Political Broadcasting - 2011

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DEFINING SUCCESS TOGETHER

Political Broadcasting Issues

- Reasonable Access
- Equal Opportunities
- No Censorship
- Lowest Unit Rates
- BCRA Requirements
- Paperwork - Disclosure Statements and the Public File

Questions to Ask

- When Does the Rule Apply? – inside “political window” or as soon as candidate is legally qualified?
- Does the Rule apply to both Federal and State Candidates?

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 he or she seeks - and filed whatever papers need to be filed
  - Special rules for Presidential candidates
    - If qualified in 10 states, qualified in all
    - Qualified upon substantial showing of activity, not necessarily upon filing of papers.

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

Reasonable Access

- Everything is Negotiable for Federal Candidates.
  - ***Never set limits in advance on how much or what type of time you will make available to federal candidates . DO NOT put limits on Federal Candidates buys in your disclosure statement***
    - A station does not have to make ***all*** of its advertising time available to federal candidates, but it must make a reasonable amount of spot - and program time - available in all dayparts.

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Reasonable Access

Applies to Federal candidates only.

- Candidates for state and local offices are ***NOT*** entitled to reasonable access.
  - Stations may choose not to sell any time, or limit candidates for a particular race to a particular daypart.
  - Different state and local races can be treated differently, as long as all candidates for the same race are treated the same
  - Can’t offer state candidates time only if they pay normal commercial rates – must charge Lowest Unit Rate within the Political Windows

Reasonable Access

- In deciding how much time to provide to a particular Federal candidate, consider:
  - The candidate's individual needs;
  - The amount of time previously supplied to the candidate;
  - The number of other local political races;
  - The potential disruption to regular programming; and
  - Number of competing candidates who might invoke "equal opportunities" privileges.

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.

“Use”

- 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
  - *Bona fide* news documentaries, where the candidate’s appearance is incidental to the subject
  - On-the-spot coverage of *bona fide* news events

“Use”

- To be a use, an appearance must be positive -- material attacking a candidate is not considered a use by the candidate being attacked, even if his or her voice or image appears.
- The appearance of a legally qualified candidate in a non-exempt entertainment program or advertisement is a “use.”
  - Terminator, Bed Time for Bonzo, The Love Boat, Pat Paulson appearances on the Smothers Brothers

Equal Opportunities

- Time for Making Demand
  - A candidate seeking equal opportunities must make his or her demand within seven days of the use by a competing candidate.
  - If a candidate does not make a timely claim for equal opportunities, it is lost, but subsequent uses may trigger further equal opportunities.
- There is no obligation to notify competitors of uses by a legally qualified candidate – but you must place information about “uses” in public file

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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 political "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 them to be immune from a libel or similar action based on a candidate "use."

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Content

- You are free to reject political ads which do not contain a “use.”
  - *NO IMMUNITY FOR SPOTS THAT ARE NOT USES BY A CANDIDATE. For third party attack ads - stations must investigate the truth of third party ads whenever they are challenged or if the station has reason to believe that they are not true - as running false ad may subject station to liability.*

Lowest Unit Charge

- During the pre-election LUC periods (45 days before a primary and 60 days before a general election), charges to candidates must be the lowest unit charge for spots sold by the station for the same class and amount of time for the same period.
- Outside window period, candidates get “comparable rates” to commercial advertisers - can’t charge political candidates artificially high price for spots

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Who is entitled to LUC?

- Only “uses” by legally qualified candidates in connection with the campaign are entitled to lowest unit charge.
  - If the candidate’s voice or image does not appear, the spot does not qualify.
  - Commercials unrelated to the campaign (e.g. the car dealer political candidate) do not qualify.
  - Ballot issue ads and third party ads not featuring the candidate do not qualify.
- LUC applies to ALL legally qualified candidates.
  - *State and local candidates are just as entitled to LUC as federal candidates – and can’t negotiate it away*

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What Does LUC Really Mean?

- Candidates get the benefit of all volume discounts offered to other advertisers even if they buy only one spot.
- Station practices that enhance the value of advertising must be made available to candidates, such as discount privileges, time sensitive make goods, preemption priorities, and other factors that enhance the value of an advertisement - they get the benefits of station's most favored advertisers

What is a “Class” of Time

- Rate categories such as fixed position, non-preemptible, preemptible with notice, preemptible without notice, 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.

Class of Time - Preemptible Time

- Price alone is not sufficient to distinguish classes of time.
- A class is recognized when a higher price buys a real benefit, such as a lower level of preemptibility or more favorable make-good privileges.
  - Levels of preemptibility: be careful that all levels are strictly observed or FCC could consider station to have a single level of preemptible time

Packages

- Stations must assign rates to all classes of time within a package
- 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, and see if the allocated price affects your lowest unit rate
- Can also allocate differing values to spots sold in a long-term contract

Packages

- You need not give the political allocation of the package price to commercial advertisers
  - 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.
  - Place contemporaneous dated and signed memo in station internal file with contract showing allocations made within package – *memo need not be in public file.*

Rates May Change Over Time

- Stations may change their rates during the 45 or 60 day window - as long as change is not done purely for political rate purposes
- *But*, spots sold before the rate increase which clear after the rate increase will set the lowest unit charge after the rate increase during time periods in which those spots run.
- Candidates exercising equal opportunities rights are entitled to match an opponent's rate.

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Potential Problems

- Agency Commissions – LUC established by “net to station”
- Bonus spots -- Where the bonus is of the same class as the sold time, it’s a frequency discount; if it is a different class, it’s a package and an allocation is necessary
- Credit -- stations must apply normal credit policies – if no credit to transient businesses, no credit to candidate committees. Federal candidates cannot be required to pay more than 7 days in advance.

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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 eligible for lowest unit rates for the remainder of the election period.

Stand by Your Ad Certificate

- The certificate must certify that the candidate will not make any direct reference to an opposing candidate, unless, in each spot, there is a statement by the candidate stating that the spot was approved by the candidate and paid for by him or his authorized committee.
- For Federal candidates only
- 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

BCRA ID - Television

- A verbal statement by the candidate that he approved the ad (required by FEC for the candidate, but not by FCC for the station); *and*
- Either:
  - A full-screen view of the candidate, ***or***
  - An image of the candidate (80% of screen height); ***and***, in either case,
- A clearly readable written statement of the approval and the name of the sponsoring committee (4% of height, 4 seconds, sufficient color contrast to be readable)

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BCRA ID - Radio

- An audio statement of the candidate in which the candidate identifies himself, identifies the office for which he is running, states that he approves of the broadcast
- Ad must also state candidate's committee has paid for the spot.

Sponsorship Identification

- State and Local Races:
  - The announcement was “sponsored by” or “paid by” a particular 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.
  - **Note**: In some states, for state and local elections, there is also a requirment that the ID include the name of the treasurer of the committee. Check your local state law to see if required in your state

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
- Every station should have a standard disclosure statement that is given whenever there is an inquiry for political time.

Recordkeeping

- Political File
- Maintained for two years
- New BCRA requirements cover each message relating to a political matter of national importance, including
  - A legally qualified candidate;
  - Any election to federal office; or
  - A national legislative issue of public importance.

Contents of Political File

- Whether the request to purchase time was accepted or rejected
- Rate charged
- Date and time aired
- Class of time purchased
- Name of candidate to which the spot refers, the office sought, or the issue to which the spot refers
- In the case of a candidate request, name of the candidate and his or her authorized committee,

Political File Contents, cont.

- In the case of any other (non-Federal, non-candidate) political or issue request (e.g. local zoning or bond issue, state issues):
  - The name of the person or entity purchasing the time,
  - 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.

Political Broadcasting Are You Ready?

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