

NOTE: The following slides are intended as a general guide to identifying some of the legal and regulatory questions that may face your stations in connection with their political advertising sales. This information should not be considered legal advice, as we do not have the specific facts of your situation which could affect how rules and policies are interpreted. For legal advice, you should always talk to your own counsel.

FCC Political Broadcasting Requirements – Getting Ready for 2024

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Political Broadcasting Issues We'll Cover Today

- Quick Refresher on Political Basics
 - Legally qualified candidates
 - Reasonable access
 - Equal Opportunities
 - No censorship
 - Lowest Unit Rates – how much you charge
 - Basics
 - Classes of Time
 - Packages – including with digital
 - Multi-station sales
- Sponsorship Identification
- Paperwork - Disclosure Statements and the Public File – including new obligations announced by the FCC in 2019 and 2020

Disclaimers

- This is an off-the-record webinar to help highlight the issues in political broadcasting – not to be used in newscasts or in other programming
- We are not offering legal advice – just helping you to spot issues
 - Specifics of any situation are important to reaching the right legal conclusion, so always talk to your own counsel as issues arise
- The FCC staff are representatives of the Commission – but the explanations they provide today are their own take on the issues. Their opinions offered today are not binding on the Commission – the FCC could reach a different conclusion when presented with all the facts of any situation

Legally Qualified Candidate

- To be a ***legally qualified candidate***, a person:
 - Must have publicly announced that he or she is a candidate for elective office; and
 - Must meet all of the qualifications prescribed by the local laws for the office being sought - and filed whatever papers need to be filed
- Write in candidate – must make a “substantial showing” of their candidacy
- For President, candidates for nomination are legally qualified either by qualifying for a place on the ballot or by “substantial showing.” For nomination or in the general election, if qualified in 10 states, FCC considers them qualified in all states

Reasonable Access

- Stations must provide Reasonable Access to Federal Candidates
- Applies to all classes and dayparts of commercial time (limited news exception)
- Applies to program length time, too - including odd lengths
- Applies to candidates running in districts within the station's service area
- *Bottom line – commercial stations cannot say that they will accept no political advertising and cannot set limits in disclosure statements on amount of time to be sold to federal candidates*
- Reasonable access does not apply to state candidates – so you can exclude them, limit the number of spots they buy, or restrict their ads to dayparts with more inventory
 - but can't force them to buy most expensive classes of spots in a daypart
 - must treat all candidates for same race in the same way

Equal Opportunities

- Whenever a legally qualified candidate “uses” a station, the use triggers “equal opportunities” rights for all other candidates for the same elective office
 - Each opposing candidate must be permitted an equal opportunity to appear on the station at the same cost (if any) in a time period of comparable audience size
 - Equal opportunities are not limited to the pre-election lowest unit rate Political Window; they apply whenever a legally qualified candidate “uses” a station
 - Watch for candidates in non-exempt free programs – like in PSAs or employees who run for office - as those uses could trigger obligation to give free time to opponents
- *Bottom line – must treat all candidates for the same office in the same way*
- Combination of equal opportunities and reasonable access requires careful inventory management for the last weeks before an election

“Use”

- Equal time (and reasonable access, no censorship and LUC) applies to “uses” – important for concerns about free appearances of candidates on the air
- A “Use” occurs when there is a ***non-exempt, positive*** broadcast of a candidate’s identified or identifiable ***voice or image***
- Exemptions:
 - *Bona fide* newscasts
 - *Bona fide* news interviews – defined expansively by the FCC - includes almost all interview programs under control of the station
 - *Bona fide* news documentaries, where the candidate’s appearance is incidental to the subject
 - On-the-spot coverage of *bona fide* news events

Content of Political Ads

- A station may **NOT** edit or censor the content of a candidate’s “use” of the station
- A station may not “channel” a candidate’s “use” to a particular time period because the station believes the content may disturb young listeners
- Because stations may not edit out defamatory material from a political ad containing a “use,” courts have held stations are immune from a libel or similar action based on a candidate “use”
- *Bottom line – if the ad comes from a candidate, you can’t make decisions about airing it based on its content – but the spot must be a “use” by a candidate (recognizable voice or picture of candidate in candidate-sponsored ad)*
- You **can be responsible for ads from non-candidate groups** – so reach out to your lawyer when you get demand letter to remove third-party political attack ad

Lowest Unit Charge

- During the pre-election LUC periods (45 days before a primary and 60 days before a general election), charges to candidates for a “use” must be the lowest unit charge for spots of the same duration sold by the station for the **same class of time** for the same time period
 - Applies to all candidates for public office – federal, state and local
 - Candidates get the benefit of all volume discounts, without having to buy in volume
 - Stations need to determine lowest rate for any class of time running at any particular time during the window
- “LUC” and “LUR” used interchangeably
- Outside window period, candidates get “comparable rates” to commercial advertisers - can’t charge political candidates artificially high price for spots
- Non-candidate spots do not get LUC – you can charge whatever the market will bear
 - Limited exception for parties who are “authorized” by the candidate – may be entitled to LUR

What is a “Class” of Time

A station will have several LURs – one for each class of time and each daypart that is offered to commercial buyers

- Different dayparts will have different LUR
- Within each daypart, there may be spots running from different classes of time, each with different LUR
- Classes include rate categories such as fixed position, non-preemptible, preemptible with notice, preemptible without notice
- Other spots may sometimes fall within a daypart but have their own LUR, e.g., broad rotations, run-of-schedule, and the like
- Classes must be:
 - Clearly defined;
 - Distinguished on the basis of real differences other than simply cost;
 - Disclosed to advertisers; and
 - Made available to candidates who buy time

Class of Time - Preemptible Time

- Price alone is not sufficient to distinguish classes of time
- There can be different classes when a higher price buys a real benefit, such as more favorable notice or make-good privileges
- These must be real distinctions, offered to commercial advertisers – with limited exception of special candidate-only discounted fixed-position spots, cannot just make up classes for candidate ad sales
- Levels of preemptibility: be careful that all levels are strictly observed or FCC could consider station to have a single level of preemptible time where candidate gets rebate to the lowest-priced spot that clears

Easy Example – Volume Discounts

- If a commercial advertiser buys spots at \$10 each, but if they spend \$100, they get 12 spots – candidate can buy only one spot at \$8.33 even though they have not bought in required volume for the discount
- Same rule applies even if the contract says 10 spots for \$100 plus 2 “no charge” spots – advertiser still got 12 spots for \$100, so candidate can buy at \$8.33 rate
- Bonus spots on a sale can either be a volume discount (if the bonus spots are of the same class) or a package (if the bonus spots are of a different class) – and must be treated properly

Packages

You need to make it easy for the candidate who is buying time:

- Candidates can't be forced to buy packages on a single station to get the rates in those packages
- Instead, stations must assign rates to all classes of time within a package, and include those rates in determining LUR for each class of time
- Allocate the package price to the various classes of time within a package, then compare the allocated price to other spots of the same class sold to other advertisers in other contracts, and see if the allocated price affects your lowest unit rate
- Can also allocate differing values to spots sold in a long-term contract – can be beneficial to station
- Can also be used when spot sale contains both over the air and digital ads – need to recognize that digital has value, but there is no LUC issues for digital

Easy Example – Package Allocation

- If a commercial advertiser buys prime time spots at \$10 each, but if they spend \$100, they get 2 bonus spots to run in overnight hours
- You need to allocate the \$100 purchase price to the spots of the different classes (prime time and overnight)
- To reflect rates in more valuable time period, allocate \$98 of the \$100 to the prime time spots, meaning they have a unit value of \$9.80 – compare them to all other prime time sales to see if it affects your prime time LUR
- Remaining \$2 allocated to the 2 overnight spots – unit rate is \$1 – compare that to all other overnight spots to see if it affects your overnight LUR

Packages

Allocations of spots within a commercial package to evaluate it for LUR purposes are done in internal station records – no need to give the allocation of the package price to commercial advertisers or to put the allocations in public file

- Invoice to advertiser can show zero dollar spots for “bonus” spots, yet you can “allocate” a value to those no-charge spots for political purposes – just make sure that the allocation adds up to the package price
- Place contemporaneous dated and signed memo in station internal file with contract showing allocations made within package – ***memo need not be in public file***

Network and Combo Buys

- Buys of multiple stations in a cluster – or from a network where multiple stations are part of the buy – do not affect LUC on any individual station
- For combination sales, if requested, cluster should make combo rate available to candidates at lowest divisible whole number of spots – availability should be referenced in disclosure statement and made available on request
- For network buy, the network (“wired” or “unwired”) theoretically has its own LUC that candidates can request
- Stations still have disclosure and potential equal opportunity obligations even if network spots don’t affect LUC – candidates can choose to assert equal opportunities on network (at the network rate) or on an individual station (at the station’s own LUC)

Federal Candidate Certifications

- Under the Bipartisan Campaign Reform Act, **Federal candidates** must supply stations with a special certificate, certified by the candidate or his authorized committee, in order to qualify for lowest unit charge privileges
- Candidates failing to comply are not entitled to lowest unit rates for the remainder of the election period
- BCRA puts similar requirements on candidates that they, in their own voice, state their approval of all ads – not just those referencing the opposing candidate - so to avoid FEC issues, virtually all ads from Federal candidates will have the required information

Sponsorship ID - TV

- For Federal candidate ad:
 - Statement in candidate's voice that the candidate approved the message
 - Accompanied by a full-screen image of candidate for at least 4 seconds
 - Plus written statement for at least 4 seconds that the candidate approved the message and that their committee paid for the ad
- State and Local – The announcement was “sponsored by” or “paid for by” a candidate or campaign organization
 - If you receive a spot that does not contain this mandatory ID, you can edit it to insert the material, even if that overrides content
- For third-party ads, make sure full legal name of sponsoring organization is on the ad after the “paid for” or “sponsored by” language
- May be state laws too adding identifications – especially for non-candidate groups

Sponsorship ID – Radio

- Only real difference - for Federal candidate ad:
 - Statement in candidate’s voice that the candidate approved the message and *states the office that the candidate is seeking*
 - Statement that their committee paid for the ad
- State and Local – The announcement was “sponsored by” or “paid for by” a candidate or campaign organization
 - If you receive a spot that does not contain this mandatory ID, you can edit it to insert the material, even if that overrides content
- For third-party ads, make sure full legal name of sponsoring organization is on the ad after the “paid for” or “sponsored by” language
- May be state laws too requiring additional information in sponsorship identifications

Disclosure Statements

- Stations must disclose to candidates all classes of time, discount rates and privileges given to commercial advertisers that affect the value of spots, and station policies that will affect the candidate's buying decisions
- Must be provided to all candidates when they want to buy time
- Every station should have a standard disclosure statement that is given whenever there is an inquiry for political time – technically, it does not need to be in writing, but since it needs to be consistent and so there are no questions about what was disclosed, you should have it in writing
- Not required to be in the public file (the FCC has only suggested, but does not require that stations put a copy there and most don't)

Recordkeeping

- Online Political File is mandatory, and the FCC is reviewing its contents
- Maintain documents in file for two years from date of document, not from date of election
- Information about **orders** for any candidate or any federal issue must be uploaded “immediately” (**same day or next business day**) – major focus of FCC attention during radio renewal cycle – hundreds of consent decrees with stations that did not meet the one-day requirement
- Much of the same information is required for issue ads as for candidate ads if the message relates to a political matter of national importance, including:
 - A legally qualified candidate;
 - Any election to federal office; or
 - A national legislative issue.
 - Any political matter of national importance that is regularly debated even if no specific legislation is pending

Contents of Political File

For all candidates (Federal, state and local) and Federal issue ads:

- Whether the request to purchase time was accepted or rejected
- Rate charged
- Date and time for spots to be aired (with exact times added to file after the spots air)
- Class of time purchased
- For Federal issue ads, name of candidate to which the spot refers, the office sought, and any issue to which the spot refers
 - FCC Clarification Order in October 2019 states that *all Federal candidates and issues* mentioned in the ad must be identified in the public file for each spot
- In the case of a candidate request, name of the candidate and his or her authorized committee and its Treasurer

Political File Contents, cont.

For all issue ads – state, local, and Federal:

- The name of the person or entity purchasing the time – full name, no acronyms
- The name, address and phone number of a contact person, and
- A list of the chief executive officers, members of the executive committee or of the board of directors of such entity.
- FCC Clarification Order in October 2019 requires station to inquire of sponsors or ad agency if sponsor gives just one name for their board or executive officers (FCC expectation is that there will be more than one officer or director)
 - Document the inquiry in case you are ever asked – not required to be in the public file

FCC Clarification on Issues Ads

- Requires you to review all issue ads (ads not by a candidate or candidate's committee)
- Determine and disclose *all* the Federal candidates and *all* the Federal issues discussed in any ad – potentially multiple disclosures for each ad
- Federal issues include:
 - Federal elections
 - Matters pending before Congress
 - Other important national issues – could include big administrative decisions (e.g., tax code or environmental regulations) or other significant national issues (e.g., impeachment or health care reform) even if not now pending before Congress
- When candidate is mentioned, spell out name of office they are seeking – no abbreviations

Impact of FCC Clarification

- More work for you – as you need to track down officers and directors of candidate committees, and identify all issues and candidates mentioned in issue ad
 - Likely that most issues advertisers will not provide complete information – so it falls to you
- Potential to make state issue ads (e.g., state party attack on state candidate) into Federal issue ads if they mention Federal issues – will require rate and schedule disclosure of state issue ads if they mention Federal issue

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