



## Political 101:

### A Broadcasters' Guide to the Basics

#### 2004 Edition

The rules governing political advertising on broadcast stations are found in statute, the Code of Federal Regulation, FCC policy statements, FCC rulings and oral and written interpretation by Commission staff. This general guide is not a substitute for legal advice by your counsel given the myriad of facts that could affect a broadcaster's obligations under the rules. The rules are ever changing and in heat of an election, the best advice is to seek counsel from the FCC staff or your communications counsel.

The Bipartisan Campaign Reform Act of 2002 (popularly known as "McCain-Feingold" or "BCRA") changed some of the ways that broadcasters deal with *federal* political ads. The three main areas affected by BCRA are: sponsorship identification, lowest unit charge and political file. Those changes will be discussed in the relevant sections of this memo. However, it is important to note that BCRA did not change the rules as they apply to state and local candidates. Where appropriate a distinction will be made.

The rules of political broadcasting breakdown into 6 general categories: 1) Reasonable Access for federal candidates; 2) Equal Opportunities; 3) Sponsorship Identification; 4) Lowest Unit Charge; 5) Recordkeeping and Political File; and 6) Disclosure requirements. We will address each in turn. First, the concepts of "legally qualified candidate" and "use" must be defined as they are the underlying definitions used for these rules.

**1. Who Is A Legally Qualified Candidates For Public Office:** A legally qualified candidate for FCC purposes, a is person who a) has publicly announced that he or she is a candidate; and b) meets the qualifications prescribed by the applicable laws for the office he or she seeks; and c) has qualified for a place on the ballot or has publicly committed himself or herself to seeking election by the write-in method, is

eligible under applicable law to be voted for by sticker, write-in, or other method in the state where he or she seeks election and has made a substantial showing that he or she is a bona fide candidate for nomination or office. In convention and caucus states, a person seeking nomination to any public office in addition to (a) and (b) above, must also make a substantial showing that he or she is a *bona fide* candidate for the office sought. A candidate in a convention or caucus state is not considered a legally qualified candidate prior to ninety days before the convention or caucus. In addition to (a) and (b) above a person seeking the offices of President or Vice President must also 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, in the case of a primary election, make a substantial showing of *bona fide* candidacy for nomination in the relevant state. However, any candidate for President or Vice President who meets these qualifications in ten states is considered to be legally qualified in all states. If there is a question as whether someone is a "legally qualified candidate," that candidate 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.

**2. What Is A "Use"?** Any positive broadcast of a candidate's identified or identifiable voice or picture, whether authorized or not, constitutes a "use." This is true regardless of whether the appearance is in a campaign related broadcast, or not. However, certain appearances are not "uses" for purposes of the political rules, even when campaign related. The distinction is important because "uses" by candidates may not be censored. Exemptions from the definition of "use" are appearances by legally qualified candidates in: (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; (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, such as debates and party conventions. Appearances by legally qualified candidates that also happen to be on-air personalities during these exempt programs are not exempt if the appearance is in connection with their on air duties.

**3. Reasonable Access.** Commercial broadcast licensees are required to provide "legally qualified candidates" for federal office "reasonable access" to "reasonable amounts of time" for the "use" of the broadcast station on behalf of their candidacy. Section 312(a)(7) provides that the Commission may revoke a station license for willful or repeated failure to comply with this provision. Reasonable access does not apply to non-commercial stations. The provision applies *only* to "legally qualified candidates" for *federal*

elective office. Thus, state and local candidates do not have a right of reasonable access. Reasonable access applies whenever a candidate is "legally qualified" *not* merely during the 45 and 60 day periods for lowest unit charge. Reasonable access only applies to "use" of the broadcast station in connection with the candidate's campaign.

Stations are *not* required to make free time available to federal candidates under reasonable access. However, if a station makes free time available to one candidate, the equal opportunities requirement would obligate you to similarly accommodate his or her opponents, if requested as provided in the rule. "Reasonable access" does not give candidates rights to a particular program on a particular day; but they do have the right to access to all day-parts, including prime-time or drive time. A station is not required to make all of its advertising time available to candidates, or make so much time available that it is forced to preempt an excessive amount of other programming. Limits on how much or what type of time you will make available to federal candidates are prohibited. Each request for access by a federal candidate must be evaluated individually based on the following factors: (a) the individual needs of the candidate, as expressed by the candidate; (b) the amount of time previously provided to the candidate; (c) potential disruption of regular programming; (d) the number of other candidates opposing the candidate that could potentially request equal opportunities; and (e) the timing of the request (*e.g.*, early in the election or right before election day).

Despite the reasonable access provision, candidates have no right of access to news programming. 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. 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. 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 prohibit federal candidates from purchasing 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, can take into account lost revenue, including any diminution of revenue due to lost ratings in immediately following programs.

**4. Equal Opportunities (Not Equal Time).** Equal Opportunities apply *whenever* (not just during the lowest unit charge window) a "legally qualified candidate for public (not just federal) office" "uses" a broadcast station. This concept includes uses which are not in connection with the candidate's campaign, such as advertisements for their usual line of business (e.g. the local car dealer) or appearances in old movies (such as Arnold Schwarzenegger movies). An opposing 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. A candidate does not have equal opportunity rights until they are in fact a legally qualified candidate for public office. Equal opportunity responses cannot be "daisy-chained." For example: 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. "Equal opportunities" does not mean precisely the same time period, but rather a "comparable" time period in terms of audience share and demographics.

It is up to the candidates to monitor your station's local public inspection file to determine whether they have a right to equal opportunities. The station has no duty to notify a candidate about requests for time by an opponent. If you do notify one candidate about uses by an opponent, however, you must do the same for all that candidate's opponents. If a use occurs in a non-political broadcast, such as an old movie featuring the candidate, or in another broadcast not sponsored by the candidate, such as a third-party advertisement, stations must take care to note the use in the public inspection file.

**5. Sponsorship Identification.** Sponsorship identification is one of the areas BCRA has had a profound effect and particular attention should be paid to sponsorship identification in this election year. First, the FCC's Rules, which have *not* changed as a result of BCRA, require that a broadcaster identify the sponsor of any material broadcast. With respect to political and issue advertising, the Commission's Rules require the sponsorship identification to be broadcast at the beginning *and* end of a program that is more than five minutes in length and at the beginning *or* end of a program that is five minutes or less. For political advertisements, the FCC rules require that the identification state (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. For television stations, the sponsorship identification must be equal to or greater than 4% of the vertical picture height (generally 20 scan lines) and remain on the screen for least four seconds. BCRA also requires the candidate to provide the sponsorship identification against a contrasting backdrop.

In addition, under BCRA advertisements sponsored by candidates for *federal* (including their official committee) office must include an audio statement by the candidate personally identifying themselves, stating that they approved the broadcast and that the candidate (or their official committee) has paid for the broadcast. Television advertisements can either include a full screen view of the candidate making these statements or a voice-over by the candidate with a clearly identifiable image of the candidate and must also include the same statement on screen at the end of the broadcast for at least four seconds on a contrasting background. These requirements for identification imposed by BCRA are, at least for now, enforced by the FEC and are not enforced against the broadcast licensee.

Advertisements sponsored by political parties or other third party organizations which advocate the election or defeat of a federal candidate or that solicit political contributions and are not authorized by a federal candidate's authorize committee, must also comply with BCRA. Under BCRA such third-party ads must include a statement that the advertisement is not authorized by any federal candidate and that " \_\_\_\_\_ committee (or third party or political party or individual). There are several additional requirements imposed by BCRA with respect to unauthorized third-party advertising which are not the broadcasters responsibility. Advertisements sponsored by political parties or other third party organizations which advocate the election or defeat of a federal candidate or that solicit political contributions and are authorized by a federal candidate's authorize committee, must also comply with BCRA. Under BCRA required statement must state that the advertisement was paid for by the third-party and authorized by the candidate or candidate's committee.

**6. Lowest Unit Charge ("LUC").** In general, federal law requires that legally qualified candidates for public office be allowed to purchase advertising time at the lowest unit charge ("LUC") during the 45 days before a primary and 60 days before a general election. The LUC is the lowest rate that a station sells to commercial advertisers within each class and type of advertising spot. All legally qualified candidates for federal, state or local office are entitled to LUC during the appropriate window. During this window,

stations must allow candidates to purchase advertising time at the lowest rate the station charges any other buyer for the same class of time.

Only candidates or their authorized campaign committees are entitled to benefit from the LUC. Third party ads, unless authorized by the candidate, are not entitled to the station's LUC. State and local candidates, once granted access, are entitled to LUC. The no censorship provision also applies to all candidates, once access is granted.

Stations calculate the LUC by figuring the lowest rate for each class of time and time period that advertisements are sold, including all volume discounts, bonus spots and preemption priorities. Candidates benefit from any discounts stations allow any other purchaser. For example, stations that offer a volume discount to a purchaser of a bulk of advertising spots must allow a candidate to purchase one spot at that the volume discount rate. Different classes of time, such as fixed position, preemptible and run-of-schedule, will each have their own LUC. Different classes and types of advertising within package deals must all be given individual values. There is no need to sell prime advertising time at the less desirable advertising time rate, only to sell to the candidate the lowest rate within each advertising class they desire to purchase.

BCRA mandates new certification requirements for *federal* candidates. Federal candidates are entitled to lowest unit charge only when they have certified that their advertisement will comply with BCRA's requirements. Specifically, in order to utilize the LUC, the federal candidate (or a candidate's authorized committee) must certify that they will not refer to their opponent (directly or indirectly) unless the advertisement meets the requirements detailed below. Written certification must be provided to the station at the time that the programming is purchased. The Commission staff has informally (and non-bindingly) advised that station's can require candidate's to complete their specified form of certification, since the station is responsible for this provision. If the ad refers to an opposing candidate, even if the reference is neutral, the ad must include:

**For RADIO:** an audio statement voiced by the candidate identifying him or herself, the office being sought, and that the candidate has approved the broadcast.

**For TELEVISION:** a clearly identifiable photographic or similar image of the candidate while simultaneously displaying a written statement for at least four seconds at the end of the broadcast. The statement must identify the candidate, state that the candidate approved the broadcasted ad and that either the candidate or the candidate's authorized committee paid for the broadcast.

Failure to provide certification to the station or to include this message forfeits all rights that the candidate or their committee has to the LUC for the duration of the political window (45 or 60 days). The Station is responsible for determining compliance with this provision, notifying the candidate if an advertisement does not comply with the BCRA requirements and suspending the candidate's lowest unit charge privileges in this case. Stations which find themselves in this circumstance should contact counsel immediately.

**7. Recordkeeping and Political File.** Stations are required to maintain a public file that is open to inspection. This file consists of a political file, records of issues of national importance, current FCC authorizations, all applications filed with the FCC, citizen agreements, contour maps, ownership reports and contracts, annual employment reports, "The Public and Broadcasting Manual", correspondence from the public, FCC investigations and/or complaints, quarterly Issues/programs lists, local public notice announcements, radio time brokerage agreements and sponsorship identification. For political broadcasting purposes, there are two important subparts that stations need to pay particular attention to; the political file and the broadcast history of any political matters of national importance.

In the political file, stations must maintain and allow for public inspection all records regarding requests for political advertising time made by federal, state or local candidates or the committee authorized to act on their behalf. Mere inquiries need not be recorded.

In this file, the station should include:

- The name of the candidate, the candidate's authorized committee, the treasurer's name and the office sought;
- The disposition of the candidate's request (whether the request to purchase political time was accepted or rejected);
- The schedule of time provided or purchased, including the length of the ad and class of time;
- Rates charged (including notations of no charges);
- The actual time the ad aired;
- Any rebates paid, and the amount, date and order to which they were paid; and
- Any free time that was given to the candidate or authorized committee.

The political file must be kept in an orderly manner where the information is accessible to the public and made available for inspection and copying during normal business hours. Stations are not required to

provide political file information by phone. If they choose to do so, they must provide such information to all candidates in the same race in a non-discriminatory manner.

Political file records must be maintained for at least two years under FCC rules. The political file must be updated and modified as soon as new information is provided and should contain contact persons for any information that is only generated periodically. Stations are cautioned to ensure that third-party and non-campaign related uses are also noted by the time, date and duration and placed in the political file so that opponents may see the record of the use for purposes of requesting equal opportunities (*see* "Use" section above).

Under the new, expanded BCRA recordkeeping requirements broadcasters are required to maintain records for any requests to purchase time that communicates any political matter of *national* importance ("national issues"). This expansive provision includes references to legally qualified candidates, elections to Federal office and national legislative issues. For this category of advertising and recordkeeping requirements, the public inspection file rules are essentially the same as those applicable to candidate advertising.

It is incumbent upon individual stations to record and disclose rates and times aired in the public file for issue advertisements. The station must therefore take the initiative to inspect the issue advertisements to determine whether issues of national importance are discussed and whether the information must be disclosed in the public file.

The national issues record must include:

- A record of each request to purchase time;
- Whether the station accepted or rejected the request;
- The rate charged for the programming;
- The date and time on which the programming is aired;
- The class of time purchased;
- The issue to which the programming refers or the name of the candidate and the election/office to which the programming refers; and
- The name of the purchaser, the name, address and phone number of a contact person for the purchaser, and a list of chief executive officers/board of directors of the purchaser.

Under the FCC's sponsorship identification rule, issue and third-party political advertisers, whether or not "issues of national importance," must provide the station with a list of the officers of the sponsoring organization for placement in the station's public file.

Although stations may maintain the political file and the national issue record in any form, NAB's political broadcast agreement form (PB-16) is a standard, efficient form that provides all of the information candidate and issue advertisers need and the FCC requires, including the federal candidate certification.

**8. Disclosure Requirements.** In addition to recording keeping requirements, the FCC regulations make certain disclosures, especially the disclosure of rates, sales practices, time classes and any other relevant information for purchasing time, mandatory for stations to provide to candidate buyers. These disclosures must be made to all federal, state or local candidates seeking to buy political advertising time. The disclosure statement should, though not necessarily, be in writing. Stations should record each inquiry for political time and document that full disclosure was provided. Generally speaking, stations may not require that candidates sign or otherwise acknowledge receipt of the disclosure; therefore incorporating documentation on the station's behalf should be standard procedure for every station. If the station sells advertising time through a rep firm, it is incumbent upon the station to properly train the sales reps regarding disclosure statements because stations are liable for any failure on behalf of reps to disclose information to candidate buyers.

The disclosure statements are meant to vary from station to station and reflect the fluctuations of the dynamic political season, therefore boilerplate language should be avoided. At a minimum, the disclosure statement should include:

- A description of each class of time available to commercial advertiser sufficient to allow candidates to understand and differentiate between the classes;
- Complete disclosure of the LUC for each class and time period;
- A description of the station's method of selling time;
- An approximation of preemption likelihood for each class of preemptible time sold;
- Sales practices that affect rates, including audience delivery;
- The station's make good policies;
- Discount and value-added privileges;
- The availability of packages and rotations; and
- All available rates and all sales practices affecting rates, both within and outside of the LUC time frame.

In addition, stations should include any other pertinent information to political broadcasting and their station, for example station particularities such as deadlines, payment information or facility use rules. Any modifications or changes made after the disclosure is made must be passed on to the candidate buyer.

**9. CONCLUSION.** This document is provided to introduce the reader to the fundamental basics of broadcaster's obligations during political advertising seasons and to highlight significant changes. Political broadcasting is an ever-changing, detail specific area of broadcast law and outcomes are determined on a case-by-case basis. If the reader is ever unsure of their responsibilities, please seek advice from your communications counsel or the FCC staff.

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