

Political Broadcasting Refresher – Looking Toward the 2020 Election

Broadcast Association Webinar

April 16, 2020

Copyright © 2020
Wilkinson Barker Knauer, LLP

WILKINSON) BARKER) KNAUER) LLP

Unusual Time, But Mostly Usual Rules

- FCC is still operating even if not in its building
- Being understanding where it can, but political rules generally are imposed by statute and cannot be waived
- We've seen extensions on construction permits, for license renewals and other filings, for Quarterly Issues Programs Lists and in TV repacking
- We've seen other rules waived for the period of the crisis
- But generally, online public file rules remain in place and that is especially true for political advertising

Political Broadcasting Issues We'll Cover Today

- Quick Refresher on Political Basics
 - Legally qualified candidates
 - Reasonable access
 - Equal Opportunities
 - No censorship and potential liability for third-party ads
- Lowest Unit Rates – how much you charge
 - Basics
 - Classes of Time
 - Packages – including with digital
 - Multi-station sales
 - Other issues including recent ruling on free spots during current crisis
- Sponsorship Identification
- Paperwork - Disclosure Statements and the Public File – including new obligations announced by the FCC in October 2019

Legally Qualified Candidate

- To be a ***legally qualified candidate***, a person:
 - Must have publicly announced that he or she is a candidate for elective office; and
 - Must meet all of the qualifications prescribed by the local laws for the office sought and filed whatever papers need to be filed for place on the ballot
- Write in candidate – must make a “substantial showing” of their candidacy
- Special rules for President:
 - If candidate is qualified in 10 states, deemed qualified in all states
 - Substantial showing test

Reasonable Access

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

Equal Opportunities

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

“Use”

- A “Use” occurs when there is a ***non-exempt, positive*** broadcast of a candidate’s identified or identifiable ***voice or image***
- Exemptions:
 - *Bona fide* newscasts
 - *Bona fide* news interviews – includes almost all interview programs under control of the station
 - *Bona fide* news documentaries, where the candidate’s appearance is incidental to the subject
 - On-the-spot coverage of *bona fide* news events
- Issues can arise with on-air employees who become politically active – and advertisers too
- Watch for politicians in PSAs about the virus

Content of Political Ads

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

Lowest Unit Charge

- During the pre-election LUC periods (45 days before a primary or open Presidential caucus and 60 days before a general election), charges to candidates must be the lowest unit charge for spots sold by the station for the ***same class of time*** for the same time period
- “LUC” and “LUR” used interchangeably
- Outside window period, candidates get “comparable rates” to commercial advertisers - can’t charge political candidates artificially high price for spots
- Non-candidate spots do not get LUC – you can charge whatever the market will bear
 - Limited exception for parties who are “authorized” by the candidate – may be entitled to LUR

Who is entitled to LUC?

- Only “uses” by legally qualified candidates in connection with the campaign are entitled to lowest unit charge.
 - If the candidate’s voice or image does not appear, the spot does not qualify
 - Commercials unrelated to the campaign (e.g., the car dealer political candidate) do not qualify – but would trigger equal opportunities
 - Ballot issue ads and third party and PAC ads not endorsed by the candidate do not qualify
- LUC applies to ALL legally qualified candidates
 - *State and local candidates are just as entitled to LUC as federal candidates – and can’t negotiate it away*
- In rare cases, political party can be entitled to LUC – but only where buy coordinated with and authorized by the candidate
 - For Federal candidate, party spot would need to say “authorized by” the candidate to get LUC
 - State rules may differ depending on campaign contribution limits, if any

What is a “Class” of Time

A station will have several LURs – one for each class of time and each daypart

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

Class of Time - Preemptible Time

- Price alone is not sufficient to distinguish classes of time
- There can be different classes when a higher price buys a real benefit, such as more favorable notice or make-good privileges
- Levels of preemptibility: be careful that all requirements for each class of preemptible time are strictly observed or FCC could consider station to have a single level of preemptible time where candidate gets rebate to the lowest-priced spot that clears

What Does LUC Really Mean?

- Candidates get the benefit of all volume discounts offered to other advertisers even if they buy only one spot
- Station practices that enhance the value of advertising must be made available to candidates, such as discount privileges, time sensitive make goods, preemption priorities, and other factors that enhance the value of an advertisement – candidates get the benefits of station's most favored advertisers
- *Bottom line – in the window, candidates get all the best deals that your best commercial advertiser gets (including volume discounts) even though the candidates don't buy anywhere near as many spots as the best advertiser*

Easy Example – Volume Discounts

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

Packages

You need to make it easy for the political buyer

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

Packages

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

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

Easy Example – Allocation of Package Price

- If a commercial advertiser buys prime-time spots at \$10 each, but if they spend \$100, they get 2 overnight spots – you need to allocate the purchase price of the package to the different classes of time in the package
- Likely will allocate most of the price to the prime time spots – say \$98 of the \$100 package price – meaning each spot has a unit value of \$9.80 – compare that price to all other prime time spots sold to see if it affects your LUC for prime time spots
- Remaining \$2 of the package price allocated to the overnight spots – meaning they have a \$1 unit price – compare that to all other overnight spots sold by the station to see if the package sale affects your LUC for overnight spots

What was that political broadcasting ruling last month?

Free spots given to commercial advertisers, if not a part of a package, can be excluded from Lowest Unit Charge calculations during the pandemic

- Don't call them "bonus spots" in any communications.
- Don't give them in strict proportion to any existing contract.
- Don't list them on the same invoice or affidavit of performance that you provide to an advertiser showing its paid spots.
- The spots should be preemptible.
- You should not guarantee audience size or reach or frequency.
- Having a message relating to the pandemic can help differentiate these spots from normal paid schedules that are still subject to LUC consideration.

Network and Combo Buys

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

Rates May Change Over Time

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

Potential Problems

- Agency Commissions – LUC established by “net to station” – rep firm commissions are like employee commissions, and different from agency commission
- Credit -- stations must apply normal credit policies – if no credit to transient businesses, no credit to candidate committees. ***Federal candidates*** cannot be required to pay more than 7 days in advance

Federal Candidate Certifications

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

Sponsorship ID – Radio

- For Federal candidates, the ad must include an audio statement by the candidate identifying himself/herself and stating that the candidate approved the broadcast and that the candidate and/or the candidate’s authorized committee has paid for the broadcast
 - If the ad refers to an opposing candidate *in any manner*, it must also identify the office being sought
- State and Local Races:
 - The announcement was “sponsored by” or “paid for by” a candidate or campaign organization
 - If you receive a spot that does not contain this mandatory ID, you can edit it to insert the material, even if that overrides content
- For third-party ads, make sure full legal name of sponsoring organization is on the ad after the “paid for” or “sponsored by” language
- May be some state laws too adding identifications

Sponsorship ID - TV

- For Federal candidate ad:
 - Identify candidate who is buying time
 - Statement that the candidate approved the message
 - Accomplished by full-screen image of candidate and statement that he/she approved the message in their own voice
- State and Local – same as for radio
 - The announcement was “sponsored by” or “paid for by” a candidate or campaign organization
 - If you receive a spot that does not contain this mandatory ID, you can edit it to insert the material, even if that overrides content
- For third-party ads, make sure full legal name of sponsoring organization is on the ad after the “paid for” or “sponsored by” language
- May be state laws too adding identifications

Disclosure Statements

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

Recordkeeping

- Online Political File is now mandatory
- Maintain documents in file for two years from date of document, not from date of election
- Information must be uploaded immediately (same day/next business day)
- BCRA requires same information for issue ads as for candidate ads if the message relates to a political matter of national importance, including:
 - A legally qualified candidate;
 - Any election to federal office; or
 - A national legislative issue.
- Public file is online for all stations for all political documents – so your file can be checked by anyone, anywhere – and the FCC is checking at license renewal time!

Contents of Political File

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

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

Political File Contents, cont.

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

- The name of the person or entity purchasing the time,
 - The name, address and phone number of a contact person, and
 - A list of the chief executive officers, members of the executive committee or of the board of directors of such entity.
- FCC Clarification Order in October 2019 requires station to inquire *once* of sponsors or agency if sponsor gives just one name for their board or executive officers (FCC expectation is that there will be more than one officer or director)
 - Document the inquiry in case you are ever asked

FCC Clarification on Issues Ads

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

Impact of FCC Decision

- More work for you – as you need to track down officers and directors of candidate committees, and identify all issues and candidates mentioned in issue ad
 - Likely that most issues advertisers will not provide complete information – so it falls to you
- Potential to make state issue ads (e.g. state party attack on state candidate) into Federal issue ads if they mention Federal issues – will require rate and schedule disclosure of state issue ads if they mention Federal issue
- NAB filed petition for reconsideration – comments filed on 12/30/19, but rules in effect while reconsideration is being considered – may see limited reconsideration decision this month

Political Broadcasting: Are You Ready for 2020?

David Oxenford

202-383-3337

doxenford@wbklaw.com

www.broadcastlawblog.com

WILKINSON) BARKER) KNAUER) LLP