SOUTH CAROLINA BROADCASTERS ASSOCIATION

2011 POLITICAL BROADCASTING GUIDE

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Table of Contents

Introduction

The Communications Act of 1934 (the "Act") and the rules and policies of the Federal Communications Commission ("FCC" or "Commission") in summary require broadcast licensees to:

- provide reasonable access to a station's facilities for federal candidates (except reserved band non-commercial educational stations);
- provide equal opportunities to opposing candidates for all public offices (whether federal, state or local);
- provide candidates advertising time at the station's lowest unit charge during certain pre-election periods and at rates comparable to commercial advertisers during other periods;
- disclose to candidates certain information as to rates and sales practices;
- include a proper sponsorship identification announcement in all political advertising broadcasts; and
- maintain a political file.

I. General Definitions: "Qualified Candidates" and "Uses"

Prior to discussing a licensee's specific obligations under the Act and the Commission's rules and policies, it is necessary to define two important terms: "legally qualified candidate" and a "use" of a broadcast station.

A. Legally Qualified Candidate

The political broadcasting rules, in general, only apply to legally qualified candidates.

Two basic threshold requirements must be met in order for a candidate to be considered "legally qualified."

First, the person must be eligible under the U.S. Constitution (federal candidates) or under local law to hold the office sought.

Eligibility requirements, such as age, residence and other factors will depend on the U.S. Constitution or the law of the jurisdiction in which the person seeks public office; the latter will vary from jurisdiction to jurisdiction.

Second, the person must have publicly announced his or her candidacy.

This may be achieved in various ways, depending on the facts surrounding a particular candidacy and/or upon the law of the jurisdiction.

For example, some jurisdictions only require candidates to place announcements in local newspapers.

The public announcement requirement serves to distinguish between persons who may run and those who actually are committed to run.

The absence of a public announcement deprives a person of candidate status for purposes of the political broadcast rules.

This also applies to incumbent politicians who often receive media coverage in the course of their official duties.

Even though it may generally be assumed that an incumbent intends to run for reelection, an incumbent may not qualify as a candidate until after publicly announcing his or her candidacy.

Once the threshold requirements of eligibility under federal or local law and public announcement of candidacy are satisfied, candidates, in order to become "legally qualified," must also have either:

(1) qualified for a place on the ballot or

(2) demonstrated a substantial showing that they have publicly committed themselves to election as a "write- in" candidate.

Determining whether a candidate has qualified for a place on the ballot is generally a simple matter, determined by a call to the local election board to verify the candidate's status.

If a candidate has not qualified for a place on the ballot, the licensee must determine whether the candidate has made the required substantial showing on a write-in basis.

This is a more difficult determination.

A "substantial showing" can be found where there is "evidence that the person claiming to be a candidate has engaged to a substantial degree in activities commonly associated with political campaigning," including for example speeches, distribution of campaign literature, issuance of press releases and the establishment of campaign committees and campaign headquarters.

There are two exceptions to this general rule. First, candidates (except those for President or Vice President of the United States) for nomination by a convention or caucus will not be legally qualified until 90 days prior to the convention or caucus.

These candidates must still meet the qualifications described above.

Second, elections for President and Vice President present an additional special situation. If a Presidential or Vice Presidential candidate in the primary election and/or general election is legally qualified in at least 10 states (including D.C.), then he or she is considered legally qualified in all 50 states.

However, if a candidate is legally qualified in less than 10 states, then he or she is considered legally qualified only in the particular states where he or she has so qualified.

B. Candidate "Use" of a Broadcast Station

Whether or not a candidate has made or seeks to make a "use" of a station's facilities is important in determining whether a candidate has received access to the station, whether the station is

obligated to afford equal opportunities to a candidate's opponents and whether the candidate is entitled to the station's lowest unit charge.

The FCC's definition of a "use" was briefly changed in the early 1990's and confusion has resulted.

However, the Commission reversed itself and went back to essentially the pre-1992 definition.

The latest definition derives from 1994 FCC pronouncements: a "use" is any "positive" appearance of a candidate's identifiable voice/or picture.

Such a "positive" appearance is considered a "use" whether or not authorized by the candidate, including, for example "positive" appearances unrelated to the campaign (for example, the appearance of Ronald Reagan in a movie while a candidate).

On the other hand, a "negative" appearance such as those presented by an opposing candidate or such a candidate's organization/committee would not be considered a "use."

Announcements/programs presented by persons or organizations which are "independent" of the candidate, such as those by Political Action Committees (PACs), labor unions, public interest or ad hoc groups, and contain a candidate's identifiable voice or picture, will be considered a "use" under the Commission's rules.

While independent political ads/programs may be broadcast by a station, such purchases are not entitled to lowest unit rates since the purchase is not by the candidate, or his/her authorized committee on behalf of the candidate.

Note, as the announcements/programs are "uses," the "equal opportunity" provisions are applicable.

Of course, a station can always prohibit announcements/programs by PACs and other independent groups which would constitute a "use" to avoid drawbacks.

Station Employee Candidates: One possible concern of which all broadcasters must be aware arises when on-air employees become legally qualified candidates.

All appearances by that employee subsequent to becoming a qualified candidate will be considered a "use," and opposing candidates will be entitled to equal opportunity and free political advertising time. Remember as well to include in your political file the details of the employee candidate's on-air time. (See Section VIII below for political file requirements).

C. Certain On-Air Appearances Not Considered "Uses"

• If an advertisement does not include any candidate voice or picture, it cannot qualify as a "use."

Additionally, if the candidate's appearance is only "fleeting"—such as, for example, a few seconds in a crowd—the political advertisement is not considered a "use."

However, remember that an identifiable voice or picture, even if only in the sponsorship identification announcement, is sufficient.

• Stations should likewise remember that candidate appearances on broadcasts which include "bona fide" newscasts, news interviews, news documentaries and on-the-spot news coverage are exempt from equal opportunities requirements.

D. The Bona Fide News Exemptions

A candidate appearance which occurs during any of four types of news programs is not considered a "use" of a station, and will not confer equal opportunity rights (see Section IV) on the candidate's opponent(s).

The exempt programs include:

(1) bona fide newscast: A bona fide newscast is a regularly scheduled newscast or a special newscast precipitated by a particular and sudden news event.

In either case, the program is only exempt if it is a bona fide effort to present the news and is not intended to advance a particular candidate.

It is not necessary that the licensee produce the newscast as long as it is bona fide and not for the purpose of promoting a particular candidacy.

(2) bona fide news interview: A bona fide news interview is a regularly scheduled program which follows an interview (question and answer) format.

It is no longer necessary that the content, format

and participants be under the broadcaster's control (e.g., "Meet the Press" or "Face the Nation").

For independently produced news interview programs, broadcasters are responsible for obtaining satisfactory assurances from the program's producer that the program is not designed to further the cause of any candidate, and that candidates have had no role in producing the program.

Licensees are responsible for independently determining to air the program in their good faith news judgment, and not for the purpose of promoting any candidate.

(3) bona fide news documentary: If the appearance of a candidate is "incidental" to the presentation of the subject covered in the news documentary.

The program cannot be designed to aid a particular candidacy in any way.

(4) on-the-spot coverage of bona fide news events: The same considerations apply here as apply to bona fide newscasts.

This exemption includes, in some circumstances, the broadcast of licensee sponsored debates.

The coverage need not be contemporaneous with the event but must be coverage of a reasonably recent event.

The legislative purpose behind these exemptions is to balance the legitimate needs of broadcast licensees to provide unrestrained coverage of political news, while preserving the opportunity of political candidates to respond to opposing candidate broadcasts.

As a general proposition, the determination of whether a candidate's appearance fits one of the four exemptions is left to a licensee's good faith judgment as to the true "newsworthiness" of the broadcast.

It is presumed that licensees possess the expertise to distinguish between broadcasts which are necessary for accurate and comprehensive news coverage, and those which mainly benefit the cause of a political candidate.

Relevant factors to consider include the format, nature and content of the program, and whether they are based on the broadcaster's (or program producer's) good faith journalistic judgment; when the program was initiated and the party who initiated it; who produces and controls the program and whether the program is regularly scheduled.

Application of these factors would tend to indicate that a program is a bona fide news program if a candidate's appearance in the program is merely incidental to the presentation of a newsworthy event or properly relates to the subject matter of the program; if a candidate is not responsible for initiating and promoting the program (if a candidate initiates a controversy which then leads to an appearance in a pre existing, regularly scheduled program, the program is probably exempt) and if other media give coverage (written or pictorial) to an event.

Factors tending to indicate that a program is not exempt include whether coverage of a news event could be accomplished equally well (without hampering coverage or detracting from "newsworthiness") by eliminating the participation of a candidate; whether changes are made to the original format, scheduling, nature or content of a regularly scheduled news interview program to accommodate the needs of a candidate and whether "staged" news events serve as the origin of the program.

Note, however, that even for exempt news programs, if a newscaster or a station employee who is also a candidate appears in the program in his or her capacity as an on-air personality, that appearance is not exempt, and will constitute a use giving rise to equal opportunity rights.

E. Debates

Candidate appearances in debates are generally exempt from equal opportunity rights as on the spot coverage of a bona fide news event.

The debate may be initiated by a broadcaster, a candidate, a third party or any other person or group.

The relevant factor is not who sponsors the debate but its newsworthiness. If a broadcaster initiates or sponsors a debate, it has the discretion to select as participants, based on objective criteria such as polling data, those candidates whom it believes are most significant.

Absent evidence of a broadcaster's intent to

advance or retard a particular candidacy, the newsworthiness of the event is left to the broadcaster's reasonable, good faith news judgment.

The exclusion from a debate of a major candidate who, based on objective criteria has demonstrated the significance of his or her campaign, might call into question the reasonableness of the broadcaster's selection of participants and may entitle that candidate to equal opportunities.

It is not necessary to provide live coverage of a debate for the exemption to apply.

A broadcaster may make a reasonable judgment to delay the broadcast or to rebroadcast a debate based on a good faith determination of the current newsworthiness of the event.

F. Conventions—State Caucuses

The Communications Act includes political conventions within the exception for "on-the-spot bona fide news events."

As such, a licensee may cover a political convention without providing subsequent equal opportunities to competing candidates.

Additionally, state caucuses and other similar meetings are covered under this umbrella so long as they serve as the main method for the public to select their delegates for national or state political conventions.

II. Bipartisan Campaign Reform Act ("BCRA") Provisions

(1) Limitations on National Political Party "Soft Money" Funded Advertising Referring to Federal Candidates

BCRA upheld by the Supreme Court on December 10, 2003 broadly prohibits "national political parties" from raising or spending "soft money" to purchase political advertising or programming which refers to candidates for federal offices.

The "reference" can be either in favor or opposed and any mention will be included in the new regulations. These prohibitions do not apply to advertising referring to, supporting or opposing state or local candidates.

What is "soft money"?

The definition as set forth in the Federal Election Campaign Act ("FECA") includes contributions from corporations and labor unions.

Direct contributions or "hard money" under FECA includes contributions of individuals and political action committees.

The restrictions do not apply to hard money contributions.

Broadcast stations are not expected to enforce the BCRA provisions.

Nevertheless, it may be possible to be accused of aiding or assisting a political party in a violation.

Broadcasters should consider asking political parties to "certify" in political broadcast order forms or contracts that all funds to purchase the advertising time are contributions which comply with BCRA.

It is also noted that the regulations apply only to national political parties (not groups such as the Sierra Club, National Rifle Association or other groups, etc.).

(2) Supreme Court strikes down BCRA "Electioneering Communications" Restrictions as to Federal Candidate Political Programming in 30/60 Daytime Periods just Before Federal Primary Elections/ Conventions, and General Elections

In the *Citizens United v. Federal Election Commission* decided January 21, 2010, the U.S. Supreme Court held that the BCRA "electioneering communications" restrictions were unconstitutional. Thus, broadcasters no longer need to be concerned with those specific provisions of BCRA. The now unconstitutional restrictions had prohibited issue advertising/political advertising/programming mentioning/identifying federal candidates *by labor unions & corporations (which would also include incorporated membership groups and other incorporated entities)* during the time periods of 30 days prior to primary elections and conventions, and 60 days prior to general elections for federal candidates. BCRA referred to the foregoing as "Electioneering Communications."

(3) BCRA Sponsorship ID and Recordkeeping Requirements. BCRA also provides certain sponsorship identification requirements, (see Section V below), a new twist to discourage negative ads which can affect a candidate's entitlement to the lowest unit charge, and adds record keeping requirements (see Section VIII).

III. Reasonable Access

A. Who Qualifies

Section 312 (a)(7) of the Act requires that a commercial broadcast licensee afford federal candidates "reasonable access" to its station's facilities. This includes allowing federal candidates to purchase "reasonable amounts of time" to use a station when a campaign is underway. Free time is not required.

To qualify for access, the federal candidate must be legally qualified at the time of the scheduled broadcast (or use), not when the request for time is made.

This is an absolute legal right of access enjoyed by federal candidates only; that is, candidates for President, Vice President, the U.S. Senate and the U.S. House of Representatives.

The FCC has the power to revoke a station's license for a "willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcast station by a legally qualified candidate for federal elective office on behalf of his candidacy." This requirement was revised in 2000 to only apply to commercial broadcast stations, and accordingly non-commercial educational stations (reserved band frequencies) are exempt.

However, should a non-commercial educational station voluntarily accept political material from federal candidates, equal opportunity to opponents and all other rules and policies apply.

Candidates for non-federal offices (e.g., Governor, Mayor, state legislature, etc.) do not have a legal right of access.

While licensees have a wide degree of discretion to determine in which state and local races to accept or sell political announcements/ programs and how much time to devote to such races, these decisions should be based upon the licensee's good faith evaluation of a particular election's importance to the state, counties and communities which the station serves.

The Commission has indicated a station must keep in mind its "public interest" obligations of reporting important state or local races.

After a station decides to cover a non federal campaign it also may elect how it will provide such coverage, using, for example, news, public affairs or interview programs, paid announcements /advertisements or any combination thereof.

Once a licensee decides to make time available to a non federal candidate, it is required to comply with all regulatory obligations, including equal opportunities, lowest unit charge, volume discounts and sponsorship identification.

B. Reasonable Access Defined

There is no ready definition of what constitutes "reasonable" access for federal candidates.

Reasonable access, however, does not require a station to provide free time.

Rather, stations must provide either reasonable access free or "permit the purchase of reasonable amounts of time" for "uses" by the candidate (i.e., identifiable voice/picture, see discussion above).

If a station sells a candidate reasonable amounts of time, it need not provide free time.

Correspondingly, a station may provide reasonable free time and not be required to sell time.

Note that the provision of free time may qualify as a corporate campaign contribution subject to regulation—and possibly be prohibited—under the Federal Election Campaign Act.

Accordingly, further inquiry should be made before adopting a free time policy.

The reasonable access requirement applies when a federal campaign is "underway," which is often well in advance of 45 days before a primary election (or a caucus or convention which selects delegates to attend a nominating convention) or 60 days before a general or special election.

A licensee may make the determination that a campaign is underway prior to these dates on a case-by-case basis by focusing on such factors as: candidacy announcements, establishment of

campaign organizations, fundraising activities, endorsements, media coverage and the progress of the delegate selection process (if applicable).

The FCC will review reasonable access complaints on a case by case basis according to the unique facts of each situation, generally deferring to the good faith determination of a licensee.

This presumption is intended to minimize Commission intrusion into a station's day to day editorial judgment.

Licensees should not, however, be misled into thinking that the presumption will insulate their decisions from FCC review.

The Commission will examine a reasonable access complaint to see if it has merit, and if so, will require the licensee to explain its decision or conduct.

A failure to provide reasonable access could result in a fine or other sanction, including in particularly egregious cases, license revocation.

A broadcast licensee must review each candidate's request for political announcements and program time on an individual basis and consider that candidate's needs.

Furthermore, the Commission recently ruled that a licensee may not make a blanket prohibition against selling non-standard time (such as, for example, five minute programs).

Instead, in deciding the type and amount of access a station will provide to a candidate, the Commission expects consideration of the factors set forth in the Carter/Mondale decision, which concerned the 1980 elections.

These factors include:

(1) the needs of the candidate as expressed by the candidate;

(2) how much time was previously sold to the candidate;

(3) the potentially disruptive impact on the station's regular programming;

(4) the likelihood of equal opportunities requests by opposing candidates, if the candidate request is granted; and

(5) the timing of the request (i.e., how close to the election, etc.).

And the Court in Carter/Mondale emphasized, these factors may not be used as a pretext for denying access: "...to justify a negative response, broadcasters must cite a realistic danger of substantial program disruption — perhaps caused by insufficient notice to allow adjustments in the schedule — or of an excessive number of equal time requests."

If a commercial station chooses to donate reasonable access time rather than sell time to candidates, such free time must be of the various lengths, classes and periods that are available to commercial advertisers.

Further, a station may not refuse all requests for time solely because they do not fit within the station's format.

The right to reasonable access entitles a federal candidate to broadcasts during all time periods, including prime time or drive time.

Licensees may not adopt a blanket policy of refusing, to sell federal candidates the various specific type, length or classes of time they ordinarily sell to commercial advertisers, and as indicated above may not adopt a blanket policy of refusing to sell program time in non-standard increments.

Further, a licensee must sell federal candidates program time (if requested), even though it may not offer program time to anyone else.

Pricing in such instances is problematic.

Use of the broadcast industry practice in the market is one possible solution, which has been suggested, in the absence of FCC directives.

C. News Programming Exemption

Stations may "ban" the sale of political advertising to federal candidates during newscasts so long as a wide array of other dayparts and programs are made available.

Thus, stations may refuse to accept political advertising in all news programming, during specific news programs or during any portion of a specific news program.

Note, however, that where candidates are banned from access to news programming and a station creates a special "news-adjacency" class of time for candidates, the time cannot be sold at rates higher

than the sale of time to the station's most-favored commercial advertiser during the newscast (see Section VI for further discussion of rates).

On the other hand, if a spot is purchased as part of a broader rotation which includes times adjacent to news programming, the candidate would be charged the same lowest unit which applies to that particular class of time.

D. Candidate Use of a Station on Weekends and Ordering Deadlines

If a station has allowed weekend access to any commercial advertiser during the year preceding the election, the station must provide federal candidates with weekend access.

However, access on weekends need be provided only to the same extent or purpose it was provided to commercial advertisers (e.g., services such as changing or deleting copy).

Of course, if necessary to ensure a candidate receives "equal opportunities," weekend access may be, in any event, required regardless of past practices.

Furthermore, the FCC has indicated that candidates may be required to meet the same ordering deadlines as commercial advertisers as long as such deadlines do not conflict with a federal candidate's right to reasonable access or any candidate's right to equal opportunity.

In particular, ordering deadlines imposed in the final days preceding an election may be found to interfere with reasonable access and equal opportunity rights.

IV. Equal Opportunity

Section 315(a) of the Act provides that if a licensee permits a "legally qualified candidate" to "use" (see definition of a "use" pages 1 & 2) its station-- then "equal opportunities" must be provided to the candidate's opponent(s), but the opponent(s) must make a "timely request" (See B, page 8).

This applies to all legally qualified candidates in both primary and general elections, federal, state and local.

Provided however, candidate appearances which occur during a bona fide newscast, news interview, documentary or on the spot coverage of a news event are exempt from this requirement.

A. Equal Opportunity Defined

The right to equal opportunities applies only to "opposing candidates."

In a general election this means candidates running for the "same office" (e.g., president, governor, mayor, etc.).

In a primary election this means candidates of the same party running for nomination for the same office (e.g., democratic or republican candidates for their party's nomination to run for president, governor, mayor, etc.).

The doctrine of equal opportunity imposes two basic obligations on licensees.

First, licensees upon request must afford opposing candidates the same opportunities to use a station's facilities.

This does not mean that opposing candidates are entitled to the identical time period or program, but they are entitled to broadcast time of "comparable desirability."

That is, when one candidate is allowed to use a station's facilities the licensee must give any opposing candidate(s) a similar opportunity to reach an audience which is comparable to the audience (determined by gross rating points and demographics) reached by the first candidate's broadcast.

Generally, a station is not required to notify opposing candidates, or give an opposing candidate an opportunity to appear in the same program, at the same time of day, on the same day of the week or in a time slot adjacent to that of the original broadcast.

Licensees and candidates have a reasonable degree of flexibility in negotiating an arrangement which is responsive both to the candidate's needs and to the licensee's need to present programming and to accommodate other candidates and commercial advertisers.

Second, licensees may not discriminate in any manner among opposing candidates when providing broadcast time.

Any special favors or "breaks" that a licensee gives to one candidate in the form of price discounts,

contract rights, bonus spots, technical assistance or other services incidental to the purchase of broadcast time also must be given to opposing candidates.

The rule of thumb is that licensees must treat political candidates in a fair, impartial and consistent fashion.

Any deviation in treatment among opposing candidates will expose the licensee to charges that it violated the equal opportunity provision of the Act.

Remember, for equal opportunities to apply a "legally qualified candidate" must make a "use" of the station's facilities.

B. Timely Requests for Equal Opportunity

Licensees are not required to notify candidates of their entitlement to equal opportunities.

Rather, candidates must timely request their equal opportunity rights within seven days of the first prior use by an opposing candidate.

Only a candidate who was legally qualified at the time of the original broadcast may request equal opportunities.

If an opposing candidate waits more than seven days after an opponent's use of a station, he or she will have forfeited his or her equal opportunity right to use the station's facilities in response to the opponent's use.

It is important to recognize that the seven day deadline extends forward from the original broadcast only, and is not enlarged by any subsequent equal opportunity broadcasts.

For example, assume that candidate A's broadcast occurs on January 1.

At the time of the broadcast, B and C are legally qualified opposition candidates.

B requests on January 6 an equal opportunity to respond to the January 1 broadcast and is provided with broadcast time on January 7.

B has satisfied the seven-day time deadline.

C, however, requests broadcast time on January 10, arguing that this is within the seven-day deadline following B's broadcast.

C is not entitled to equal opportunities since the seven-day period began with A's January 1 broadcast, the "first prior use."

C cannot keep alive the right to respond to as broadcast by "leap frogging" off B's subsequent broadcast.

An exception to this rule occurs when an opposing candidate becomes legally qualified after the original broadcast.

Accordingly, modifying the example above, assume that candidate C becomes legally qualified after January 1, the day of A's broadcast.

B requests response time on January 6, which is aired January 10.

If C became a legally qualified candidate during the period January 2-10, he or she is allowed a new seven-day period to request response time beginning with B's broadcast on January 10.

Remember, it is the candidate's obligation to request equal opportunities and to demonstrate that he or she is legally qualified.

To assist candidates in monitoring political "uses," broadcast licensees must maintain a political file which includes accurate, up to date information concerning all candidate uses of a station.

Political file requirements are discussed in Section VIII below.

C. Rates for Equal Opportunity Claims

A candidate making a valid and timely equal opportunity request (see above) is entitled to the same rate his or her opponent paid for comparable time (i.e., comparable to that purchased by the opponent) even if there has been a rate increase during the interim.

However, if there has been a rate decrease, the second candidate must receive the lower rate.

In this case, the broadcaster does not refund the original candidate.

D. Censorship Restrictions

Generally, a station may not edit or censor any material broadcast by a legally qualified candidate which is a bona fide "use" of a station's facilities.

Except as noted below, it makes no difference if the candidate's "use" broadcast is vulgar, in bad taste

or libelous; the licensee may not edit or censor it.

Because of this statutory restriction licensees are, for the most part, absolved of legal responsibility or liability for candidate "uses" of a station. [Also, note the South Carolina provision in Appendix A.]

The no censorship rule also means a station cannot "require" a candidate to discuss his or her candidacy or any other subject in a "use."

The FCC, however, has implicitly recognized two exceptions to this restriction: a use that (i) presents a clear and present danger of an imminent act of violence or (ii) contains obscene material.

In those cases the licensee may censor or refuse to broadcast the material in question.

Stations may likewise place *neutral advisory warnings* before the advertisements which they believe in good faith contain material which will disturb children even if the material may not be indecent (e.g. "graphic depictions of dead, bloodied or aborted fetuses or ... excised or bloody fetal tissue.") Thus far, the FCC has *not* allowed stations to restrict the ads to "safe harbor" hours when children are unlikely to be in the audience, on the grounds of indecency.

The *neutral advisory* warnings must be in a non-editorializing and neutral fashion such as:

"The following political advertisement contains scenes which may be inappropriate for children. Viewers discretion is advised."

Please note that a station may not require the candidate to tape or add the advisory in the candidate's material, or require payment for the extra air time necessary to present the advisory.

Due to the judgments and complexities involved, consultation with legal counsel is advised prior to any decision or action as to political broadcasts with obscene material or as to the airing of a neutral advisory warning.

The prohibition against censorship applies only to "uses" by a legally qualified candidate.

Licensees still retain editorial control over and liability for "non use" broadcasts presented by political committees, supporters of candidates, public interest groups, etc. and programs which fall within one of the four news exemptions discussed in Section I above.

It is noteworthy that a licensee may ask to preview the broadcast material.

A licensee may not, however, require prior review as a condition to the "use" of a station.

When making a request to preview the material, a licensee must inform the candidate that the station may not censor the material and should specify the reason(s) for its request.

Legitimate reasons justifying review include:

(1) To determine if the candidate appears in the broadcast, thereby making it a "use." A licensee has a recognized interest in knowing whether the station will incur "equal opportunity" responsibilities from the broadcast.

(2) To make certain the broadcast contains the required sponsorship identification (see pg. 12).

(3) To verify the actual length of the broadcast. A licensee has a right to make sure the candidates' broadcast will not unexpectedly disrupt the station's programming schedule and that the broadcast is the agreed to length.

E. The Zapple Doctrine–Quasi-Equal Opportunities for Candidate Supporters

As noted above, the equal opportunity doctrine in Section 315 of the Act applies only to "uses" by a candidate (his/herself); it does not apply to material including appearances or copy by a candidate's "supporters."

However, the Commission has extended the equal opportunity principle to situations where a candidate does not make defined "use" of a station's facilities, but where spokespersons or supporters of a candidate (e.g., an independent political committee) buy time or appear on a broadcast for the purpose of either supporting the candidate, criticizing an opponent or discussing campaign issues.

In such a situation, when a candidate "use" has not occurred, the "Zapple Doctrine" (the name derives from the case in which the issue first arose) nevertheless affords the spokespersons or supporters of an opposing candidate equal opportunity to a comparable amount of time in which to respond.

The lowest unit charge requirements, discussed in Section VI below, do not apply in such a case (because there is no "use" by a candidate).

Naturally, if time is provided free to one candidate's supporters, the opposing candidate's supporters must receive free time if they request it.

The Zapple Doctrine is limited to situations during a normal campaign period when there are legally qualified candidates for public office.

The same bona fide news exceptions under Section 315 concerning candidate uses also apply to the Zapple Doctrine.

V. Sponsorship Identification Requirements

A. "Paid-for" or "Sponsored By" Language and Other Details

Section 317 of the Act requires an announcement identifying any person, entity or other party who provides consideration (e.g., payment of cash or other consideration) for broadcast material. The announcement should clearly reflect the appropriate "paid for" or "sponsored by" language.

The wording of the required announcement must contain letters equal to or greater than four percent of the vertical picture height (roughly 20 scan lines), and must appear for at least four seconds.

For radio stations, audio identification must be clearly audible and of sufficient length to reasonably convey the specific identity of the person or entity buying the time.

Television stations may use audio identification in addition to, but not as a substitute for, visual identification. A visual identification is required.

Stations must "fully and fairly" disclose the true identity of the person or persons actually sponsoring a candidate's broadcast.

It is not sufficient to simply name the sponsor; rather the sponsorship identification must disclose that the broadcast was "Paid for (or sponsored) by. . ." and specifically identify the person, group or committee which actually paid for the broadcast.

For political material five minutes or more in length, the sponsorship announcement must occur at the beginning and end of the broadcast.

The responsibility for correct sponsorship identification rests with the licensee.

Thus, as suggested earlier, a station should seek to review political material in advance of the broadcast to determine whether it complies with the sponsorship identification requirements.

The Commission recognizes, however, that sufficient time will not always exist to preview political material and air the broadcast as scheduled.

In such a situation a station may broadcast the candidate's material the first time without risk of violating the sponsorship identification requirements.

After the first broadcast has aired, however, the station must include the required sponsorship identification in all future broadcasts (if it does not already comply with these requirements).

For television announcements, if circumstances prevent a station from immediately adding the required visual identification without taking extraordinary measures, then a station may add only an aural sponsorship identification, so long as the required visual identification is added within one business day of the first airing of the candidate's broadcast.

If a candidate's proposed broadcast material does not contain the proper identification announcement a station may not refuse to broadcast the material if the candidate has a right to access (federal candidates) or equal opportunity rights (all candidates).

If after being alerted, the candidate does not modify the broadcast to include a proper identification then the station should insert the required identification announcement within the candidate's material, or add the identification at the beginning or conclusion of the candidate's broadcast. Stations may charge for any added air time for a required identification.

It is appropriate & advisable to communicate with a candidate prior to making changes to the material, & this provides notice of the need to pay for the use of additional air time for the required identification.

Stations could reference this possibility as well in their political time sales disclosure statement discussed in Section VI below.

The modification of a candidate's material to

include the required sponsorship identification is an established exception to the censorship prohibition discussed above.

B. Sponsorship ID Under BCRA for Federal Candidate Material

The Bipartisan Campaign Reform Act ("BCRA") amended the Federal Election Campaign Act ("FECA") includes requirements for political programming which *advocates the election or defeat of a candidate for federal office, or that solicits any political contributions*. The requirements apply whether "authorized" or "not authorized" by a candidate or his/her committee:

(i) Candidate "Authorized" Political Material

For political material "authorized" by the federal candidate or his/her authorized committee:

(1) radio broadcasts must include a personal audio statement by the candidate that identifies the candidate, and that the candidate has approved the broadcast and the candidate's authorized committee or candidate paid for the broadcast. Also, if an opponent is mentioned the material must likewise state the office the candidate seeks; and

(2) TV broadcasts must identify the candidate and state that the candidate has approved the broadcast and that the candidate's authorized committee or the candidate paid for the broadcast by either (1) the candidate making the statement in an unobscured, full-screen view (80+%); or (2) a candidate voice-over, with a clearly identifiable photograph or similar image of the candidate.

Also, there must be a visual presentation of the same statement at the end of the political material in a clearly readable manner with a reasonable degree of color contrast between the background and printed statement for a period of at least four seconds.

(ii) "Not-Authorized" Material

For political programming which is not-authorized by a federal candidate or his/her authorized committee, the broadcast (radio/TV) on-air material must state that the ad or program is not authorized by any federal candidate, and include in an aural statement "the name of the person or entity responsible for" the broadcast material, and paying for the broadcast, any entity connected to the of the payer, and a permanent address/telephone number.

For television, the statement is to be made in an unobscured, full screen view of a representative of the committee or other person making the statement, or other person in a voice over, and shall appear in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds.

Importantly, at least for now, broadcasters are not required to guarantee or assure candidates comply with the above new FECA requirements.

(3) Federal Candidate Certification under BCRA for LUC Entitlement

As set forth below in Section VI below, to be entitled to the lowest unit charge, a candidate for federal office must "certify " that if an opponent is mentioned/identified in political broadcast material, that certain wording identifying the candidate and setting forth other information is to be included by the candidate. The language is similar to the above referenced wording required for authorized material but differs in some respects. As with the other BCRA-FECA, language above, the broadcaster is not required to force the insertion of the language, and the broadcaster need only be concerned with obtaining the "certification" (see below Section VI).

C. Political Advertising in South Carolina

In South Carolina, "a candidate, committee or other person" making an expenditure in broadcasting a communication to voters supporting or opposing a public official, a candidate, or a ballot measure must "place his name and address on the printed matter or have his name spoken clearly on a broadcast so as to identify accurately the person and his address." [See the full text in attached Appendix A.]

Although stations are not required by the FCC to announce the names of the officers of executive committee members of independent organizations, political action committees, or other groups which sponsor political programs or announcements, the FCC's rules to require stations to maintain a list of such persons in their public files.

VI. Lowest Unit Charge

A. Lowest Unit Charge Defined

Section 315(b) of the Act requires licensees to charge all "legally qualified candidates" no more than the "lowest unit charge" ("LUC") for each class and amount of time for the same period for a "use" of a station during the 45 days preceding a primary or runoff election and the 60 days preceding a general or special election. These are often called LUC "windows."

The word **"class"** refers to different rate categories which a station may have (e.g., fixed, preemptible or run-of schedule).

"Amount of time" refers to the length of time purchased (e.g., 30 seconds, 60 seconds or 5 minutes).

The **"same period"** refers to the parts of the broadcast day which a licensee may have established (e.g., prime time, drive time or afternoon).

A station's lowest unit charge for each "class and amount of time for the same period" also must take account of all discounts and privileges which a station provides to its most favored commercial advertiser.

Outside the 45 and 60 day pre election LUC window periods, stations may not charge candidates more than the comparable commercial rate for advertisers for the same class and amount of time, and candidates are entitled to the same terms and conditions as commercial advertisers.

(1) New BCRA Federal Candidate Required Certification

To discourage negative advertisements or attack ads by candidates for federal offices, the new BCRA provisions add a new twist to the rules which can result in the denial of lowest unit charge to a federal candidate.

To be entitled to the lowest unit charge benefit, a candidate for federal office must now "certify" that the candidate's political advertisement will not make a direct reference to an opponent candidate UNLESS:

(a) for radio broadcasts, the on-air copy includes a personal audio statement by the candidate which identifies the candidate, the office the candidate is seeking, and that the candidate has approved the broadcast; and

(b) At the end of political programming or a spot, TV broadcasts include clear readable text that identifies the candidate and states that the candidate has authorized the broadcast and that the candidate's authorized committee or the candidate paid for the broadcast, and includes a clearly identifiable photograph or similar image of the candidate.

Safe approach: have candidate certify upon each purchase of political time.

At least for now, broadcasters are not required to guarantee or assure candidates comply with the new requirements.

(2) Denial of LUC if no BCRA Certification:

(a) If a candidate does not supply the required "certification" to a broadcast station, the candidate is not entitled to the lowest unit charge. Thus, a broadcaster can deny the lowest unit charge to a candidate for federal office who does not provide the certification.

(b) The federal candidate is penalized further if the candidate in any broadcast does not meet the requirements. In that event, the candidate is not entitled to the receive the lowest unit charge rate during any portion of the remaining 45 or 60 day LUC periods that occur after the date of such broadcast.

(Note however, a broadcaster cannot refuse to sell time simply because the candidate does not "certify." Only the rate is affected.)

B. Obligation to Disclose Station Sales Policies

The FCC requires broadcast licensees to disclose to candidates all classes of time, discount rates and privileges which they afford to commercial advertisers.

This requirement applies at all times, not just during the 45 and 60 day pre-election periods.

The method of disclosure is left to the licensee's discretion, but the Commission suggests a written outline which briefly describes the various rates and discount privileges available.

Regardless of the method used, the disclosure must include the following:

(1) A description and definition of all classes of time available to commercial advertisers which is complete enough to allow candidates to identify and understand the specific attributes which differentiate each class, including different classes of preemptible or candidate only non preemptible time if available.

The FCC has stated that the disclosure must include all rotations which a station sells, or sufficient information to allow a candidate to identify all rotations available for purchase, noting that a complete list of rotations is available upon request.

(2) A complete description of the lowest unit charge and related privileges (such as bonus spots, discount privileges, priorities against preemption and availability of make goods prior to specific deadlines and value added privileges, if any) for each class of time offered to commercial advertisers.

If the actual lowest unit charge is not known, the station should disclose its best estimate of the lowest unit charge, noting that it is an estimate and that adjustments may be required.

(3) If applicable at your station, a description of the station's method of selling preemptible time based upon advertiser demand, commonly known as the "current selling level," with the stipulation that candidates will be able to purchase these demand, generated rates in the same manner as commercial advertisers.

(4) An approximation of the likelihood of preemption for each kind of preemptible time offered. A station may note, if applicable, that the likelihood will vary during the election season.

(5) An explanation of the station's sales practices, if any, that are based on audience delivery, including that actual audience levels delivered may not be determinable until after an election (or at least when that determination may occur).

Even if a station provides a special, candidate only rate, the station must disclose information about all other classes of time.

Once a station provides this information to a candidate it is not necessary to repeat the disclosure for each subsequent negotiation for advertising time, unless the station's policies or rates have changed.

Stations must, however, update or modify previously disclosed information to the extent necessary in later discussions with the candidate or buyer.

Once disclosure is made, stations must negotiate in good faith to actually sell time to candidates in accordance with the disclosure.

The FCC realizes that stations cannot force candidates to read a disclosure statement or listen to an oral presentation of the station's sales policies and rates.

It is recommended that stations ask candidates or their authorized representatives to provide a written acknowledgment of having received the disclosure statement, or maintain some other form of documentation verifying the extent of the station's disclosure, particularly if a revised disclosure is provided in subsequent dealings with a particular candidate.

Stations may not, however, require a federal candidate to provide a written acknowledgment of having received disclosure as a condition of access to the station.

Stations may require state and local candidates (who have no right of access) to provide a written acknowledgment of receiving the disclosure statement but only if it would not interfere with the candidate's right to equal opportunities.

Stations may want to include such an acknowledgment provision in any contract or agreement for the purchase of political advertising time, or as an attachment to the contract.

If a candidate refuses to provide a written acknowledgment, a station may wish to note this fact in its political file.

The foregoing disclosure requirements are intended to further Commission policies, which prohibit a station from discriminating between candidates and commercial advertisers, and between candidates, in developing and applying sales practices which affect rates.

Thus, stations must disclose to candidates all available rates and any sales practices, including

discount privileges, which affect those rates on a continuing basis, not just during the "lowest unit charge" periods preceding elections.

The requirements are intended to allow candidates to determine that they are receiving comparable or lowest unit rates as required under the Act.

C. Classes of Time

Historically, the FCC limited the classes of time for which varying rates could exist to:

(1) "fixed" or "non preemptible,"

(2) "preemptible with notice,"

(3) "run-of-schedule" and

(4) "immediately preemptible."

However, due to evolving station sales practices the FCC now affords licensees greater discretion in establishing separate classes of time.

Thus, licensees may establish more than one class of immediately preemptible, preemptible with notice and non preemptible time as long as the differences between classes are not based solely on price or the identity of the advertiser.

Some demonstrable benefit, such as varying levels or assurances of protection from preemption, scheduling flexibility or special make good benefits must serve to distinguish between different classes of time within a category.

All of the classes, their differences and their rates must be included in the disclosure statement to candidates.

D. Candidate-Only Class of Time

The FCC has observed that candidates often have a special need to purchase fixed or non preemptible time, which may, in effect, permit stations to use special premium priced classes of time which, if sold only to candidates, could lead to abuses by stations taking advantage of a candidate's special needs.

Generally, the FCC permits stations to sell candidate's premium priced fixed or non preemptible time only if (1) such a class also is offered to commercial advertisers on a bona fide basis, and (2) no lower priced class of time (e.g., preemptible time) sold to a commercial advertiser is functionally equivalent to the premium priced non preemptible class.

But, the FCC does allow stations to sell candidates a special discounted "candidate only" class of non preemptible time at a preemptible rate (e.g., a rate below the station's effective selling level for preemptible time), even if non preemptible time is not available to commercial advertisers.

Such a candidate only class would, in effect, confer a greater benefit on candidates than the station's commercial advertisers, and may be offered so long as:

(1) the station can show that a commercial advertiser buying preemptible time at that same rate runs a genuine risk of preemption,

(2) no lower priced class of time (i.e., a preemptible class) which is sold to commercial advertisers is "functionally equivalent" to the non preemptible candidate class (i.e., it is never actually preempted) and

(3) the station also discloses and offers all preemptible rates to candidates, describing the likelihood of preemption for all preemptible rates.

If such a discounted class of time costs less than time charged to the station's most favored advertisers, it would allow the station to avoid making what are often complicated "lowest unit rate" calculations. [But, in the case of a federal candidate not entitled to the lowest unit charge (such as a candidate who fails to "certify"), a broadcaster should not provide the candidate only "lowest unit rate."]

Also importantly, a station would still be required to disclose all classes of time available, even if those other classes are higher priced.

E. Calculating Rates–Rotations and Preemptible Spots

The "lowest unit charge" refers to the lowest per spot charge made to a station's most favored advertiser for the same class of time, taking into account all discounts and other privileges.

Stations may not temporarily increase their rates during the pre-election periods so as to deprive candidates of their lowest unit charge rights.

The rate charged does not depend on when the spot is purchased, but rather when the spot will air (i.e., before or during the pre election period). Stations may adjust their rates during the pre

election period if the adjustment is the result of a normal business practice, including new audience ratings and changes in seasonal rates (e.g., from summer to winter rates).

The FCC has established detailed requirements for determining the lowest unit charge for weekly rotations where an advertiser purchases one or more preemptible spots to run over the course of a week during pre determined dayparts.

Specifically, the lowest unit charge for preemptible time sold by stations using weekly rotations is the lowest price that any advertiser paid for a spot which airs in a particular rotation during a particular week.

The key factor here is when the advertisement is broadcast, not when it was purchased.

Different rotations will continue to constitute separate classes of time for the purpose of calculating the lowest unit charge, regardless of whether or not they overlap.

However, rotations must be "distinctly" different, or have meaningful differences in value to the advertiser to qualify as separate classes of time.

For example, if rotation A is limited to the morning drive time and rotation B encompasses both the morning and early afternoon, these would constitute distinctly different classes of time since an advertisement in rotation A would only air during the morning drive time, while an advertisement in rotation B may air either in the morning or early afternoon.

The FCC allows stations to determine whether real distinctions exist between different rotations based on the station's reasonable, good faith judgment.

Such judgments should correspond to a station's normal commercial sales practices and be based on objective criteria, such as audience size or demographics, which justify price differences between rotations.

Spots purchased in individual programs also can differ in value and qualify as separate classes.

For example, a higher rated program would justify a higher spot rate.

If a station sells spots within individual programs, such rates also may fluctuate on a weekly basis.

Note that the lowest unit charge may change on a weekly, or program-by-program basis, only if the station's actual commercial rates change on the same basis.

These different classes (if they exist) must be reflected in the station's sales practices.

The rates charged for preemptible time may fluctuate in accordance with varying levels of demand.

As long as these fluctuations occur as part of the station's regular business practice, the lowest unit charge for preemptible time may change accordingly.

In selling preemptible time to candidates, a station must explain rate fluctuations and the likelihood of preemption.

This will allow the candidate to assess whether to purchase time at the then effective selling level (i.e., the lowest price paid for a spot which airs), or to purchase time at a higher, intermediate rate, with a lower risk of preemption.

If a lower priced spot then airs in the same class and period of time as the candidate purchased, the candidate must receive a rebate of the difference (see "Payment method and rebates," pg. 20).

F. Package Plans and Bonus Spots

The Commission no longer allows stations to treat package plans as separate classes of time.

Rather, all rates offered to advertisers in a package, whether individually negotiated or available to all advertisers, as well as bonus spots, must be included in lowest unit charge calculations as discount privileges.

The use of package plans and bonus spots can have a significant impact on a station's lowest unit charge by reducing the average value of each spot sold in a package or added as a bonus.

Unless specific values are assigned, the average value of each spot is applied to calculate the lowest unit charge for those classes of time in the package or added as a bonus.

This could have the result of creating a lower unit charge for a class of time than might otherwise apply to that class.

To avoid this problem, stations may separately value each spot sold in a package, and use this

value in calculating the lowest unit charge for that class of time in a particular time period.

The FCC will rely on the reasonable, good faith judgment of licensees to allocate the value of each spot sold in a package or added as a bonus, but will not allow stations to circumvent the lowest unit charge requirements by establishing artificial price levels.

Therefore, if the package or bonus spots are for the same class and time period, the total price paid should be divided by the total number of spots to calculate the rate for each spot.

When spots of different classes or time periods are involved, a station may exercise its good faith discretion in valuing spots for each class and time period, but should remember that these values must be included in their lowest unit charge determination.

Thus, if a low rate is assigned to a particular class of spot, that rate may establish the lowest unit charge for all spots purchased in the same class of time and time period.

Note that an extremely low value could be assigned to a bonus spot (e.g., the midnight to 6 a.m. time period), as long as it is consistent with the station's normal commercial sales practices, and the class is disclosed and made available to candidates at no cost.

Should the rate determined in the foregoing manner be the lowest unit rate for a particular time period, program or class of time, that rate must be given to candidates, even where a candidate does not purchase the entire package or a pro rata portion of the package.

Prices assigned to each spot in a package should be noted on the face of the contract or invoice, or alternately, stations may maintain separate internal documentation setting forth the allocation prepared contemporaneously with the formation of the contract.

This separate document must be signed and dated by an authorized representative of the station, and available for FCC review upon request.

The chosen method of documentation must reflect the value assigned to each spot, paid or bonus, and the total value must equal the package price.

These procedures are intended to give broadcasters flexibility in meeting the desires of commercial advertisers who may want an average rate paid or no per spot rate appearing on their sales contract.

Individual package contracts do not, however, have to be disclosed to candidates, as long as the actual rates contained in those packages are used in the station's calculation of the lowest unit charge for each class of time.

G. Advertising Agency Commissions

Stations need to consider commissions paid to advertising agencies in determining and applying their lowest unit charge to candidates.

The result will vary depending on whether an agency purchases time for a candidate, or the candidate purchases time directly.

For example, assume that a station's lowest unit charge for a class of time is $100, exclusive of agency commissions.

If an agency purchases time for an advertiser it receives a 15 percent commission (i.e., $15), netting the station $85.

If a candidate purchases time using an agency the cost to the candidate is $100, with the station netting the same $85 after the agency commission.

However, if a candidate purchases time directly from the station, without the use of an agency, then the cost to the candidate should only be $85.

That is, the lowest unit charge must exclude the commission normally paid to an agency when a candidate purchases time directly.

The agency commission is included in the lowest unit charge only when a candidate uses an agency.

Note that this distinction does not apply to representation ("rep") firms which are considered agents of the station.

Representation firm commissions are similar to the sales commission a station pays its employees and are viewed as part of the station's cost of doing business.

They are, therefore, not deducted from the lowest unit charge.

H. Billboards, Sponsorships, PSAs and Merchandise Incentives

Many stations offer non cash promotional incentives to commercial advertisers as an inducement to purchasing advertising time.

These may include offers such as billboards, sponsorships and merchandise.

Stations do not need to include these non cash promotional incentives in calculating their lowest unit rate.

Stations also do not need to offer to candidates non cash merchandise and promotional incentives so long as: (1) they are of de minimis value (e.g., coffee mugs), or (2) may reasonably imply a relationship between the station and advertiser (i.e., candidate), such as bumper stickers which prominently identify both the station and the advertiser.

If, however, a non cash merchandise or promotional incentive does not meet one of these criteria, it must be made available to political advertisers on the same basis as commercial advertisers.

Stations also do not need to consider in their lowest unit charge calculations billboards (defined as "groups of short promotional announcements, listing the sponsors of advertising for a particular daypart or program") or program sponsorships which may be offered to commercial advertisers.

Additionally, stations do not need to make billboards or program sponsorships available to candidates.

Stations are not required to make available to candidates "paid PSAs," or any variation thereof because advertising "sponsored by" a candidate may "closely resemble" political advertising.

Paid PSAs, as defined by the Commission, are announcements promoting a charity or non profit organization or event that are paid for, at least in part, by a commercial advertiser and are identified as paid for by the commercial advertiser.

Paid PSAs differ from institutional advertisements since paid PSAs are not the message of the advertiser and the advertiser frequently has limited control over the content or schedule of the spot.

However, because the FCC believes PSAs are of more than de minimis value to advertisers, the FCC requires stations to treat paid PSAs, or PSAs connected either orally or in writing to a purchase by a commercial advertiser, in the same manner as "bonus spots" in determining the lowest unit charge for a class of time and time period.

Thus, as with bonus spots, stations must allocate a value to paid PSAs when they are included in a package or bonus plan made available to commercial advertisers.

As with package and bonus plans, stations may exercise their reasonable, good faith judgment in allocating the value of such PSAs, which value must then be used to determine the lowest unit charge for the class of time and time period during which the spots are aired.

I. NCSAs

Under the terms of an FCC staff ruling, noncommercial sustaining, announcements (NCSA), such as those distributed by the South Carolina Broadcasters Association and other non-profit state broadcast associations and voluntarily broadcast by stations, do not affect the lowest unit rate.

J. Fire Sales

The FCC has eliminated its "fire sale" policy.

This policy previously applied to a station's last minute sale of all remaining inventory, usually at a large discount, which then had to be included in the lowest unit charge calculation for all classes of time during the particular period (e.g., a daypart or specific program) in which the fire sale spots aired.

As a practical matter, elimination of the fire sale policy will have very little effect upon the lowest unit charge for any given period.

Candidates who buy time which happens to clear in the same time period as a last minute sale of time at a lower rate will still be entitled to that lower rate.

K. Make Goods

Stations also must include the rate a commercial advertiser paid for a make good spot in calculating the lowest unit charge for the time period during which the make good spot aired.

For example, if a station places a make good spot, which is a make good for a low cost spot, in a valuable program or daypart in which spot announcements are sold at a higher price, the value of that make good (i.e., the price paid) must be included in determining the lowest unit charge for the program or daypart in which the spot actually airs.

If a candidate purchased the same class of time in that program or daypart at a higher price than the cost of the make good, then the candidate is entitled to a rebate of the difference.

Therefore, to the extent possible, stations should broadcast low-priced make goods before the pre-election period (i.e., 45 day and 60 day time periods) to avoid impact on calculation of the lowest unit rate.

Stations may, however, exclude from lowest unit charge calculations any make goods furnished to meet contracted for promises of audience delivery, demographics or ratings, *provided* it is the station's practice to provide such make goods to both its commercial and political advertisers.

Licensees also must offer make goods to candidates on the same basis they are available to commercial advertisers, including "time sensitive" make goods if the station has provided them to any commercial advertiser who purchased time in the same class during the year preceding the 45 or 60 day pre election period.

A candidate also is entitled to receive make good spots in the same manner as a commercial advertiser if contracted for audience delivery is not achieved.

However, when audience information may not be ascertainable prior to an election, this fact must be disclosed to the candidate at the time an order is placed.

Inclusion of details of "make good policies" in a station's statement of disclosure of rates (see above B in this Section VI) will help avoid candidate confusion.

The station and candidate should then be able to negotiate an alternate arrangement, such as a rebate or providing a make good in connection with a subsequent general or special election if the candidate still is running.

L. Sold Out Time

When can Stations tell candidates that preemptible time is sold out?

If a station sells preemptible time on a strict auction basis, where price is the only variable determining whether a spot clears, a station cannot claim that preemptible time is sold out, since any advertiser can purchase a preemptible spot by simply offering to pay a higher price.

It is, however, possible to sell out preemptible time if it is sold on something other than a strict auction basis.

For example, if a station sells a predetermined inventory of preemptible time at a flat rate which will only be preempted for higher priced non preemptible spots, then it is possible to be sold out of preemptible time once all available inventory is sold at the preemptible rate.

If a station has different classes of preemptible time with price ceilings for each class, it is possible to be sold out of one or more of those classes.

Finally, regardless of station policies, under certain circumstances, a station may have to preempt spots in order to fulfill the station's "reasonable access" and "equal opportunities" obligations.

M. Payment Method, Credit, and Rebates

A station cannot discriminate between commercial advertisers and candidates, or between candidates, in payment methods.

Thus, if a station offers "credit" to commercial advertisers similarly situated to candidates, it must extend such credit to candidates subject to the same qualifying terms and conditions.

For example, if a station extends credit to all advertisers with an established credit history at the station, it must extend credit to a candidate guaranteeing payment, if the candidate has an established credit history with the station.

Stations, often however, consider that a candidate's situation will be comparable to a single event or transient commercial advertiser who has no credit history.

If a station does not extend credit to such a commercial advertiser, it does not have to extend credit to a candidate.

A station cannot require candidates to pay by cash or certified check if it does not require such payment by similarly situated commercial advertisers.

Finally, if a station requires cash in advance from a federal candidate, it cannot require the payment more than one week in advance of the air date of the first scheduled advertisement.

(Note as well that if a station's prepayment policy is less than a week, i.e. three days, then the all candidates—state, local and federal—are entitled to the shorter time period.)

Stations also must regularly review their advertising contracts and political records during the election period to determine if candidates are entitled to credits or rebates, and if so, must promptly provide them.

A rebate situation would arise, for example, if the price a candidate paid for a spot is higher than the lowest unit charge for a spot of the same class in the same time period that actually airs in that time period.

Reviews must occur on a timely basis, with every effort made to provide rebates or credits before the election when possible.

Stations are expected to provide rebates on a more expeditious basis as the Election Day approaches in recognition of candidates' need to maximize their immediate campaign funds.

N. Internet Auction Sales

The impact of Internet auctions of ad time on the LUC are a matter of some concern because they enable buyers to obtain spots at lower rates from participating stations. These programs, which include Bid4Spots, Inc., SoftWave Media Exchange and dMarc Broadcasting, Inc. (which is owned by Google), vary in their details. In general, however, such programs operate as online auctions, matching advertisers with affiliated stations.

The advertisers set a fixed price they are willing to pay and the stations "bid" to provide advertising spots (usually last minute, unsold inventory) at the set rate. Should such sales be included in LUC calculations? The potential impact on stations' LUC calculations can be considerable. The Internet Auction services maintain that as "unwired networks" sales through their system should be treated as a "network" sale, which are excluded from LUC calculations. A request for a declaratory ruling was filed with the FCC in 2007. As yet the FCC has not acted, so questions remain unanswered. Until favorable resolution, stations are at risk of a decision that includes the ads in LUC calculations, which could lead to rebates, and an administrative nightmare for many stations.

VII. Fairness Doctrine

In 1987 the FCC repealed the Fairness Doctrine, finding that it violated First Amendment rights and "chilled" the free speech of broadcast licensees.

The repeal means that stations are no longer required to provide coverage of both sides of a controversial issue, and are not required to provide time to parties who wish to present the "other side" of a controversial issue addressed by a station.

The Commission has extended this ruling to apply to ballot issues.

Stations may however desire to present ballot issue material.

Please remember in doing so that:

- lowest unit rate provisions do not apply,
- adequate sponsorship identification must be included;
- FCC rules require that stations insert into their public file" (and keep for two years) a listing of the "chief executive officers" or members of the executive committee or of the board of directors of the sponsoring organization or group;
- broadcasts as to ballot issues may also fall within the BCRA definitions of a "political matter of national importance" (see discussion below); and
- protections against libel claims and censorship restrictions that apply to stations with regard to candidate uses do not apply to "non-use" issue advertising.

Stations are responsible for reviewing these ads and requiring changes or, where indecent, limiting them to a safe harbor.

Also, in 2001, the Commission, at the direction of

the U.S. Court of Appeals, abandoned its rules governing personal attacks and political editorials stemming from the Fairness Doctrine.

These rules required broadcasters, *inter alia*, to provide those who were the subject of a "personal attack" or "political editorial" the right to respond.

VIII. Political File Requirements

BCRA includes an amendment to Section 315 of the Communications Act that addresses candidate purchases but expands the requirements to encompass purchases of time for material that deals with a "political matter of national importance." The BCRA requirement reads as follows:

(1) In General

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

(A) is made by or on behalf of a legally qualified candidate for public office; or

(B) communicates a message relating to any political matter of national importance, including:

(i) a legally qualified candidate;

(ii) any election to Federal office; or

(iii) a national legislative issue of public importance.

(2) Contents of Record

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

(A) whether the request to purchase broadcast time is accepted or rejected by the licensee;

(B) the rate charge for the broadcast time;

(C) the date and time on which the communication is aired;

(D) the class of time that is purchased;

(E) the name of the candidate to which the communication refers and the office to which the candidate is seeking election, the election to which the communication refers, or the issue to which the communication refers (as applicable);

(F) in the case of a request made by, or on behalf of, a candidate, the name of the candidate, the authorized committee of the candidate, and the treasurer of such committee;

(G) in the case of any other request, the name of the person purchasing the time, the name, address, and phone number of a contact person for such person, and a list of the chief executive officers or members of the executive committee or of the board of directors of such person; and

(H) as applicable, the nature of the political matter of national importance (see paragraph 1(B)) in the broadcast.

(3) Political Matters of National Importance

BCRA's inclusion of matter as to "any political matter of national importance ... federal election .... national legislation," encompasses much issue advertising and broadcasts as to legislation which may be on a ballot. As there is little guidance as to definitions, this requirement creates uncertainty. Broadcasters will have to make subjective decisions as to the on-air material. Broadcasters should endeavor to do so in good faith and when in doubt simply include the details in the political file.

(4) Overview

Although the BCRA adds much of the same detail, existing Section 73.1943 of the Commission's rules requires every licensee to maintain and permit public inspection of a complete and orderly political file which includes a copy of all requests for broadcast time made by or on behalf of a candidate for public office, together with an appropriate notation showing the disposition made by the licensee of such requests, and the charges made, if any, if the request is granted.

If free time is provided, that information also must be set forth.

Notations as to the disposition of a request should include the schedule of time purchased, the length of the spot, when the spots actually aired, the rates charged and the classes of time purchased.

When there is a written contract between the station and the candidate, and the contract includes the terms described above, placement of the

contract in the political file is required.

If a rebate is subsequently issued, an appropriate notation should be made on the contract or in another document placed in the file, identifying the amount and date of the rebate and the order to which it relates.

Absent a written contract, the FCC has left it to the station's best judgment as to how the material should be recorded in the political file, as long as the required information is present.

Stations also may want to consider including in their political file a copy of their political disclosure statement (and any updates and revisions), though it is not required under the rules.

Some attorneys advise not keeping the disclosure statement in the public file.

As part of the sponsorship identification rule, stations also must retain the names of officers of organizations that pay for or furnish programs or announcements.

The file must be maintained in a neat and orderly fashion so that anyone viewing the contents of the file will be able to readily determine what the station has sold or otherwise provided to each and every candidate.

(5) Placement and Retention Timeframes

With the exception of a notation of the time a spot actually aired, the required material must be placed in the public file immediately and BCRA says "as soon as possible."

The FCC has in the past concluded, however, that a station need not use extraordinary efforts to place the exact time that candidate spots aired in the political file, so long as there is an alternative method available for determining that information.

The name of a station contact person should also be provided.

Thus, a station could for example provide information concerning spots and program times ordered by a candidate with a notation that, upon request, the station will provide access to station logs or other station information containing the actual air time.

Political records in the public file may be inspected and copied just like any other material in the file.

Copying may be provided at a nominal charge.

Stations are not required to provide political file information, by phone, fax or e-mail, but if they decide to do so, such information must be provided on a non-discriminatory basis.

Political material must be retained for two years.

After the two year period a station should consider keeping its political file records in the event future questions arise, since complaints alleging a failure to comply with the political requirements may be filed beyond the two year file retention period.

Stations may consider maintaining records older than two years in an internal file for the entire license period in the event a question arises in connection with a station's license renewal.

Some attorneys advise throwing the records away since a complainant may use the records as evidence as long as they are accessible.

Appendix A*

Special South Carolina Provisions

CODE OF LAWS OF SOUTH CAROLINA

Title 7. Elections

Section 7-1-80. Liability of broadcasting station for defamatory statement by candidate.

The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations and the agents or employees of any such owner, licensee or operator shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast by a candidate for political office in those instances where, under the acts of Congress or the rules and regulations of the Federal Communications Commission, the broadcasting station or network of stations, is prohibited from censoring the material broadcast by such candidate, provided the owner, licensee or operator shall cause to be made at the conclusion of the broadcast the following announcement in substance; "The broadcast you have just heard was not censored in accord with the immunity from censorship extended legally qualified political candidates."

Title 8. Chapter 13. Ethics, Government, Accountability and Campaign Reform

Section 8-13-1354. Identification of person independently paying for election-related communication; exemptions.

A candidate, committee, or other person which makes an expenditure in the distribution, posting or broadcasting of a communication to voters supporting or opposing a public official, a candidate or a ballot measure must place his name and address on the printed matter or have his name spoken clearly on a broadcast so as to identify accurately the person and his address. Campaign buttons, balloons, yard signs or similar items are exempt from this requirement.