Advisory

pillsbury

Communications

February 2010

Political Broadcasting Advisory

This Advisory provides a review of the FCC's political broadcasting regulations.

Table of Contents	Page
Introduction	**2**
Political Broadcasting	**3**
"Legally Qualified Candidate"	**3**
For Primary, General, or Special Elections	4
For Non-Presidential Conventions or caucuses	4
For Persons Seeking Nomination for President or Vice President	4
The Concept of "Use"	**4**
Exemptions from the "Use" Rules	5
Equal Opportunities	**5**
Time for Making Demand	5
What Qualifies as "Equal"	6
Notification to Competing Candidates of a Use Not Required	6
Limitations	6
The "Zapple Doctrine," or Quasi-Equal Opportunities	6
Reasonable Access	**7**
Charges for Reasonable Access	7
How Much Time Must be Devoted to "Access"?	8
How Much Access is "Reasonable"?	8
Access to News Programming	8
News Adjacencies	9
Program Length Commercials and Non-Standard Length Spots	9
Weekend Access	9
Ordering Deadlines	9
Only Federal Candidates Qualify	9
Access for Non-Federal Candidates	10
Ballot Issues	10
Content of Political Broadcasts	10
Censorship	10
Subject of "Use" Irrelevant in Equal Opportunities Context	11
Sponsorship Identification	11
Prior Review	11
Rates	**12**
Charges to Candidates	12

Lowest Unit Charge	12
Who is Entitled to the Lowest Unit Charge?	12
Candidate Certifications	13
Why is an Understanding of "Class," "Length," and "Period" Important?	13
What is a "Class of Time?"	14
Preemptible Spots as Distinct Classes	14
Defining Classes of Time	14
Special Candidate-Only Class of Time	15
Sold Out Time	15
What is "Length of Spot?"	16
What is "Period?"	16
Other Rate Issues	**17**
National and Local Rates	17
Package Deals	17
Package Spot Prices May Vary Over Time	17
Public Service Announcements	18
Rebates	19
Use of Production Facilities	19
Changing Rates During the Pre-Election Period	19
Rate Changes and Equal Opportunities	20
Lowest Unit Charge Traps	20
Disclosure Statements	**22**
Rep Firms	23
Sponsorship Identification	**23**
Stand By Your Ad Requirements	24
Third-Party Spots	24
FCC Enforcement of BCRA Requirements	25
Material Provided by Candidate	25
Ordering Deadlines, Prepayment, and Credit	25
Recordkeeping	**26**
Public Inspection File	26
Officers of Sponsoring Organizations	26
Third Party Ad Recordkeeping	27
Inspection and Copying	27
Retention of Political File Materials	27
Internal Recordkeeping	27
Conclusion	**28**

Introduction

Eight years after adoption of the Bipartisan Campaign Reform Act ("BCRA") of 2002, popularly known as "McCain-Feingold," Congress' and the FCC's interest in political broadcasting and political advertising practices remains undiminished. Broadcast stations must insure that a broad range of federal mandates are met, providing "equal opportunities" to all candidates using the stations facilities, affording federal candidates for public office "reasonable access" and treating all candidates for public office no less favorably than the station treats its most favored advertisers. Accordingly, it is imperative that broadcasters be very familiar with what is expected of them in this regulatory area, that they have adequate policies and practices in place to insure full compliance, and that they remain vigilant to legislative, FCC, and FEC changes in the law.

In this environment, it is critical that all stations adopt and meticulously apply political broadcasting policies that are consistent with the Communications Act and the FCC's rules, including the all-important requirement that stations fully and accurately disclose *in writing* their rates, classes of advertising, and sales practices to candidates. That information should be contained in each station's carefully prepared Political Advertising Disclosure Statement which should be routinely provided to candidates and their committees.

Many of the political broadcasting regulations are grounded in the "reasonable access," "equal opportunities," and "lowest unit charge" provisions of the Communications Act. These elements of the law ensure that broadcast facilities are available to candidates for federal offices, that broadcasters treat competing candidates equally, and that stations provide candidates with the rates they offer to their most-favored commercial advertisers during specified periods prior to an election. As a general rule, stations may not discriminate between candidates as to station use, the amount of time given or sold, or in any other meaningful way. While this Advisory will outline some of the general aspects of the political broadcasting rules, there are dozens of possible variations on any one issue. Accordingly, stations should contact legal counsel with any specific questions or problems they may encounter.

Political Broadcasting

There are two concepts that are basic to an understanding of the federal laws, rules, and policies governing political broadcasting. These are the concepts of a "legally qualified candidate" and of a "use" of a broadcast facility.

A person seeking the benefits afforded candidates by the political broadcasting rules must prove that he or she is a legally qualified candidate. A determination of whether and when a candidate has made that showing is a matter of the good faith judgment of the station, applying the rules set forth below.

"Legally Qualified Candidate"

To be a legally qualified candidate for FCC purposes, a person must:

(1) have publicly announced that he or she is a candidate; *and*
(2) meet the qualifications prescribed by the applicable laws for the office he or she seeks; *and*
(3) meet additional requirements, which vary depending on the office sought and the type of election.

These additional requirements are:

For Primary, General, or Special Elections

A person seeking election to any office, or nomination to any office *other* than President or Vice President of the United States, by means of a primary, general or special election, in addition to (1) and (2) above, must meet the following additional criteria as to each state in which he or she seeks "legally qualified" status:

(a) he or she must have qualified for a place on the ballot; *or*
(b) (i) must have publicly committed himself or herself to seeking election by the write-in method; *and*
(ii) must be eligible under applicable law to be voted for by stic
(iii) must make a substantial showing that he or she is a *bona fid*

For Non-Presidential Conventions or Caucuses

A person seeking nomination to any public office, except President or Vice President, by means of a convention, caucus, or similar procedure must, in addition to (1) and (2) above, also make a substantial showing that he or she is a *bona fide* candidate for the office sought. No person seeking such a nomination is considered a legally qualified candidate for nomination by a convention, caucus, or similar procedure prior to ninety days before the beginning of the convention or caucus.

For Persons Seeking Nomination for President or Vice President

A person seeking nomination for these national offices must, in addition to (1) and (2) above:
(a) show that he or she, or proposed delegates on his or her behalf, have qualified for the primary or presidential preference ballot in the relevant state; *or*
(b) make a substantial showing of *bona fide* candidacy for nomination in the relevant state.

Any candidate for President or Vice President who meets these qualifications in ten states is considered to be legally qualified in all states.

The Concept of "Use"

Under present law, any positive broadcast of a candidate's identified or identifiable voice or picture, whether authorized or not, constitutes a "use." Understanding a "use" is important, as most of the other political broadcasting rules are triggered when a "use" is involved.

As there can be a "use" even if a candidate has not authorized an on-air appearance, "equal opportunities" issues and other problems may occur even when the broadcasts are involuntary and not authorized by the candidate. Spots by an independent political group, corporation or union promoting a candidate, or even appearances of a candidate in old movies or TV shows, may be considered "uses." Stations must also be careful about employee candidates, as the appearance on the air by an employee who is also a candidate for public office is a use and could trigger free time to his or her opponents. However, an ad attacking a candidate, even if it contains the candidate's voice or picture, is not considered a "use" by the candidate being attacked, because it is not a "positive" broadcast. Also, the appearance by a candidate in the spot may be so short in duration that it is considered *de minimis* and therefore not a use under the "fleeting use" exception.

Exemptions from "Use" Rules

The use of a candidate's voice or picture in four kinds of programming never constitutes a use:

(1) *bona fide* newscasts, including specialized news shows such as "Entertainment Tonight;"
(2) *bona fide* news interviews, including guest interviews on audience participation/call-in shows (the Commission has even found television and radio talk programs -- including, for example, Oprah, Geraldo, or even Howard Stern-- which sometimes feature newsworthy guests to be *bona fide* news interview programs where the host controls the interview process);
(3) *bona fide* news documentaries, where the candidate's appearance is only incidental to the subject; and
(4) on-the-spot coverage of *bona fide* news events.

These four classes are *not uses at all*. The distinction is important, since a broadcaster may not censor a use by a candidate.

Note, however, that this exception applies only to candidates who are the subject of a report, interview, or other coverage. If the station employee who reads the news, conducts the interview, or otherwise appears is himself a candidate, his appearance is not exempt and will be considered a "use."

Equal Opportunities

When a legally qualified candidate for public office “uses” a station, that use will trigger "equal opportunities" rights, sometimes inexactly referred to as “equal time.” "Equal opportunities" requires that each opposing candidate be permitted an equal opportunity to buy time at the same rates paid by the first candidate, if the first candidate bought time, or to receive free time, if the first candidate received free time. The “equal opportunities” requirement applies whether the candidate is running for federal, state, or local office. Contrary to a common misperception, “equal opportunities” rights **do not** arise only during the pre-election “lowest unit rate” periods. They apply whenever a legally qualified candidate “uses” a station.

Time for Making Demand

Any candidate who is entitled to “equal opportunities” must make his or her demand within seven days of the *first* prior "use" by the competing candidate. After seven days the “equal opportunities” privilege as to any use expires, though subsequent uses may trigger more “equal opportunities” rights. This "seven-day rule" protects stations from facing unreasonable demands for time by candidates who have "sandbagged" equal opportunity claims.

Equal opportunity responses cannot be "daisy-chained." Suppose candidates A, B, and C all are legally qualified candidates for the same office, and candidate A broadcasts a use to which B makes a timely equal opportunity request. C does not make a timely request based on A's use. C may not then respond to B within seven days of B's responsive use. C must respond to the first prior use triggering the right of response. In this case, the first prior use was A's use.

What Qualifies as "Equal"

"Equal opportunities" does not mean precisely the same time period, but rather a "comparable" time period. The audience share must be comparable. To avoid controversy, a station should consider providing an audience that is demographically similar to that of the prior use. Also, if a station allows one candidate to use its facilities beyond just the microphone (*e.g.*, using the station’s production studio), the station must do the same for that candidate's opponents, if requested.

Notification to Competing Candidates of a Use Not Required

A station has no obligation to notify opposing candidates when a "use" has occurred. It is up to those candidates to monitor stations and to check the stations political files to determine whether they have a right to “equal opportunities.” There is no duty to notify a candidate about requests for time by an opponent. If the station does notify one candidate about uses by an opponent, however, the station must treat all candidates for an elective position the same. Once a station gives political file information telephonically to one candidate, all candidates in the same race must be accorded the same treatment. As the public file is the principal place where

candidates should gather information about uses by a competing candidate, the recordkeeping requirements discussed in a subsequent section of this guide are very important.

Limitations

Remember, the “equal opportunities” provision applies only to "uses." If no use has occurred, then there is no right of “equal opportunities.” An issue which regularly arises is the appearance by a candidate on a station before he or she has become “legally qualified.” If the candidate has not completed the steps necessary to become a legally qualified candidate, “equal opportunities” do not apply.

The "Zapple Doctrine," or Quasi-Equal Opportunities

Under the "Zapple Doctrine," if a station sells time during a campaign to supporters of a legally qualified candidate (such as political action committees or spokespersons) who urge their candidate's election, discuss campaign issues, or criticize a competing candidate on the air, the station must afford comparable time to the opponent's supporters or spokespersons, if requested. This doctrine applies only during campaign periods.

As an initial matter, the FCC does not require that you afford any opportunity for an independent supporter of a candidate to use the station's airwaves. However, once the choice is made to allow the supporters of one candidate to broadcast on the station, the opponent's supporters also must be allowed, under the "Zapple Doctrine," to use the station.

The "Zapple Doctrine" does not afford candidates or their supporters the right to free, equal time in response to the broadcast of paid announcements by supporters of opposing candidates. A station need not give free time in response to an assertion of quasi-equal opportunities if the supporter of the opposing candidate paid for the quasi-use. The "Zapple Doctrine" applies only to spokespersons/supporters of *major* political party candidates. The four "*bona fide*" exemptions discussed above apply here as well, so quasi-equal opportunities rights will not arise where the appearance occurred on any of these types of news programs.

While the "Zapple Doctrine" operates very much like “equal opportunities,” it is really based on the Fairness Doctrine which was abolished by the FCC in 1987 because of constitutional concerns. The FCC or the courts may eventually rule that the “Zapple Doctrine” no longer has vitality. However, no one has directly challenged the "Zapple Doctrine's" constitutionality. Accordingly, the Commission will still consider "Zapple" complaints, and thus all "Zapple" requests should be taken seriously.

Reasonable Access

The Communications Act requires stations to provide "legally qualified" candidates for *federal* elective office "reasonable access" to "reasonable amounts of time" to promote

their candidacies. A station's license may be revoked for "willful or repeated failure to allow 'reasonable' access 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."

The right of "reasonable access" applies only to candidates for **federal** elective office. It does not apply to state or local candidates. Thus, while a station may never decline to accept all advertising for a federal race, it may pick and choose which state and local elections it will accept candidate advertising. For example, it may choose to accept advertising for Governor, State Senate, and Mayor, and decline to accept advertising for a state House of Representatives or local council races. Once a station accepts advertising for any candidate in a local, state or federal race, however, it must accept advertising from all candidates in that race.

"Reasonable access" applies only to commercial stations. In order to qualify for "reasonable access", the legally qualified candidate's request must involve a "use," i.e., the appearance of the identified voice or image of the candidate. The "reasonable access" requirement begins once a candidate becomes legally qualified, and thus is **not** limited to the 45 days before a primary or 60 days before a general election.

Charges for Reasonable Access

The "reasonable access" requirement does not require commercial stations to make free time available to federal candidates. However, if a station makes free time available to one candidate, the "equal opportunities" requirement obligates the station to accommodate his or her opponents upon timely request. The touch stone is to treat all candidates fairly and equally.

How Much Time Must be Devoted to "Access"?

"Reasonable access" does not give a candidate the right to placement in or adjacent to any particular programming. Nor must a station make all of its advertising time available to a candidate, or make so much time available to one or more candidates that the station is forced to preempt an excessive amount of other programming.

However, a station should never set limits in advance on how much or what type of time it will make available to *federal* candidates. Each request for access by a federal candidate must be evaluated individually.

In responding to a candidate's request for time, a station should weigh the following factors:

(1) the individual needs of the candidate, as expressed by the candidate;
(2) the amount of time previously provided to the candidate;
(3) potential disruption of regular programming;
(4) the number of other candidates likely to invoke equal opportunity rights if the broadcaster grants the request before him; and
(5) the timing of the request.

How Much Access is "Reasonable"?

As noted above, when deciding how much access a station will provide to a particular federal candidate, the station must consider the candidate's individual needs, the amount of time previously supplied to the candidate, the potential disruption of regular programming, and the number of competing candidates likely to invoke “equal opportunities” privileges. **Because each response to a request for “reasonable access” must consider these factors, the FCC's political advertising staff warns that a station should not set a blanket policy in advance as to how much "reasonable access" it will allow.** Thus, a station’s Political Disclosure Statement or rate card must not restrict federal candidates to a certain number of spots per day-part, or per week. Instead, a station must weigh each request on the merits at the time it is made, and must negotiate and discuss with the candidate or his/her representative the candidate's needs and the station's circumstances. If a complaint is filed with the FCC charging a station with a “reasonable access” violation, the station will have the burden of proving that it gave due consideration to all of these factors.

Access to News Programming

Candidates have no right of access to news programming; this is an exception to the general “reasonable access” requirement. Stations may refuse to sell political advertising to run in all news programming, during some news programs, or during any portion of a specific news program.

News Adjacencies

Stations may establish a separate "news adjacency" class of time, so long as the charge for such spots does not exceed the lowest unit rate for spots run during the newscast. This cap on the price of the "news adjacency" class applies only when (1) the political spots are sold as a separate "news adjacency" class in which placement adjacent to the newscast is guaranteed; and (2) candidate advertising is banned from news programming.

Program Length Commercials and Non-Standard Length Spots

Requests for non-standard length times by federal candidates must be evaluated under the same criteria as all other requests for “reasonable access.” Stations may not flatly refuse to make available non-standard programming lengths or commercial lengths, even if such non-standard lengths have never been programmed on or sold by the station. The rates to be charged for program length time, if not otherwise sold by the station, may take into account lost revenue, including any diminution of revenue due to lost ratings in immediately following programs.

Weekend Access

Stations that have provided weekend access to any commercial advertiser within the twelve months preceding the pre-election period must provide access to federal candidates the weekend before the election. However, stations need only offer candidates the kinds of weekend services that previously have been made available to commercial advertisers. Thus, if a station has provided weekend access only for deleting copy or canceling spots, as opposed to selling and scheduling new spots, the station is only required to provide the same pre-election weekend services to federal candidates. However, even if a station has not been open on the weekend in the year prior to the election, the station must still give candidates access to station personnel over the last weekend preceding an election in order to allow a candidate to effectively make use of his or her equal opportunity rights.

Ordering Deadlines

Stations may hold candidates to the same ordering deadlines that are applied to commercial advertisers, so long as the deadlines do not interfere with a candidate's "reasonable access" or "equal opportunities" rights. Thus, when a federal candidate requests access or when any candidate makes a valid "equal opportunities" demand, ordering deadlines and other matters of procedure should be waived as necessary to ensure that "reasonable access" and "equal opportunities" rights are afforded in a timely manner, a particular concern in the days immediately preceding an election.

Only Federal Candidates Qualify

"Reasonable access" is a personal privilege that applies only to federal candidates; it does not apply to their spokespersons or any other entities. Thus, a station does not have to provide time to a political action committee, a political party which is not acting directly on behalf of a candidate, a corporation, union, or to any other non-candidate advertiser – even if their message deals with a federal election. And, as noted above, it does not apply to candidates for state or local office.

Access for Non-Federal Candidates

A station is not required to provide "reasonable access" to non-federal candidates. However, it would not be judicious to completely ignore state and local elections in a station's programming. The Commission has interpreted a station's broad public interest obligations to include being responsive to the needs and interests of the station's communities and providing some coverage of local or state elections. A station whose programming does not even acknowledge important elections may be accused at renewal time of failing to meet its community's needs. Remember, though, that if a station allows one non-federal candidate a "use," the "equal opportunities" requirement would apply and the station would have to allow "equal opportunities" to his or her legally qualified opponents for the same office. Furthermore, once access is granted to a state or local candidate, all other political rules, such as lowest unit charge, non-discrimination, and no censorship apply to that election.

However, as “reasonable access” does not apply to state and local candidates, a station is not required to sell them advertising time, or, if a station decides to sell time to candidates for a state or local office, the station may restrict sales to particular day-parts, and put upfront restrictions on how many spots such candidates may buy within that day-part. This is in contrast to federal candidates who must have access to all classes and day-parts offered by a station (except news), and with whom a station must engage in a reasoned discussion of how much time such candidates may buy. Note, however, that once a station sells spots to one state or local candidate for a particular office, the station must make available the same opportunities for all candidates for that same office – though races for other state and local offices may be treated differently.

Ballot Issues

Under current law, a station is not required to accept any demand for airtime under the Fairness Doctrine to promote competing sides of ballot issues.If a station does allow advertising regarding ballot issues, lowest unit charge does not apply, and a station can accept advertising from supporters of one side of an issue, but not the other. Importantly, the protection against defamation suits afforded stations in connection with the broadcast of “uses” does not apply to non-candidate spots, such as ballot issue advertising, so pre-screening copy of issue advertising is advisable.

Content of Political Broadcasts

Censorship

A station may not edit or censor the content of a candidate's “use” message. Even if the ad is of poor quality, contains an outrageous message, is part of a "smear" campaign, or is a "negative ad," it must be run as submitted. Because a station may not edit out libelous material, the station is immune from a civil action for libel based on statements made in a "use" by a legally qualified candidate.

However, the Commission's staff has indicated that if the content of a "use" violates another federal statute, such as a message that is legally obscene, the station may censor that use. This situation should arise rarely, if ever. The Commission has not made clear what a station may do about spots containing disturbing, indecent, or profane, but not obscene, material. In 1996, a federal appeals court reversed an FCC declaratory ruling that would have allowed broadcasters to "channel" political spots containing depictions of aborted fetuses to times in which children are not in the audience. *Refusing to accept a candidate spot based on its content is an invitation to complaint and an FCC investigation. Therefore, counsel should be consulted before attempting to edit or censor any "use," or before using disclaimers in connection with such spots.*

A station *may* censor non-"use" political broadcasts, including broadcasts by supporters or opponents of legally qualified candidates. Because stations have the power of censorship in these circumstances, they are *not* immune from liability for

libelous or slanderous statements contained in a spot that is not a “use” by a candidate. Thus, stations need to carefully review the contents of third-party ads and should, especially if the accuracy of the content is challenged, request supporting data for any claims made in the spot. Where there are questionable allegations made in a spot, especially allegations that could be found to be defamatory, the station should decline the non-“use” spot. *This is a very sensitive area in which counsel should be consulted.*

Subject of “Use” Irrelevant in Equal Opportunities Context

A candidate who appears pursuant to an “equal opportunities” request may use the time as he or she sees fit, and is not required to discuss his or her candidacy. This is an application of the no-censorship provision. However, an advertisement which does not involve a candidate’s campaign, e.g., is for the candidate’s car dealership, may still be a “use,” but will not qualify for lowest unit charge treatment. An opponent requesting “equal opportunities” as a result of a commercial advertisement featuring a candidate is entitled to lowest unit charge treatment if the spot runs within the LUC window.

Sponsorship Identification

Sponsorship identification is always required. See discussion of “Sponsorship Identification” below.

Prior Review

A station may ask to review a political spot in advance to ensure that it constitutes a "use" by the candidate, that it contains the necessary sponsorship identification (see discussion below), and that the broadcast will stay within the agreed length. When asking for a tape or script for advance review, a station must inform the candidate that the station is prohibited from censoring the material. However, if the spot does not contain the proper sponsorship identification, the station must inform the candidate and ask the candidate to remedy the problem, and should offer to fix the problem for the candidate. If the candidate refuses to fix the spot, the station may not pull the spot but must fix the spot itself, including, if necessary, covering the spots content with the ID tag in order to stay within the purchased length. A candidate may be charged the station’s normal production rates for the cost of correcting a sponsorship identification.

Rates

Charges to Candidates

A legally qualified candidate is always entitled, at a minimum, to purchase time for a "use" at rates comparable to what other advertisers pay so long as the “use” is in connection with his or her campaign. Thus, candidates placing ads outside the lowest unit charge window are entitled to receive volume discounts on the same basis as commercial advertisers purchasing the same amount of advertising. A station may never discriminate against a candidate or charge him or her more than what the station

would charge any other advertiser for any of the station's services, including airtime. Services the station makes available to commercial advertisers must be made available to candidates on the same terms.

Lowest Unit Charge

For "uses" broadcast during the 45 days before a primary or primary runoff election and 60 days before a general election (the "LUC Window"), a station may charge candidates no more than its "lowest unit charge" for the same class (rate category) of advertisement, the same length of spot, and the same time period (day-part or program). "Lowest unit charge" is also referred to as "lowest unit rate." If a station sells spots on election day, those spots must also be sold at the lowest unit rate. The candidate must be sold spots at the lowest charge the station gives to its most favored advertiser for a spot running during the window that is of the same class, length of spot, and time period. If the station's lowest unit charge is commissionable to an agency, the station must sell to candidates who buy direct at a rate equal to what the station would net from the agency buy.

Within the LUC Window, candidates must receive the benefit of any volume discounts a station offers to other advertisers even if the candidate purchases only one spot. Thus, if a station charges $20 for a single one-minute spot and $150 for 10 one-minute advertisements (or $15 per ad), the station may charge a candidate only $15 per a one-minute ad even if the candidate buys only one spot.

Any station practice that enhances the value of advertising spots must be disclosed, and must be made available to candidates. These include, but are not limited to, discount privileges that affect the value of the advertising such as bonus spots, time-sensitive make goods, preemption priorities, and other factors that enhance the value of the advertisement. Under the FCC's rules, if a station has provided any commercial advertiser with even a single time-sensitive make good for the same class of spot during the preceding year, the station must be ready to provide time-sensitive make goods for all federal, state, and local candidates before the election.

Who is Entitled to the Lowest Unit Charge?

Only "uses" by legally qualified candidates for public office are entitled to the lowest unit charge. The candidate must appear personally in the spot by voice or image, and the appearance must be in connection with his or her campaign. If the owner of the general store runs for sheriff, he or she is not entitled to the lowest unit charge for spots promoting the store's weekly specials. A candidate's appearance in his business advertisement would trigger equal opportunity rights, and, if within the lowest unit charge window, the lowest unit charge for the opponent requesting equal opportunities. Outside the lowest unit charge window, a candidate making a valid equal opportunity claim in response to his or her competitor's spots will be entitled to the same rate the competitor paid, and may use the time any way he or she sees fit.

Only candidates and their authorized campaign committees are entitled to the lowest unit rate. Over the past few years, political parties have sought to skirt federal

campaign finance restrictions through "soft money" advertisements -- *i.e.,* spots which depict and support a specific candidate, but which are purchased by the party rather than by the candidate or the candidate's authorized committee. Many of these types of advertisements are "independent expenditures" under FEC Rules. The FCC staff has stated that such spots are entitled to the lowest unit rate only if they are authorized by a federal candidate. As a practical matter, however, such advertisements will rarely, if ever, be authorized by a federal candidate, as doing so would result in the advertisement losing its "independent expenditure" status under FEC Rules. Corporations and unions purchasing independent ads to support or oppose a candidate are NOT entitles to the lowest unit charge.

State and local candidates ***are*** *entitled to the lowest unit charge*. As set forth above, "reasonable access" requirements do not apply to state and local candidates. However, if a station chooses to sell time to such candidates during the pre-election windows, lowest unit rates apply.

Candidate Certifications

In order to qualify for lowest unit rates, federal candidates must provide stations with a "stand by your ad" certificate, certified by the candidate or the candidate's authorized committee. This certification must set out that the candidate will not make any direct reference to an opposing candidate in the advertising unless, in the case of television, at the end of the spot there is a clearly identifiable image of the candidate, and a clearly readable printed statement that the spot was authorized by the candidate and paid for by him or his authorized committee, or, in the case of radio, the voice of the candidate identifying himself is reasonably identifiable, identifies the office that he or she is running for, and makes the statement that he or she approved the spot. A federal candidate who does not provide the station with such certification, or whose spot does not contain the required statements, is not entitled to lowest unit charge.

Why is an Understanding of "Class," Length," and "Period" Important?"

During the lowest unit charge periods discussed above, a station may charge a legally qualified candidate no more that the lowest rate charged any other advertiser – commercial or candidate -- for the same **class** (rate category) of advertisement, the same **length** of spot, and the same time **period** . These three categories – class, length, and period – must be well understood to permit a determination of whether a candidate has been give the lowest unit rate for its spot. In fact, two spots that run adjacent to each other in the same spot break may have entirely different lowest unit rates because they differ in class, length, **or** period.

What is a "Class of Time?"

"Class" refers to rate categories such as fixed position non-preemptible, preemptible, and run-of-schedule ("ROS"). A station's lowest unit charge for fixed position non-preemptible spots can be different than the lowest unit charge for preemptible spots, even if both spots are of the same length and run in the same time period.

Stations have broad discretion in defining different classes of time for lowest unit charge purposes. The classes must be clearly defined, distinguished on the basis of real differences (rather than simply on price or the identity of the advertiser), disclosed, and made available to candidates. A station may not create a special, premium-priced class of time that is sold only to candidates (although it may create a special discount class for candidates so long as candidates have access to other classes of time as well and the rate is lower than charged commercial advertisers for a spot of the same preemptibility).

Preemptible Spots as Distinct Classes

The Commission now allows stations to treat meaningfully different levels of preemptibility as distinct classes of time. However, all classes of preemptible time must be disclosed and made available to candidates, including the lowest-priced class that has a likelihood of clearing. Candidates must be told what the likelihood of clearance is for each class. Salespersons may not inflate the price of a spot beyond the minimum necessary to clear by falsely claiming that all preemptible time has been sold out or by claiming that a class of preemptible time is highly unlikely to air when experience shows otherwise.

Defining Classes of Time

The Commission has always held that price alone is not sufficient to distinguish classes of time. But a distinct class will be recognized when a higher price buys some demonstrable benefit, such as a specific projected lower risk of preemption or more favorable make-good privileges. Previous Commission policy held that all preemptible time must be treated as a single class. A candidate who bought a higher-priced preemptible spot that had a better chance of clearing was entitled to a rebate if *any* lower-priced preemptible spot actually cleared in the same time period. That is no longer the case. Under the current FCC policy, stations may establish multiple levels of preemptibility with various attributes, the most significant of which will usually be differing risks of preemption. If these levels of preemptibility are strictly observed, each level would have a different lowest unit rate. Thus, the Commission has recognized that certainty of airing is a valuable element of the advertising purchase.

However, stations that sell preemptible time solely by the auction method, in which any advertiser can preempt another by paying a higher rate, will not be able to take advantage of this new policy, since all "auction" spots will be distinguished only by price, and thus will be in the same class.

Stations with enough spot volume to define separate levels of preemptibility may find it worthwhile to adopt such a system. For example, a lower class (Level 1) of preemptible time might be distinguished by the lowest degree of preemption protection -- **all** spots of this class are "bumped" before any spots are bumped from any superior, higher-priced class. In this system, Level 2 preemptible spots would have a higher clearance priority (and perhaps a make good feature) and could command a higher price. A candidate buying a Level 2 spot would not be entitled to a rebate to the Level

1 lowest unit charge just because a Level 1 spot happened to clear in the same time period.

Of course, it is likely that spots will be sold at different rates even within a single class of preemptible time. In such cases, candidates will be entitled to rebates if any preemptible spot *of the same preemptible class* clears in the same day-part at a lower rate than the candidate paid. Thus, each level of preemptibility will be distinguished by a range of rates, in addition to the varying levels of clearance priority and other factors. When such a system is in place, spots may still be sold essentially by the auction method within each class while reducing the station's exposure to excessively large rebates.

This system will work only when the station scrupulously applies the requirements for each class of time. Candidates are allowed to challenge the *bona fides* of a station's class structure. The criteria the Commission uses to determine whether the class distinctions are reasonable include, but are not limited to: (a) whether the same classes are used year-round or just during the campaign season; (b) whether the station has applied the criteria to *all* advertisers consistently and fairly; (c) whether the station has adequately disclosed and explained the various classes to candidates; and (d) whether the candidate received the appropriate lowest unit charge for the class of time purchased.

Moreover, all separate levels of preemptibility must be fully disclosed to candidates. This includes a description of each preemptible class sufficient to give candidates an understanding of the differences between them (including the make good privileges associated with each); the station's best, good-faith estimate of the lowest unit rate for each class; and a best, good-faith estimate of the likelihood of clearance for each class.

Special Candidate-Only Class of Time

While the establishment of multiple classes of preemptible time can help reduce the size of rebates to candidates, it cannot eliminate rebates altogether. One way to eliminate rebates, and possibly to simplify the complexities raised by multiple classes of preemptible time, is to establish a special candidate-only class of non-preemptible time. This may be done only if the special class is sold below the prevailing rate (the “effective selling level”) for preemptible time. In other words, the commercial, preemptible class that is priced comparably with the candidate-only class must run a genuine risk of preemption, *i.e.,* it must not be the functional equivalent of fixed time. Of course, a station may not adopt a candidate-only class of non-preemptible time and then refuse to sell preemptible time to candidates. It must still disclose and sell all commercially available classes of time to candidates.

Sold Out Time

When a station sells advertising strictly on an "auction" basis, in which one advertiser may preempt another simply by paying a higher price, the station can never be "sold out." It would be a violation of the FCC’s political time rules in such cases to tell

candidates that preemptible time is sold out and that only fixed time is available. The difficulty stations face in this situation is that they must sell the candidate the spot at the prevailing "auction" rate -- giving the candidate the best shot at clearing -- and then rebate the difference between the rate paid and the lowest-priced preemptible spot that actually cleared during the same day-part.

This burden is lessened when a station structures multiple levels of preemptibility. When more than one level of preemptibility is offered, a candidate chooses his or her rate based on the level of preemption protection he or she demands. The candidate will never earn a rebate beyond the lowest-priced spot *of the same class* that clears. Moreover, when multiple levels of preemptibility are offered, a station *can* be "sold out" of certain classes of preemptible time: if so many spots have been sold in Preemptible Class 2 that no spots in Preemptible Class 1 will clear even at the highest Class 1 rate, then Class 1 is "sold out." If the candidate wants a chance of clearing, he or she must buy the more expensive Class 2.

The Commission has repeatedly stressed that a station may not steer a candidate to higher-priced non-preemptible time by claiming that preemptible time is "sold out" if it would give a commercial advertiser the chance to clear at a slightly increased preemptible rate.

A station may not decline an "equal opportunities" or "reasonable access" demand because the station is "sold out." But remember that a station has some flexibility in determining what constitutes "equal" opportunities and "reasonable" access.

What is "Length of Spot?"

"Length of Spot" refers to the obvious: the time occupied by the spot, such as a :60, a :30, a :15, or a :10. It also refers to non-traditional spot lengths and to the length of program-length commercials. In determining a station's lowest unit rate, a station compares rates only of spots of the same length as the candidate ad being purchased. The rate of a :30 is irrelevant to the lowest unit rate calculation where the candidate is buying a :60 or a :15. This is true even where a station bases all of its rates off of the rate for a particular spot length, such as a :30 (for example, a :15 is 60% of the rate of a :30, a :60 is 190% of the rate of a :30, etc.). Moreover, the lowest unit rate is based on the lowest charge actually made for a spot of the same class, length, and period, running on the station, regardless of the station's rate card in effect at the time the political ad is requested.

What is "Period?"

Period refers to the time period in which the spot is placed. Depending on how a spot was sold, it can refer to a particular spot break or placement within any break in a particular program. It could also refer to placement within a specific time period, such as "drive time" or from 9:00 am to 11:00 am. Or it could refer to broader rotation periods. The key is once again to compare periods exactly. If traffic assigns two spots to run next to each other , but one was a fixed position :30 guaranteed to run in the second break in the program that runs from 8:00 pm to 9:00 pm on Wednesday night,

and the other was running as a rotator that permitted it to be run anytime between 7:00 pm and 11:00 pm during weekdays, and was subject to preemption, they are of different class and purchased for different periods, and thus have entirely different lowest unit rates.

Other Rate Issues

National and Local Rates

"National" and "local" rates are not different classes of time for lowest unit charge purposes. Thus, if a station's card rates (or its actual rates) are different for national and local buys, qualified candidates are entitled to the lowest rate regardless of whether the buy is made nationally or locally. A station may not charge "national" rates to candidates for national offices if local rates would yield a lower lowest unit charge.

Package Deals

A station may no longer treat package deals as separate classes of time for lowest unit charge purposes. **Instead, stations must assign a rate to each spot within a given package.** These rates are then compared to other rates for the classes of spots contained in the package to determine if the rates, as allocated, affect the lowest unit rate for that class of time. Thus, under this rule, package plans that include multiple day-parts can set the lowest unit rate for candidate purchases of individual day-parts.

However, the price listed on the contract need not control the lowest unit rate. Stations are free to allocate the individual rates in packages in any reasonable way on "internal" documentation, so long as the total cost of the spots does not exceed the total package price. Some price must be assigned even to bonus spots.

If a station decides to allocate the rates differently from the contract for lowest unit rate purposes, *it must document the allocation at the time the package is sold*. The allocation can be noted on the face of the contract or invoice or in a separate internal document that is prepared contemporaneously with the contract. The internal document need not be placed in the political file, nor must it be provided to the advertiser, but it must be signed and dated by a station representative and must be made available to the FCC upon request. The document will also be subject to discovery if a complaint is filed. *The rate recorded on the internal documentation is the rate that controls for lowest unit rate purposes.*

Package Spot Prices May Vary Over Time

One of the variables stations may use in their internal package plan allocations is time, meaning the week, month, or even season in which the spot runs. Thus, *long-term contracts can be written up and billed to provide even cash flow throughout their terms, while internal documentation can assign higher values to spots that run during weeks or months of higher audience or demand, provided that the assigned values are reasonable and justified by outside factors, and are not merely an attempt to raise rates during political periods.* Particularly in situations in which periods of higher audience or

demand coincide with the pre-election period, it is important for stations to anticipate such changes when long-term contracts are sold, to allocate the prices accordingly and to document its rates when the contract is entered into and not later. This procedure can help stations avoid being forced to sell political advertising in September at what is effectively the lowest unit rate for January.

This treatment of package plans requires extreme care in the way custom packages are sold and scheduled. Unrealistically low rates in less desirable day-parts or programs that are sold as part of a package to secure price integrity in day-parts or programs of higher demand, or to dress up and close deals, can set the lowest unit charge for that day-part, even for candidates who do not buy the more expensive day-parts. Similarly, discounted prime time spots that are tied to purchases of higher-priced spots in less desirable day-parts can set a station's lowest unit charge for prime time purchases by candidates.

Because of this policy, *sales contracts must be written with extreme care to avoid unrealistically low rates in each day-part*, particularly in time periods of lower demand or broad rotations, where bargain-priced spots are often placed. Stations should take care to place realistic prices on all spots sold in a package. Stations may wish to put any unrealistically low units that are tied to higher priced spots exclusively in the class with the lowest level of preemption protection, or in classes with the broadest flexibility as to spot placement.

For spot packages containing different classes of spots that are sold at a flat package rate, a station must now make an allocation of the package cost among the spots included. Otherwise, the Commission might determine the station's lowest unit charge by simply dividing the number of spots into the total cost, with no consideration given to the relative values of different classes or time periods.

IMPORTANT NOTICE: *If a station has any long-term package contracts currently on the books, the station should immediately review those contracts to determine the values of the spots within the packages and their impact on its lowest unit rate. If the prices listed on the face of the contracts do not reflect the real value of the spots, or if no allocation at all is set out between different classes of spots within the package, please contact counsel to discuss the allocation of the package spot values.*

Non-Cash Merchandising and Promotional Incentives need not be offered to candidates if (1) they are of minimal value (coffee mugs, tee shirts, etc.) or (2) if they may reasonably imply some relationship between the candidate and the advertiser (such as joint bumper stickers). Any other non-cash promotional incentives must be made available to candidate advertisers on the same basis as they are offered to commercial advertisers.

Billboard "Liners" and Program Sponsorship "Liners" need not be offered to candidates on-air. Billboards less than ten seconds in length are recognized as too short to permit the required sponsorship identification, and program sponsorships imply a relationship between the station and the candidate. *On-air identifications*

("mentions" or "liners") of commercial advertisers need not be included in lowest unit rate calculations.

Public Service Announcements (PSAs)

Stations that give or sell PSAs at discounted prices to nonprofit entities in connection with the purchase of normal advertising need not give or sell PSAs to candidates, and such free or discounted PSAs may be excluded from the lowest unit charge calculation. However, paid PSAs purchased by commercial advertisers must be treated as "bonus" spots in making lowest unit charge calculations. As with package plans, a station may allocate the price of commercial schedules that include PSAs using the same procedure used for package plans. PSAs which are not associated with a commercial contract do not affect lowest unit charge.

Trade-outs, Per Inquiry, Noncommercial Sustaining Announcements ("NCSA") or PEP announcements, and Network Spots do not affect a station's lowest unit charge.

Rebates

Stations must conduct periodic audits to determine whether rebates are due, and must make every effort to provide rebates before the election. Rebates must be made more expeditiously as the election approaches.

Use of Production Facilities

"Lowest unit charge" applies only to the sale of *broadcast time*. If the candidate also wishes to use production facilities, he or she may be charged normal commercial advertiser rates for doing so.

Changing Rates During the Pre-Election Period

Stations may increase their lowest unit charges during the pre-election period as a part of a general rate increase when justified by seasonality or improved ratings. Thus, if the ratings for "*The West Wing*" improve, rates in that show, including the lowest unit charge, may be increased. Candidates buying spots to run before the rate increase get the rate in effect then, and those purchasing time to run after the increase pay the higher rate. But if spots sold to run before the rate increase clear after the rate increase, they will continue to set the lowest unit charge for programs in which they clear. Remember, the candidate is entitled to the lowest unit charge for spots of the same class and length that run during the same period as his or her spots.

A station's lowest unit rates may change during the political window if the station is selling on a demand or auction basis, if the station takes into account ratings changes in its prices, or when a pre-existing contract which establishes the lowest unit charge runs out during the window. It is important to remember that the price is set by when a spot runs, not necessarily when it was sold. This means that the lowest unit charge for spots to be run in a particular week is set by the lowest price paid by an advertiser for a

spot run during a particular class of time during that week, even if the purchase of new spots by an advertiser at the time the spot runs would have been at a higher price.

Obviously, a station may reduce its rates during the pre-election period, too. However, a candidate who has purchased a long-term contract at the higher rate will be entitled to a rate adjustment for any spots run after the rate decrease. If a station anticipates that a rate increase will occur during the pre-election period, it is not required to lock the station into a pre-increase lowest unit charge by selling a long-term contract to a candidate with a rate fixed at the pre-increase rate. Instead, the contract may indicate that the rate charged will not exceed the lowest unit charge on the date being contracted for. Of course, if a station sells a long-term contract to a commercial client that would effectively establish the lowest unit charge through all or part of the pre-election period, the station must sell a similar contract to a candidate who requests it.

Rate Changes and Equal Opportunities

The “equal opportunities” provision of the Communications Act causes some unique lowest unit charge problems. The “equal opportunities” provision requires that all candidates for the same office be treated similarly. Assume that Candidate A buys time that is scheduled to run before the pre-election period. He or she is entitled only to the "comparable use" rate, not the lowest unit charge. Candidate B makes a timely “equal opportunities” request within seven days, and his or her spots will run in the pre-election period to which the lowest unit charge provisions apply. Though the Commission's rules prohibit discrimination between candidates, B will pay the lowest unit charge, even if it is less than what A paid. The difference is caused by law, not by the station's discrimination.

On the other hand, if rates increase between a use by Candidate A and the time Candidate B makes an “equal opportunities” request, B will be entitled to the same, pre-increase rate paid by A. In this case, Candidate B's spots, run at the pre-increase rate, do not set the lowest unit charge after the increase. The interplay of these rules is complicated. For specific problems, consult the firm.

Lowest Unit Charge Traps

A few quirks of the convoluted lowest unit charge system have locked many broadcasters into lowest unit charge levels they would rather have done without. Four of the most common traps are (1) failing to account for agency commissions; (2) giving bonus spots or selling excessively discounted spots during the pre-election period; (3) running low-priced "make goods" during the pre-election period; and (4) circulating outdated rate cards.

(1) Agency Commissions on Political Buys

Except for spots sold by a station's rep firm, the lowest unit charge is based on the net to the station. Commission to the station’s rep firm will not be netted out of the spot price, as the rep is considered a station employee or agent, while an agency is the representative of the spot buyers. Assume that the commissionable lowest unit charge

for a drive time news adjacency is $100. A recognized agency books a news adjacency on behalf of a legally qualified candidate who is entitled to the lowest unit charge. The station bills the agency $100, of which the station nets $85. The station's new lowest unit charge for drive time news adjacencies is $85, at least for candidates who wish to make a "direct" buy. To avoid this problem, stations should recognize that the net to the station sets the lowest unit charge, even for non-agency buys. So if the station's lowest unit charge is not commissionable to an agency, the station can avoid reducing it further by refusing to commission it.

(2) Bonus Spots

Stations should be careful about giving bonus spots or selling excessively discounted spots as part of a package during the pre-election periods. Such practices can reduce a station's lowest unit charge. For example, if an advertiser receives one spot free for every 9 spots he buys, the unit price will be decreased by 10% for computing the station's lowest unit charge. If the spots in this example were $10 each, the advertiser would get 10 spots for $90. Thus, the lowest unit charge would be $9.

(3) Discounted Spots

Excessively discounted spots can cause the same problem. Stations often write contracts to show unrealistically low rates for some day-parts or programs in a package to induce clients to purchase more expensive programs or day-parts. Formerly, a station could require a candidate to buy all parts of a package to get the package rates. Now, candidates may "cherry-pick," so it is essential to make realistic allocations of spot values in all packages sold, either on the face of the contract, or in an internal station allocation of a package plan purchase price made at the time that the package arrangement is entered into.

(4) Make Goods

Make goods that run in the pre-election periods can set the floor for a station's lowest unit charge. For example, assume a television station has raised its rates during the pre-election period because of the increased fall viewing. If a lower-priced spot that was preempted before the pre-election period is made good *during* the pre-election period, the price for that spot can set the lowest unit charge for the same class of spot in the pre-election period. Stations can avoid this trap by running all make goods that sold at rates below the current lowest unit charge before the pre-election period begins.

Make goods can also obligate a station to run free spots under certain circumstances. This arises out of a station's "equal opportunities" obligation and is unrelated to lowest unit charge. If a station runs a candidate's spot in the wrong time slot and runs a "free" make good, a competing candidate who makes a timely demand for "equal opportunities" would be entitled to a comparable free spot. However, if the make good is run because of a technical failure of the paid spot, so that the paid spot is substantially interrupted or unintelligible, this type of make good would not create a

windfall for the competing candidate who would not be entitled to a free spot. Of course, the candidate could still buy a comparable spot at the same price.

(5) Outdated Rate Card

Candidates pay the lower of the station's actual lowest unit charge or the price specified on its published rate card. If a station's published rate card shows rates that are lower than those actually being offered by the station, the station should withdraw or update the rate card. If the station must distribute a rate card that shows more than one "grid," it should make sure that cards distributed immediately prior to and during the pre-election period clearly indicate what grid is current. A station may not implement a blanket rate increase or move to a higher grid prior to or during a pre-election period to circumvent the lowest unit charge provisions. However, a station may raise rates as part of normal business practice if justified by seasonality or changes in ratings.

Disclosure Statements

The Commission has made full disclosure of rates and sales practices to candidates an important element of regulatory compliance. Stations must disclose to candidates all classes of time, discount rates, and privileges given to commercial advertisers that affect the value of spots. The disclosure must include, at a minimum: (1) a description of each class of time available to commercial advertisers sufficient to allow candidates to understand and differentiate between the classes; (2) complete disclosure of the lowest unit charges for each class and time period; (3) a description of the station's method of selling time, *e.g.,* grid, demand-driven "current selling levels" (auctions, fluctuating levels, etc.); (4) an approximation of preemption likelihood for each class of preemptible time sold; (5) sales practices that affect rates (including audience delivery arrangements and preemption priorities); (6) the station's make good policies; (7) discount and value-added privileges; (8) the availability of packages; and (9) rotations.

Individually negotiated packages need not be separately disclosed, since those rates must now be used to calculate the lowest unit charge. Information may be provided in outline format. All rotations need not be disclosed if is clear that other rotations are available on request.

These disclosure obligations require that stations adopt comprehensive, political advertising policy statements. While the Commission’s rules do not require that such statements be in writing, prudence dictates that they in fact be written to ensure that all necessary disclosures are made to all candidates. Candidates must be informed of all available rates and all sales practices affecting rates, even outside of the pre-election lowest unit rate periods. The only way to assure that consistent, accurate, and complete disclosure is made to every candidate is to carefully craft a written political advertising Disclosure Statement and to have a practice of routinely making it available to candidates and their agents. Candidates have the right to be fully informed of the rates and sales practices of a station. Accordingly, stations should avoid providing candidates with only partial, limited descriptions of its rates and policies in order to

avoid the accusation that the station is attempting to channel the candidate into most costly and less favorable buys.

Stations should attach their current political rate card to the Disclosure Statement. For stations with many different classes, time periods, and lengths available to candidates, it may be impractical to list the lowest unit rate of each different alternative. In such cases all major categories should be listed, and a footnote included indicating that other alternatives are available and that the candidate or the candidate's representatives should inquire as to such alternatives. It is vital that the listing include a broad variety of options, so that it cannot be argued that the issuing station is trying to steer candidate advertising to fixed position non-preemptible time or other more expensive categories of advertising.

In cases where rates may fluctuate rapidly for certain classes of time (such as when supply and demand vary rapidly), stations must provide their best, good-faith estimates of the lowest unit charges for such classes at the time of disclosure. By implication, those rates need not be guaranteed.

If a station adopts a special, candidate-only non-preemptible class of time, it must still disclose the availability and associated features of all other classes of time, even those that are higher-priced or less desirable.

The fact that full disclosure has been made should be documented and signed by station personnel *each time* the station receives an inquiry regarding political advertising and the Political Disclosure Statement is sent out. Once full disclosure is made to a regular time buyer, such as an agency, that buyer need only be given updated information for subsequent orders.

Rep Firms

Each licensee is responsible for making full disclosure to *all* candidates inquiring about time purchases. Thus, it is the station's responsibility to educate its rep firm about its political policies and rates and to provide the rep firm with adequate numbers of copies of its current political Disclosure Statements. Stations should immediately notify rep firms of any changes in rates, policies, classes, availability, etc. when political sales are being made. Detailed records of the station's efforts to keep the rep up to date should be maintained. Similarly, stations must obtain from their rep firms information about requests for political time and must place that information in their public files.

Sponsorship Identification

When a station broadcasts a political advertisement, the station must be sure that it contains a proper sponsorship identification. That identification must indicate: (1) that the announcement is "paid for" or "sponsored by" a particular candidate or organization; and (2) the name of the candidate or organization that paid for the time. Nothing less than the language "paid for" or "sponsored by" will do, and the name of the paying entity must be specifically identified. The public must be informed that the

sponsor is a specific person or entity, so the tag: "Paid for by people who want Jim Bob elected Dog Catcher" is insufficient.

Moreover, the person or entity being identified as the sponsor in a candidate or issue advertisement must be the one that is *truly* purchasing the airtime. The FCC has ruled that an issue advocacy spot identifying the "Fairness Matters to Oregonians Committee" as the sponsor did not identify the "true sponsor" where the facts showed that the "Fairness to Oregonians Committee" was merely a front for the Tobacco Institute. This case is significant because it stands for the proposition that, in certain circumstances, a station may be required to look *behind* the named sponsor and identify the party with true financial and editorial control over the message. This does not mean that broadcasters must be private investigators; they need only exercise "reasonable diligence" to obtain the information necessary to assure that a proper sponsorship identification is made. Nonetheless, the FCC held in the Oregon case that where a challenger "makes so strong a circumstantial case that someone other than the named sponsor is the real sponsor," reasonable diligence requires that the broadcaster inform the named sponsor that the true sponsor must be identified. In that case, the challenger presented facts showing that essentially all of the "Fairness Matters to Oregonians Committee's" funding was provided by the Tobacco Institute, and that editorial control of the Committee's campaign rested with a tobacco company that was the Tobacco Institute's single largest contributor. A rebuttable presumption that should be employed is this: the name of the sponsor should be the same person or entity whose name is on the payment check. If the sponsorship of an issue ad is challenged, treat the matter as a high priority and consult with counsel to determine whether the sponsorship identification should be altered.

For television spots, visual identification in letters equal to four percent of the picture height must be broadcast for at least four seconds. Aural identification is optional for television spots. There is no specific length requirement for radio. Sponsorship identification announcements must be made at both the beginning and the end of political material that runs five or more minutes.

Stand By Your Ad Requirements

BCRA requires that *federal* candidates be identified in their campaign spots, stating that the spots has been authorized or approved the broadcast. For television, this identification can be done either by:

(1) A full-screen view of the candidate identifying himself and stating that he approved the ad, or
(2) A candidate voice-over in which the candidate identifies himself and states that he approved the ad, accompanied by a clearly identifiable "photographic or similar" image of the candidate. FEC rules indicate that a picture is "clearly identifiable" if it occupies at least 80% of the vertical screen height.

Television spots must also contain, at the end, a clearly readable **written** "disclaimer" stating that the candidate approved the ad and that his authorized committee paid for the ad. The statement must be broadcast for at least four seconds, and occupy at

least four percent of vertical picture height. The disclaimer must have a reasonable degree of color contrast between the text and the background so that it is "clearly readable."

For radio spots, this requirement is met by an audio statement by the candidate which identifies himself or herself and the office for which he or she is running, and states that he approves of the broadcast.

Other provisions of BCRA extend these identification requirements to all federal candidate advertising, whether or not an opponent is mentioned.

Third-Party Spots

BCRA also imposes new identification requirements on third-party spots. Third-party spots that advocate the election or defeat of federal candidates, or which solicit campaign contributions, must contain the following:

(1) A statement that the spot is not authorized by any federal candidate, and
(2) A statement identifying who paid for the broadcast, any organization connected to the payor, and a permanent street address.

For television, such statement must be made in an unobscured, full-screen view of a representative of the political committee of the person making the statement, or by a representative of such committee in a voice-over, together with the text of the information in a clearly readable format for at least four seconds and occupying at least four percent of the screen height.

FCC Enforcement of BCRA Requirements

The FCC takes the position that it is the FEC's responsibility to enforce BCRA, not the FCC's responsibility. Accordingly, it is not clear that stations have any independent duty to insure that a candidate, a candidate's committee, or a third party has complied with the requirements of BCRA.

However, as to federal candidate advertising, particularly where a candidate's opponent is mentioned, we do advise stations to monitor ads to determine if the BCRA identifications are contained in the ads. A station giving lowest unit rates to a federal candidate who has not observed the BCRA identification requirements may, at a minimum, be subject to a complaint from an opposing candidate who did observe those requirements and may charge the station with improperly granting lowest charge rates to his/her opponent. This is an issue that remains unresolved. Furthermore, if the station does discover a BCRA-related problem with an ad, the candidate should appreciate the matter being brought to his or her attention.

In its *Citizens United* decision, the Supreme Court struck down the BCRA prohibition against corporations from independently purchasing advertising to support or oppose the candidacy of federal candidates. It is too early to predict whether Congress will take action to try to nullify or mitigate the effects of that decision. In any event, if a

corporation or union pays to air a spots that contains the positive appearance of a legally qualified candidate whose voice or image is identified or readily identifiable, then the spot is a "use" even if it is not controlled or otherwise authorized by the candidate or his/her campaign committee. Such “use,” however, does not give opponents "free" time, only the opportunity to purchase time on the same basis as the entity placing the ad. Also, even if there is not a “use” because the ad does not contain the voice or picture of a candidate in a positive light, the Zapple Doctrine, discussed above, may trigger quasi-equal opportunities to supporters or opponents of the candidate.

Material Provided by Candidate

If a candidate or his/her supporting organization provides the station with scripts, copy, tape, film, or other material, but not payment, as an inducement to broadcast the material, the station must indicate that the material was "provided" or "supplied" by the candidate or organization if and when the station uses it. 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 supplied by the candidate or his or her committee.

Ordering Deadlines, Prepayment, and Credit

Stations may not discriminate against candidates in the extension of credit. If the station’s credit policy is such, however, that it does not extend credit to transient organizations with no established credit history, it may demand payment for a schedule in advance of the start of the schedule. However, federal candidates may not be required to pay more than seven days in advance of a flight’s start date. This does not mean that a station can demand across the board that no political advertising can be sold to run with less than a week's notice. Generally, ordering and production deadlines for candidate advertising must correspond to the deadlines applied to commercial advertisers. Genuine requests by candidates for “reasonable access” or “equal opportunities” should be accommodated without regard to ordering or prepayment deadlines.

Recordkeeping

Public Inspection File

Stations must keep in their public inspection file records of all requests for paid and free time made by or on behalf of political candidates, along with a notation indicating whether or not the station granted the request. The file should indicate what, if anything, was actually broadcast and what rates, if any, were charged. The file should also indicate when the spots contracted for actually ran. This can usually be done by keeping "actual times" as a station would for an agency or co-op buy. Gifts of time must also be indicated. A "use" by a candidate (even one that is inadvertent or otherwise occurs outside the sales process) should also be noted in the files. *The FCC expects stations to update political files with new information immediately under normal circumstances.* Files must be updated to reflect the dates and amounts of any

rebates to candidates as well as the contract to which the rebate applies. Oral agreements for sales of time must be memorialized in the political file.

While stations need not update exact times of political spots immediately, they must provide some method for opposing candidates to ascertain the exact time an opponent's spot aired. If a station does not update its political file immediately to indicate exact times, then the file should contain a notation that the station, upon request, will provide the actual airtimes.

We recommend that a station start a separate file on each political candidate at the time the candidate or his/her representative inquires about airtime.

Each file should contain:

(1) for each order, an NAB-type political advertising request form (which should include the disposition of the request, as well as the names of the officers and directors of the candidate's authorized committee);
(2) a copy of the contract for each order;
(3) a copy of the invoice (showing the dates and times of airings) for each order, as soon as it is issued; and
(4) any information concerning rebates made to the candidate.

These documents should contain the information required by FCC's political file rules for each candidate purchase.

Officers of Sponsoring Organizations

The FCC's sponsorship identification rule requires stations to keep records in their public inspection files of the names of officers or directors of groups that sponsor or provide material used in any political broadcast or program involving a controversial issue of public importance. If a station retains scripts or recordings of political broadcasts or other candidate "uses," *such scripts or recordings should not be placed in the public file nor provided to competing candidates.*

Third Party Ad Recordkeeping

BCRA has also established station public file requirements for third party ads which communicate any "political matter of national importance," or which refer to a legally qualified federal candidate, any election to federal office, or a national legislative issue of public importance. This is a very broad provision which would seem to cover issue advertising on any issue potentially pending before Congress in any bill or proposed legislation. For such advertising, the FCC's public inspection file requirements have been expanded to essentially mirror those applicable to candidate advertising. With respect to such federal issue advertising, the following information must now be placed in the station's public file:

(1) A statement that a request to purchase time was made and as to whether the request to purchase time was accepted or rejected.

(2) The rates charged for the broadcast.
(3) The dates and times the ads aired.
(4) The class of time purchased (e.g. fixed, preemptible with notice, etc).
(5) The name of the candidate to which the spot refers, along with the office the candidate seeks and in what election it is sought (e.g. primary or general election); or, if not candidate related, an identification of the issue involved.
(6) The name of the person or entity buying the time, with the name, address and telephone number of a contact person for such person or entity.
(7) A list of the chief executive officers of the entity buying the time, the members of its executive committee, and its Board of Directors.

In the case of issue advertising that does NOT contain a reference to a political matter of national importance, the only thing that must be placed in the public file is a list of the chief executive officers of the entity buying the time, the members of its executive committee, or its Board of Directors.

Inspection and Copying

Political file material may be inspected and copied like any other part of the public inspection file. A station's public inspection file must be located at the station's main studio and must be available for inspection by members of the public during normal business hours, including lunch time, without any requirement for an appointment. Stations do not have to provide political file information by telephone, but must be non-discriminatory if they do provide it in that manner.

Retention of Political File Materials

Political file materials must be kept available for public inspection for two years. If the materials become the subject of an investigation or litigation, no steps should be taken to destroy them, whether the materials are in hard copy or are in electronic form, without prior consultation with counsel. If there are no pending investigations or litigation, we recommend that a station remove all political file material from the political file promptly upon passage of the two-year holding period.

Internal Recordkeeping

For a station that broadcasts a significant amount of political matter, recordkeeping can become an onerous burden particularly if a system is not established early and adhered to faithfully. Such a system might include a list or database of lowest unit charges, with a separate sheet or entry for each program or day-part and each class of spot offered. This way the station has an easy reference source that can be quickly checked or updated. This is particularly important for television and larger-market radio stations, which might have dozens of lowest unit charges. Moreover, with respect to each candidate inquiring about airtime, a station's internal records should include evidence that the station made the requisite disclosure to the candidate or his/her representative. This kind of internal information should not be placed in the station's public inspection file.

Conclusion

This **Advisory** is intended only to refresh a broadcaster's recollection of some of the more important aspects of federal political broadcasting law and to point out some of the more significant recent changes. While the **Advisory** may provide quick answers to some general questions, it would be a mistake to rely on this **Advisory** or any summary for a definitive answer to a complicated question. Moreover, political broadcasting is a volatile area of FCC regulation, and some information in this **Advisory** will certainly be outdated before long. Accordingly, stations are advised on proceed in this complicated area with the close support of communications counsel.

Lastly, we remind clients and others that the rules for calculating political rates should be kept in mind *every* time a station is considering accepting an advertising order, even in non-election years. Since internal allocations must be made at the time the schedule is sold, the pre-election period will be too late to correct any rate errors made months or even years earlier. If a broadcaster would like assistance in structuring multiple levels of preemptibility, scheduling, and pricing long-term contracts and packages, or needs other help to avoid expensive mistakes resulting in unnecessarily low political rates, please contact any of the lawyers in the firm's Communications Practice Section.

Disclaimer

The subject of this Advisory is complicated and subject to change. Furthermore, the interpretation and applicability of the various laws and regulations mentioned in this Advisory often turn on the specific facts and circumstances presented. Accordingly, nothing in this Advisory should be relied upon or construed as legal advice or opinion on any specific set of facts or circumstances. As a consequence, you should first consult with experienced legal counsel concerning the interpretation and application of such laws and regulations to any specific set of facts or circumstances.

For further information, please contact:

Richard R. Zaragoza
Washington DC
+1.202.663.8266
richard.zaragoza@pillsburylaw.com

Clifford M. Harrington
Washington DC
+1.202.663.8525
clifford.harrington@pillsburylaw.com

This publication is issued periodically to keep Pillsbury Winthrop Shaw Pittman LLP clients and other interested parties informed of current legal developments that may affect or otherwise be of interest to them. The comments contained herein do not constitute legal opinion and should not be regarded as a substitute for legal advice.
© 2010 Pillsbury Winthrop Shaw Pittman LLP. All Rights Reserved.