26, 2000. *See Order* in MM Docket No. 83-484, 15 FCC Rcd 20697 (2000).

### **Zapple Doctrine**

In 1970, the FCC adopted the *Zapple* doctrine which required stations to provide “quasi-equal opportunities” when supporters of one candidate appeared on a station. *Zapple* was based on the Fairness Doctrine. Because the Fairness Doctrine has been repealed by the FCC and its various applications held invalid in court, NAB believes that *Zapple* is no longer valid. The FCC, however, has not ruled on the question and stations facing *Zapple* requests should consult with communications counsel. For the same reason, appearances by candidates’ spouses or children should not result in any obligations to opposing campaigns. As a matter of journalistic integrity, stations may wish to require that employees who are supporters of candidates refrain from promoting their campaigns on air.

## **APPENDICES**

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### **COMMUNICATIONS ACT SECTIONS**

#### **§ 312. Administrative Sanctions**

(a) Revocation of station license or construction permit

The Commission may revoke any station license or construction permit –

(1) – (6) . . .

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station, other than a non-commercial educational broadcast station, by a legally qualified candidate for Federal elective office on behalf of his candidacy.

(b) – (e) . . .

(f) “Willful” and” “repeated”

For purposes of this section:

(1) The term “willful”, when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States.

(2) The term “repeated”, when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.

#### **§ 315. Candidates for Public Office**

(a) Equal opportunities requirement; censorship prohibition; allowance of station use; news appearances exception; public interest; public issues discussion opportunities

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any --

- (1) bona fide newscast,
- (2) bona fide news interview,
- (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
- (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) Charges

(1) In general

The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed--

- (A) subject to paragraph (2), during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and
- (B) at any other time, the charges made for comparable use of such station by other users thereof.

(2) Content of broadcasts

(A) In general

In the case of a candidate for Federal office, such candidate shall not be entitled to receive the rate under paragraph (1)(A) for the use of any broadcasting station unless the candidate provides written certification to the broadcast station that the candidate (and any authorize committee of the candidate) shall not make any direct reference to another candidate for the same office, in any broadcast using the rights and conditions of access under this chapter, unless such reference meets the requirements of subparagraph (C) or (D).

(B) Limitation on charges

If a candidate for Federal office (or any authorized committee of such candidate) makes a reference described in subparagraph (A) in any broadcast that does not meet the requirements of subparagraph (C) or (D), such candidate shall not be entitled to receive the rate under paragraph (1)(A) for such broadcast or any other broadcast during any portion of the 45-day and 60-day periods described in

paragraph (1)(A), that occur on or after the date of such broadcast, for election to such office.

(B) Television broadcasts

A candidate meets the requirements of this subparagraph if, in the case of a television broadcast, at the end of such broadcast there appears simultaneously, for a period no less than 4 seconds--

- (i) a clearly identifiable photographic or similar image of the candidate; and
- (ii) a clearly readable printed statement, identifying the candidate and stating that the candidate has approved the broadcast and that the candidate's authorized committee paid for the broadcast.

(C) Radio broadcasts

A candidate meets the requirements of this subparagraph if, in the case of a radio broadcast, the broadcast includes a personal audio statement by the candidate that identifies the candidate, the office the candidate is seeking, and indicates that the candidate has approved the broadcast.

(D) Certification

Certifications under this section shall be provided and certified as accurate by the candidate (or any authorized committee of the candidate) at the time of purchase.

(E) Definitions

For purposes of this paragraph, the terms "authorized committee" and "Federal office" have the meanings given such terms by section 431 of Title 2.

(c) Definitions

For purposes of this section--

- (1) the term "broadcasting station" includes a community antenna television system; and
- (2) the terms "licensee" and "station licensee" when used with respect to a community antenna television system mean the operator of such system.

(d) Rules and regulations

The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

(e) Political record

(1) In general

A licensee shall maintain, and make available for public inspection, a complete record of a request to purchase broadcast time that--

- (A) is made by or on behalf of a legally qualified candidate for public office; or
- (B) communicates a message relating to any political matter of national importance, including--
  - (i) a legally qualified candidate;
  - (ii) any election to Federal office; or
  - (iii) a national legislative issue of public importance.

(2) Contents of record

A record maintained under paragraph (1) shall contain information regarding--

- (A) whether the request to purchase broadcast time is accepted or rejected by the licensee;
- (B) the rate charged for the broadcast time;
- (C) the date and time on which the communication is aired;
- (D) the class of time that is purchased;
- (E) the name of the candidate to which the communication refers and the office to which the candidate is seeking election, the election to which the communication refers, or the issue to which the communication refers (as applicable);
- (F) in the case of a request made by, or on behalf of, a candidate, the name of the candidate, the authorized committee of the candidate, and the treasurer of such committee; and
- (G) in the case of any other request, the name of the person purchasing the time, the name, address, and phone number of a contact person for such person, and a list of the chief executive officers or members of the executive committee or of the board of directors of such person.

(3) Time to maintain file

The information required under this subsection shall be placed in a political file as soon as possible and shall be retained by the licensee for a period of not less than 2 years.

**§ 317. Announcement of Payment for Broadcast**

(a) Disclosure of person furnishing

(1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: *Provided*, That "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.

(2) Nothing in this section shall preclude the Commission from requiring that an appropriate announcement shall be made at the time of the broadcast in the case of any political program or any program involving the discussion of any controversial issue for which any films, records, transcriptions, talent, scripts, or other material or service of any kind have been furnished, without charge or at a nominal charge, directly or indirectly, as an inducement to the broadcast of such program.

(b) Disclosure to station of payments

In any case where a report has been made to a radio station, as required by section 508 of this title, of circumstances which would have required an announcement under this section had the consideration been received by such radio station, an appropriate announcement shall be made by such radio station.

(c) Acquiring information from station employees

The licensee of each radio station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any program or program matter for broadcast, information to enable such licensee to make the announcement required by this section.

(d) Waiver of announcement

The Commission may waive the requirement of an announcement as provided in this section in any case or class of cases with respect to which it determines that the public interest, convenience, or necessity does not require the broadcasting of such announcement.

(e) Rules and regulations

The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

## FCC RULES

### **47 C.F.R. § 73.1212. Sponsorship Identification; List Retention; Related Requirements.**

(a) When a broadcast station transmits any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such station, the station, at the time of the broadcast, shall announce:

- (1) That such matter is sponsored, paid for, or furnished, either in whole or in part, and
- (2) By whom or on whose behalf such consideration was supplied: *Provided, however,* That "service or other valuable consideration" shall not include any service or property furnished either without or at a nominal charge for use on, or in connection with, a broadcast unless it is so furnished in consideration for an identification of any person, product, service, trademark, or brand name beyond an identification reasonably related to the use of such service or property on the broadcast.
  - (i) For the purposes of this section, the term "sponsored" shall be deemed to have the same meaning as "paid for."
  - (ii) In the case of any television political advertisement concerning candidates for public office, the sponsor shall be identified with letters equal to or greater than four percent of the vertical picture height that air for not less than four seconds.

(b) The licensee of each broadcast station shall exercise reasonable diligence to obtain from its employees, and from other persons with whom it deals directly in connection with any matter for broadcast, information to enable such licensee to make the announcement required by this section.

(c) In any case where a report has been made to a broadcast station as required by section 507 of the Communications Act of 1934, as amended, of circumstances which would have required an announcement under this section had the consideration been received by such broadcast station, an appropriate announcement shall be made by such station.

(d) In the case of any political broadcast matter or any broadcast matter involving the discussion of a controversial issue of public importance for which any film, record,

transcription, talent, script, or other material or service of any kind is furnished, either directly or indirectly, to a station as an inducement for broadcasting such matter, an announcement shall be made both at the beginning and conclusion of such broadcast on which such material or service is used that such film, record, transcription, talent, script, or other material or service has been furnished to such station in connection with the transmission of such broadcast matter: *Provided, however,* That in the case of any broadcast of 5 minutes' duration or less, only one such announcement need be made either at the beginning or conclusion of the broadcast.

(e) The announcement required by this section shall, in addition to stating the fact that the broadcast matter was sponsored, paid for or furnished, fully and fairly disclose the true identity of the person or persons, or corporation, committee, association or other unincorporated group, or other entity by whom or on whose behalf such payment is made or promised, or from whom or on whose behalf such services or other valuable consideration is received, or by whom the material or services referred to in paragraph (d) of this section are furnished. Where an agent or other person or entity contracts or otherwise makes arrangements with a station on behalf of another, and such fact is known or by the exercise of reasonable diligence, as specified in paragraph (b) of this section, could be known to the station, the announcement shall disclose the identify of the person or persons or entity on whose behalf such agent is acting instead of the name of such agent. Where the material broadcast is political matter or matter involving the discussion of a controversial issue of public importance and a corporation, committee, association or other unincorporated group, or other entity is paying for or furnishing the broadcast matter, the station shall, in addition to making the announcement required by this section, require that a list of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association or other unincorporated group, or other entity shall be made available for public inspection at the location specified by the licensee under § 73.3526 of this chapter. If the broadcast is originated by a network, the list may, instead, be retained at the headquarters office of the network or at the location where the originating station maintains its public inspection file under § 73.3526 of this chapter. Such lists shall be kept and made available for a period of two years.

(f) In the case of broadcast matter advertising commercial products or services, an announcement stating the sponsor's corporate or trade name, or the name of the sponsor's product, when it is clear that the mention of the name of the product constitutes a sponsorship identification, shall be deemed sufficient for the purpose of this section and only one such announcement need be made at any time during the course of the broadcast.

(g) The announcement otherwise required by section 317 of the Communications Act of 1934, as amended, is waived with respect to the broadcast of "want ad" or classified advertisements sponsored by an individual. The waiver granted in this paragraph shall not extend to a classified advertisement or want ad sponsorship by any form of business enterprise, corporate or otherwise. Whenever sponsorship announcements are omitted pursuant to this paragraph, the licensee shall observe the following conditions:

- (1) Maintain a list showing the name, address, and (where available) the telephone number of each advertiser;
  - (2) Make this list available to members of the public who have a legitimate interest in obtaining the information contained in the list. Such list must be retained for a period of two years after broadcast.
- (h) Any announcement required by section 317(b) of the Communications Act of 1934, as amended, is waived with respect to feature motion picture film produced initially and primarily for theatre exhibition.

NOTE: The waiver heretofore granted by the Commission in its Report and Order adopted November 16, 1960 (FCC 60-1369; 40 F.C.C. 95), continues to apply to programs filmed or recorded on or before June 20, 1963, when § 73.654, the predecessor television rule, went into effect.

- (i) Commission interpretations in connection with the provisions of the sponsorship identification rules are contained in the Commission's Public Notice, entitled "Applicability of Sponsorship Identification Rules," dated May 6, 1963 (40 F.C.C. 141), as modified by Public Notice, dated April 21, 1975 (FCC 75-418). Further interpretations are printed in full in various volumes of the Federal Communications Commission Reports.

### **47 C.F.R. § 73.1940 Legally Qualified Candidates for Public Office.**

- (a) A legally qualified candidate for public office is any person who:
- (1) Has publicly announced his or her 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 met the qualifications set forth in either paragraph (b), (c), (d), or (e) of this section.
- (b) A person seeking election to any public office including that of President or Vice President of the United States, or nomination for any public office except that of President or Vice President, by means of a primary, general or special election, shall be considered a legally qualified candidate if, in addition to meeting the criteria set forth in paragraph (a) of this section, that person:
- (1) Has qualified for a place on the ballot; or
  - (2) Has publicly committed himself or herself to seeking election by the write-in method and is eligible under applicable law to be voted for by sticker, by writing in his or her name on the ballot or by other method, and makes a substantial showing that he or she is a bona fide candidate for nomination or office.
- (c) A person seeking election to the office of President or Vice President of the United States shall, for the purposes of the Communications Act and the rules in 47 CFR

chapter I, be considered legally qualified candidates only in those States or territories (or the District of Columbia) in which they have met the requirements set forth in paragraphs (a) and (b) of this section: Except, that any such person who has met the requirements set forth in paragraphs (a) and (b) of this section in at least 10 States (or 9 and the District of Columbia) shall be considered a legally qualified candidate for election in all States, territories, and the District of Columbia for the purposes of this Act.

- (d) A person seeking nomination to any public office, except that of President or Vice President of the United States, by means of a convention, caucus or similar procedure, shall be considered a legally qualified candidate if, in addition to meeting the requirements set forth in paragraph (a) of this section, that person makes a substantial showing that he or she is a bona fide candidate for such nomination: Except, that no person shall be considered a legally qualified candidate for nomination by the means set forth in this paragraph prior to 90 days before the beginning of the convention, caucus or similar procedure in which he or she seeks nomination.
- (e) A person seeking nomination for the office of President or Vice President of the United States shall, for the purposes of the Communications Act and the rules there under, be considered a legally qualified candidate only in those States or territories (or the District of Columbia) in which, in addition to meeting the requirements set forth in paragraph (a) of this section:
- (1) He or she, or proposed delegates on his or her behalf, have qualified for the primary or Presidential preference ballot in that State, territory or the District of Columbia; or
  - (2) He or she has made a substantial showing of a bona fide candidacy for such nomination in that State, territory or the District of Columbia; except, that any such person meeting the requirements set forth in paragraphs (a)(1) and (2) of this section in at least 10 States (or 9 and the District of Columbia) shall be considered a legally qualified candidate for nomination in all States, territories and the District of Columbia for purposes of this Act.
- (e) The term "substantial showing" of a bona fide candidacy as used in paragraphs (b), (d) and (e) of this section means evidence that the person claiming to be a candidate has engaged to a substantial degree in activities commonly associated with political campaigning. Such activities normally would include making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee, and establishing campaign headquarters (even though the headquarters in some instances might be the residence of the candidate or his or her campaign manager). Not all of the listed activities are necessarily required in each case to demonstrate a substantial showing, and there may be activities not listed herein which would contribute to such a showing.

## **47 C.F.R. § 73.1941 Equal Opportunities**

- (a) *General requirements.* Except as otherwise indicated in § 73.1944, no station licensee is required to permit the use of its facilities by any legally qualified candidate for public office, but if any licensee shall permit any such candidate to use its facilities, it shall afford equal opportunities to all other candidates for that office to use such facilities. Such licensee shall have no power of censorship over the material broadcast by any such candidate. Appearance by a legally qualified candidate on any:
- (1) Bona fide newscast;
  - (2) Bona fide news interview;
  - (3) Bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary); or
  - (4) On-the-spot coverage of bona fide news events (including, but not limited to political conventions and activities incidental thereto) shall not be deemed to be use of broadcasting station. (section 315(a) of the Communications Act.)
- (b) *Uses.* As used in this section and § 73.1942, the term "use" means a candidate appearance (including by voice or picture) that is not exempt under paragraphs 73.1941 (a)(1) through (a)(4) of this section.
- (c) *Timing of request.* A request for equal opportunities must be submitted to the licensee within 1 week of the day on which the first prior use giving rise to the current right of equal opportunities occurred: Provided, however, That where the person was not a candidate at the time of such first prior use, he or she shall submit his or her request within 1 week of the first subsequent use after he or she has become a legally qualified candidate for the office in question.
- (d) *Burden of proof.* A candidate requesting equal opportunities of the licensee or complaining of noncompliance to the Commission shall have the burden of proving that he or she and his or her opponent are legally qualified candidates for the same public office.
- (f) *Discrimination between candidates.* In making time available to candidates for public office, no licensee shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any licensee make any contract or other agreement which shall have the effect of permitting any legally qualified candidate for any public office to broadcast to the exclusion of other legally qualified candidates for the same public office.

## **47 C.F.R. § 73.1942 Candidate Rates.**

(a) Charges for use of stations. The charges, if any, made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his or her campaign for nomination for election, or election, to such office shall not exceed:

(1) During the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period.

(i) A candidate shall be charged no more per unit than the station charges its most favored commercial advertisers for the same classes and amounts of time for the same periods. Any station practices offered to commercial advertisers that enhance the value of advertising spots must be disclosed and made available to candidates on equal terms. Such practices include but are not limited to any discount privileges that affect the value of advertising, such as bonus spots, time-sensitive make goods, preemption priorities, or any other factors that enhance the value of the announcement.

(ii) The Commission recognizes non-preemptible, preemptible with notice, immediately preemptible and run-of-schedule as distinct classes of time.

(iii) Stations may establish and define their own reasonable classes of immediately preemptible time so long as the differences between such classes are based on one or more demonstrable benefits associated with each class and are not based solely upon price or identity of the advertiser. Such demonstrable benefits include, but are not limited to, varying levels of preemption protection, scheduling flexibility, or associated privileges, such as guaranteed time-sensitive make goods. Stations may not use class distinctions to defeat the purpose of the lowest unit charge requirement. All classes must be fully disclosed and made available to candidates.

(iv) Stations may establish reasonable classes of preemptible with notice time so long as they clearly define all such classes, fully disclose them and make available to candidates.

(v) Stations may treat non-preemptible and fixed positions as distinct classes of time provided that stations articulate clearly the differences between such classes, fully disclose them, and make them available to candidates.

(vi) Stations shall not establish a separate, premium-period class of time sold only to candidates. Stations may sell higher-priced non-preemptible or fixed time to candidates if such a class of time is made available on a *bona fide* basis to both candidates and commercial advertisers, and provided such class is not functionally equivalent to any lower-priced class of time sold to commercial advertisers.

(vii) [Reserved]

(viii) Lowest unit charge may be calculated on a weekly basis with respect to time that is sold on a weekly basis, such as rotations through particular programs or dayparts. Stations electing to calculate the lowest unit charge by such a method must include that calculation all rates for all announcements scheduled in the rotation, including announcements aired under long-term advertising contracts. Stations may implement rate increases during election periods only to the extent that such increases constitute "ordinary business practices," such as seasonal program changes or changes in audience ratings.

(ix) Stations shall review their advertising records periodically throughout the election period to determine whether compliance with this section requires that candidates receive rebates or credits. Where necessary, stations shall issue such rebates or credits promptly.

(x) Unit rates charged as part of any package, whether individually negotiated or generally available to all advertisers, must be included in the lowest unit charge calculation for the same class and length of time in the same time period. A candidate cannot be required to purchase advertising in every program or daypart in a package as a condition for obtaining package unit rates.

(xi) Stations are not required to include non-cash promotional merchandising incentives in lowest unit charge calculations; provided, however, that all such incentives must be offered to candidates as part of any purchases permitted by the licensees. Bonus spots, however, must be included in the calculation of the lowest unit charge calculation.

(xii) Make goods, defined as the rescheduling of preempted advertising, shall be provided to candidates prior to election day if a station has provided a time-sensitive make good during the year preceding the pre-election periods, prospectively set forth in paragraph (a)(1) of this section, to any commercial advertiser who purchased time in the same class.

(xiii) Stations must disclose and make available to candidates any make good policies provided to commercial advertisers. If a station places a make good for any commercial advertiser or other candidate in a more valuable program or daypart, the value of such make good must be included in the calculation of the lowest unit charge for that program or daypart.

(2) At any time other than the respective periods set forth in paragraph (a)(1) of this section, stations may charge legally qualified candidates for public office no more than the charges made for comparable use of the station by commercial advertisers. The rates, if any, charged all such candidates for the same office shall be uniform and shall not be rebated by any means, direct or indirect. A candidate shall be charged no more than the rate the station would charge for comparable commercial advertising. All discount privileges otherwise offered by a station to commercial advertisers must be disclosed and made available upon equal terms to all candidate for public office.

- (b) If a station permits a candidate to use its facilities, the station shall make all discount privileges offered to commercial advertisers, including the lowest unit charges for each class and length of time in the same time period, and all corresponding discount privileges, available upon equal terms to all candidates. This duty includes an affirmative duty to disclose to candidates information about rates, terms conditions and all value-enhancing discount privileges offered to commercial advertisers. Stations may use reasonable discretion in making the disclosure; provided, however, that the disclosure includes, at a minimum, the following information:
- (1) A description and definition of each class of time available to commercial advertisers sufficiently complete to allow candidates to identify and understand what specific attributes differentiate each class;
  - (2) A description of the lowest unit charge and related privileges (such as priorities against preemption and make goods prior to specific deadlines) for each class of time offered to commercial advertisers;
  - (3) A description of the station's method of selling preemptible time based upon advertiser demand, commonly known as the "current selling level," with the stipulation that candidates will be able to purchase at these demand-generated rates in the same manner as commercial advertisers;
  - (4) An approximation of the likelihood of preemption for each kind of preemptible time; and
  - (5) An explanation of the station's sales practices, if any, that are based on audience delivery, with the stipulation that candidates will be able to purchase this kind of time, if available to commercial advertisers.
- (c) Once disclosure is made, stations shall negotiate in good faith to actually sell time to candidates in accordance with the disclosure.
- (d) This rule (§ 73.1942) shall not apply to any station licensed for non-commercial operation.

### **47 C.F.R. § 73.1943 Political File.**

- (a) Every licensee shall keep and permit public inspection of a complete and orderly record (political file) of all requests for broadcast time made by or on behalf of a candidate for public office, together with an appropriate notation showing the disposition made by the licensee of such requests, and the charges made, if any, if the request is granted. The "disposition" includes the schedule of time purchased, when spots actually aired, the rates charged, and the classes of time purchased.
- (b) When free time is provided for use by or on behalf of candidates, a record of the free time provided shall be placed in the political file.
  - (b) All records required by this paragraph shall be placed in the political file as soon as possible and shall be retained for a period of two years. As soon as possible means immediately absent unusual circumstances.

**47 C.F.R. § 73.1944 Reasonable Access.**

(a) Section 312(a)(7) of the Communications Act provides that the Commission may revoke any station license or construction permit for willful or repeated failure to allow reasonable access to, or to permit purchase of, reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

(b) *Weekend access.* For purposes of providing reasonable access, a licensee shall make its facilities available for use by federal candidates on the weekend before the election if the licensee has provided similar access to commercial advertisers during the year preceding the relevant election period. Licensees shall not discriminate between candidates with regard to weekend access.

## ANSWERS TO “QUIZ YOURSELF” SECTIONS

### LEGALLY QUALIFIED CANDIDATES

- (1) **False.** In some states, individuals may campaign for the position of delegate to a party convention. Although their names may appear on the ballot, it has been held that such positions are not a “public office.” Thus, “candidates” for the position of delegates in these states are not candidates for public office and are not, therefore, entitled to the rights afforded to legally qualified candidates for public office described by federal law. Be sure to check your local laws on this point, as these laws may differ from federal law.
- (2) **Probably False.** A person is legally qualified once she has announced her intention to run for office and is qualified under the applicable local, state or federal law to hold the office, and has qualified for a place on the ballot. Announcing an intention to seek reelection one year from the election date may be considered too soon for qualification on the ballot under the applicable law. Additionally, a person seeking *nomination* for any public office (except President and Vice President) by means of a *convention* or *caucus* is legally qualified 90 days before the beginning of the caucus or convention.
- (3) **Probably True.** As above, a legally qualified candidate is one that is qualified to hold the office, qualified for a place on the ballot, and has publicly announced his intention to run for the office. Announcing his or her candidacy over the Internet is likely a valid form of public announcement. Thus, if the other requirements are met, the candidate is legally qualified.

### “USES” OF A BROADCAST FACILITY

- (1) **True.** Whenever a legally qualified candidate appears in a non-exempt program, that would be a “use” subject to equal opportunities, so long as the appearance is positive. *Political Programming Policies*, 9 FCC Rcd. 651 (1994). The appearance does not have to relate to the election or be under the control of the candidate. The station would have to make note of the “free” time in its political file, and the candidate’s opponent would have the right to request “free” equal opportunities.
- (2) **False.** Under the old FCC definition, any appearance by a candidate in an advertisement would trigger equal opportunities requirements. However, under the refined definition, those appearances must be “positive.” Therefore, an advertisement that casts a candidate in a negative light is, by definition, not a “positive appearance.”
- (3) **Probably false.** The FCC has indicated that for a program to be an exempt news interview, the station must have some control over the topics being discussed. Thus, if the host selected the topics and asked at least some questions of the guests in addition to questions from the audience, the

program probably would be exempt. Pure “open mike” programs are not, and opposing candidates are entitled to equal opportunities if candidates appear on these programs.

### **FEDERAL CANDIDATE ACCESS: REASONABLE ACCESS**

- (1) **False.** Candidates for federal office are entitled to reasonable access to stations whose over-the-air signal (TV – Grade B; FM – 1mVm; AM – 0.5 mVm) covers at least an identifiable political unit (city, county, etc.) within their district. Cable carriage outside of a station’s over-the-air coverage area does not result in reasonable access obligations to candidates running in those locations.
- (2) **False.** Candidates for federal office are entitled to reasonable access to all time periods and all kinds of programs, except news. If the candidate only wanted to buy spots in a particular game, however, the station can refuse to sell time in that game.
- (3) **True.** The FCC requires stations to provide candidates on the weekend before an election the same type and level of access to the station that it provided to any commercial advertiser during the previous year.
- (4) **False.** Stations may not set-up front limits on the amount of time that federal candidates can buy. If you have such a policy applicable to commercial advertisers, you should make clear in your disclosure statement that it will not apply to federal candidates. Stations can, however, negotiate with federal candidates about how much access is reasonable.
- (5) **Probably true.** Assuming that it does not violate their affiliation agreement, stations can preempt network-aired political programs. The networks will, however, give the candidate a clearance report and the candidate can demand that your station sell it another program-length time period.
- (6) **False.** The FCC in 1999 reversed its 1994 ruling that stations were not required to provide federal candidates with “odd-length” spots. If a federal candidate makes such a request, the station must make an individual determination whether to grant or deny it, based on the amount of time the candidate has otherwise purchased, the level of disruption to the station’s other programming, the number of potential equal opportunities requests from other candidates, and the timeliness of the request (*i.e.*, stations have greater discretion to turn down last minute requests). As a practical matter, it may be that stations will not be required to air significant numbers of such spots. The FCC also has indicated that stations have wide discretion in setting the rate for this type of purchase.

- (7) **True.** The FCC allows stations to exclude candidates from all news programs, some news programs, or just the “hard” news portions of programs that also include sports and weather.

### **EQUAL OPPORTUNITIES**

- (1) **True.** Until both parties have selected their candidates, the Democrats are not running for governor, but for the Democratic nomination for governor. Thus, the Republican candidate, even if he is not opposed for that party’s nomination, is not an opposing candidate to the Democrats. Once a Democratic nominee has been selected (and the governor has officially been placed on the ballot as the Republican nominee), they will become opposing candidates and the governor’s appearance in the PSAs would be uses entitling her opponent to equal opportunities.
- (2) **False.** Equal opportunities only require stations to offer paid spots to respond to paid spots. Similarly, candidates are not entitled to free time under reasonable access.
- (3) **False.** The opponent is entitled only to buy an ROS spot that may run at any time. The opponent can request a morning drive spot, but then must pay the LUC for a morning drive spot if the spot runs during a political “window.”
- (4) **False.** The spokesman’s appearance in the ads is a use by a candidate even though the election is not discussed. His opponents would have the right to buy the same amount of time. And while the Ford dealer paid commercial rates, the opposing candidates would have to receive the station’s LUC if the spots air during a political window.

### **LOWEST UNIT CHARGE**

- (1) **False.** Stations are required to provide their lowest unit charge to all candidates for any public office who buy time during the political windows. The Bipartisan Campaign Reform Act of 2002 (“BCRA”) establishes new conditions on the availability of the lowest unit charge to federal candidates. *See infra* page 117, Answer 1 to Federal Candidate Certification.
- (2) **True.** By promising a favored advertiser that its spots will clear even if they are nominally preemptible, the station creates a fixed time class. Candidates buying at that rate would have to be given the same clearance guarantee, and the station would have to disclose the availability of that rate to candidates.
- (3) **True.** The FCC views stations that sell preemptible time on an auction basis as having only one preemptible class, and the lowest price spot that clears in that class establishes the LUC, at least for that week. Candidates in that situation can buy high to ensure that they clear and then get rebates to the

price of the lowest clearing spot. Stations that sell time in this way should make sure that they frequently audit their political rates during an election to provide candidates with timely rebates.

- (4) **True.** If, instead of having a continuous auction, a station sells time in several distinct categories of preemptible time, or has several classes of preemptible time and a higher-priced fixed class, candidates are only entitled to get the lowest rate in the class they purchased. Thus, if a candidate wanted to ensure that his spot clears, he could buy a higher-priced, less preemptible class, and the station would not have to offer a rebate if a spot in a lower-priced, more preemptible class ended up clearing.
- (5) **False.** Audience delivery make good spots that are provided pursuant to an audience delivery guarantee do not affect the LUC. If a station, however, offers make good spots to some advertisers without having first made a ratings point guarantee, those make good spots are deemed to be bonus spots and they will reduce the station's LUC.
- (6) **False.** If you sell time on an auction basis, the FCC takes the view that time can never be sold out since an advertiser could offer a higher price to preempt a previously sold spot. If you instead sell preemptible time in several distinct classes, with a higher-priced class of fixed time, you can tell candidates all preemptible time is sold out if all of the spots in a program or time period are sold at the highest preemptible rate.
- (7) **False.** The FCC says that incentives of *de minimis* value or which would imply an endorsement of the candidate do not affect the LUC and do not have to be offered to candidates. Since the bumper stickers would imply an endorsement, candidates would not be entitled to them.
- (8) **Probably false.** The FCC for many years ruled that party spots were entitled to the LUC because parties were presumed to be authorized candidate committees. In 1996, the Supreme Court held that state parties could be deemed independent committees under the federal election laws. Independent committees are not entitled to political rates. Indeed, any ads paid for by "soft money" contributions must be independent of the candidate and, thus, are not entitled to the LUC. Stations can insist that parties provide evidence that they are among a candidate's authorized committees before selling them time at the LUC.
- (9) **True.** Paid PSAs for commercial advertisers do affect the LUC. Stations must assign a reasonable value to the PSAs and calculate their effect on the LUC. PSAs aired for non-profit organizations and bonus spots provided to non-profits, however, do not reduce the LUC. This also applies to the anti-drug spots purchased by the Office of National Drug Control Policy or spots aired for the Census.

- (10) **True.** Pure barter deals do not affect the LUC. Mixed cash and barter deals do and stations must assign a value to each portion of those contracts.
- (11) **False.** If a contract that sets a station's LUC expires during the window, and the station does not plan to offer the same rate again, the station's LUC goes up at the end of the contract. Stations can change their LUC as frequently as once a week if that is consistent with their ordinary business practices.
- (12) **False.** Bonus spots must be given a value that is subtracted from the rate for the paid spots in establishing the LUC. Candidates get the benefit of the bonus spots even if they buy only one ad.
- (13) **Probably true.** If a station offers audience delivery guarantee rates, it must make them available to candidates. If the ratings data will not be available until after the election, the station must negotiate with candidates about whether shortfalls will be made up by rebates or credits in future elections. If in the last year a station has provided ratings guarantees to any advertiser based on overnights, the FCC's staff has stated that the same deal must be offered to candidates. Some candidates in 1996 claimed that they should be able to buy overnight guarantees, as well as guarantees on an individual spot basis, in order to make them equal with long-term advertisers. There has been no ruling on that question.
- (14) **True.** Candidates are entitled to significant incentives that do not imply an endorsement on the same basis as commercial advertisers. One station in fact did send President Clinton's 1992 time buyers to Paris.
- (15) **False.** Fixed time periods at premium prices can only be sold to candidates if a station offers fixed time to commercial advertisers, even if few advertisers actually buy it. The only class of time that stations can create just for candidates is a candidate-only discount class which gives candidates fixed spots at a rate lower than the station's likely effective selling level for preemptible spots.

## **FEDERAL CANDIDATE CERTIFICATION**

- (1) **False.** In the past, the FCC has taken the position that federal candidates could not be required to sign any particular agreement as a condition of access to stations. BCRA, however, provides that, in order to obtain the lowest unit charge, federal candidates must certify in writing that either (1) the ads they will run do not contain a reference to another candidate; or (2) if there is a reference to an opposing candidate – (a) for television ads, the ad contains an appearance by the candidate and a written statement at the end of the spot “in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least four seconds,” stating that the candidate approved the spot and that it was paid for

by the candidate or the candidate's authorized committee; and/or (b) for radio ads, an audio statement at the end of the spot by the candidate identifying him or herself, the office being sought and that the candidate approved the broadcast.

Note that the additional BCRA disclosures apply to ads that contain any reference to an opposing candidate. Although this provision was intended to discourage "attack" ads, it applies whether or not the reference is derogatory.

Because of this requirement of a specific written certification, NAB believes that federal candidates can now be required – as a condition of receiving the lowest unit charge – to sign agreements such as NAB's Political Broadcast Agreement forms. If a federal candidate fails to certify or falsely certifies, the candidate loses the right to the lowest unit charge on that station for the remainder of that campaign. FCC staff has taken the position that if a candidate loses the right to lowest unit charge during a primary campaign, he or she may reassert the right for the general election. If a candidate is not entitled to the lowest unit charge, stations are not required to provide even the comparable rates candidates enjoy outside the window. *Remember that FCC sponsorship identification rules continue to require that all political spots include a statement identifying the sponsor of the ad regardless of whether it refers to another candidate.*

## **DISCLOSURE**

- (1) **False.** FCC staff has indicated that stations can give examples of packages and other rates on their disclosure statements and indicate that additional information is available on request.

## **SPONSOR IDENTIFICATION**

- (1) **False.** The FCC held in 1996 that if stations are presented with evidence that a sponsor ID on an issue ad is inaccurate, they should require the advertiser to change the ID. Stations are not required, however, to initiate investigations into issue advertisers unless presented with credible information that the true sponsor is not reflected in the ID. Also, stations are required to put a list of the officers, directors, committee members, etc. of issue advertisers in the public file.
- (2) **True.** The sponsor ID must reflect the actual name of the entity paying for the ads. If a candidate will not correct an inadequate ID, stations must insert an accurate ID over the spot.
- (3) **True.** Although BCRA contains a provision requiring *candidates* airing television spots that attack another candidate to include an aural statement by

the candidate that he or she approved the spot, that requirement – like many other sponsor identification rules added by BCRA – is imposed on candidates and enforced by the Federal Election Commission. The FCC does not require stations to ensure that spots their air comply with rules enforced by another agency.

## **ISSUE ADVERTISING**

- (1) **Probably false.** The FCC for many years ruled that party spots were entitled to the LUC because parties were presumed to be authorized candidate committees. In 1996, the Supreme Court held that state parties could be deemed independent committees under the federal election laws. Independent committees are not entitled to political rates. Indeed, any ads paid for by “soft money” contributions must be independent of the candidate and, thus, are not entitled to the LUC. There are occasions where state and federal parties can be authorized committees (*i.e.*, where they use “hard money” to purchase the ad time). Stations can insist that parties provide evidence that they are among a candidate’s authorized committees before selling them time at the LUC.
- (2) **True.** The FCC eliminated the Fairness Doctrine with respect to ballot issues in 1990. Stations are not obliged to provide response time to issue ads.
- (3) **False.** The FCC does not require stations to police the truth of statements in issue ads. If a station believes that claims in such ads are not true, they are within their rights to refuse to run the ads or to require that the copy be changed, but they do not have to do so.

## **RECORD RETENTION**

- (1) **False.** First, the FCC in 1998 changed its rule and now requires that the public file be kept at a station’s main studio. Thus, stations that have kept their file in other locations must at least now keep another copy at the main studio. In any event, information in the political file must be updated “as soon as possible,” which the Commission says usually means immediately. Thus, you must update your political file at least daily during political periods.
- (2) **True.** Stations are not required to give out information about candidate buys over the phone. Although the FCC in 1998 changed the public file rule to require stations to provide information about documents in the public file over the telephone, on reconsideration it excluded the political file from the new rule (as well as limiting the telephone rule generally to stations within the main studios outside of their city of license).
- (3) **False.** Because it is part of the public inspection file, the political file must be accessible by all members of the public. Stations are required to provide the

public access to its political file during normal business hours and cannot exclude any member of the public.

- (4) **False.** The only information that candidates are entitled to about their opponents is the material in the political file. The FCC does not require that ad copy or tapes be placed in the file.
- (5) **False.** BCRA changed the information that stations must collect about some issue ads. Stations must now place in their public file notations of all requests to purchase time for ads “relating to any political matter of national importance,” the specific dates and times when those ads ran, and the rates charged for those ads, in addition to the subject of the ad and the identity of the sponsor and its governing officers or board members. These records are similar to the ones broadcasters must place in their public files concerning candidate ads.

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