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Public Broadcasters Political Broadcasting Obligations

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This memo summarizes the FCC's political broadcasting rules as applied to public stations.

Reasonable Access

Unlike commercial broadcasters, who are required by Section 312(a) of the Communications Act to provide legally-qualified candidates for federal office with "reasonable access," public stations are exempt from that requirement. This exemption came about through a change in the Communications Act adopted in 2000, following abuse of the reasonable access provision by federal candidates who demanded that public stations air their campaign spots.

Other provisions of the Communications Act remain intact, however. These provisions pertain to the questions of whether a station *may* air material featuring a political candidate or political issue, and whether the station may let one candidate appear on the station without granting opposing candidates a similar opportunity.

Political Editorials, Political Ads and Issue Ads

Two sections of the Communications Act prohibit public stations from carrying most political spots. Section 399B prohibits public stations from airing "any advertisement." The definition of "advertisement" includes the acceptance of remuneration in exchange for any programming material intended "to express the views of any person with respect to any matter of public importance or interest;" or for any material intended "to support any candidate for political office." In addition, Section 399 provides that no public station may support or oppose any candidate for political office. This last section applies even in the absence of any remuneration.

Taken collectively, these provisions of Section 399 and 399B prohibit public stations from airing *issue ads* on referendum issues or other matters of public importance or interest; *political ads* that support or oppose any political candidate; or *station editorials* that support or oppose a candidate.

The provisions that prohibit public stations from airing issue and political ads were recently challenged by a San Francisco public TV station overturned by the Ninth Circuit Court of Appeals in *Minority Television Project v. FCC*. At the time of this writing, the FCC indicated

that, pending the outcome of any appeal or rehearing, it would not enforce those provisions of the Communications Act in the states and territories located in the Ninth Circuit's jurisdiction, namely Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam and the Northern Mariana Islands. The prohibitions continue to apply in the other states. For stations located in the Ninth Circuit that choose to accept political spots, the *Minority Television Project* case raises issues that are not yet resolved, such as the need to calculate lowest unit charges to which candidates are entitled within 45 days of a primary and 60 days before the election and to prepare political disclosure statements. Questions relating to the station's tax exempt status with the IRS can also be implicated, since the *Minority Television Project* decision did not address IRS rules that prohibit 501(c)(3) organizations from participating or intervening in any political campaign on behalf of a candidate. The government filed a petition for rehearing en banc with the Ninth Circuit on June 29, 2012.

Equal Opportunities

The Communications Act does not, of course, prohibit public stations from broadcasting news or other programs that address political issues or that feature political candidates. It does, however, contain certain provisions that restrict a station's freedom to cover political campaigns in a completely one-sided manner. In addition to banning political editorials and political ads on public stations, the Communications Act contains a provision that requires any station that permits one political candidate to use a broadcast station to "afford equal opportunities to all other such candidates for that office."

There are several complications to this apparently simple rule, set forth in Section 315 of the Communications Act. The first is the definition of a "use" of a broadcast station. That term is defined broadly to include any appearance of the candidate by voice or picture, but limited to the candidate's appearance in certain types of programs. In order not to discourage broadcasters from covering political candidates and political issues, four specific types of programs are exempted from the equal opportunities requirements. They are a:

- (1) bona fide newscast;
- (2) bona fide news interview;
- (3) bona fide news documentary; and
- (4) on-the-spot coverage of bona fide news events.

The appearance of a candidate in an exempt program, such as a newscast or debate, is not a "use" and does not give rise to any equal opportunity obligations.

By contrast, a station that permits a candidate to appear in a non-exempt program, such as an entertainment program, creates "equal opportunities" rights that may be exercised by opposing candidates for the same office. While the station is not obliged to contact the opposing candidate(s), it is required to place a record of the use in the station's Public Inspection File, and to honor any requests for "equal opportunities" made within one week of the first "use." See Section 73.1941 of the FCC's Rules. Untimely demands for equal opportunities may be denied.

An “equal opportunity” does not necessarily mean “equal time,” time in the same program, or even time in the same day part as the first use, but it does mean an opportunity to reach the same size audience under conditions no less favorable than those imposed on the first use. Giving one candidate an advantage over another by letting one preview the script of an opponent’s speech or by subjecting one candidate to a Q&A format while permitting an opposing candidate unfettered use of air time may violate the “equal opportunities” requirement, as well as a related requirement that stations not discriminate between candidates “in practices, regulations, facilities, or services.” Section 73.1941(e).

Announcers as Candidates

What happens when an on-air personality runs for political office? From the moment the announcer becomes a qualified candidate (i.e., meets applicable legal criteria and announces his candidacy), his appearances on the station are “uses.” Even if the announcer never mentions a political issue, appearances on the station, except in an exempt program, will give opponents a right to demand “equal opportunities.” In most such situations, stations take the announcer off the air until the election is over.

A Candidate’s First Amendment Rights

May a station comply with FCC political broadcasting rules and still violate rights guaranteed to a candidate by the First Amendment? The Supreme Court considered that question in *Arkansas Educational Television Commission v. Forbes*. An independent congressional candidate who was not included in a debate broadcast on a state-owned broadcast network maintained that his exclusion infringed his First Amendment rights. The Court rejected the candidate’s arguments and upheld the station’s right to exclude candidates in whom there was little or no public interest or support. The Court indicated, however, that the result would have been different if the candidate had shown that he was a popular candidate who was excluded because the station disagreed with his views.

Candidates as Underwriters

May political candidates be underwriters? Yes, but with the exception, discussed above, of the stations in the Ninth Circuit:

(1) The underwriting announcement may not be a “political advertisement,” i.e. an announcement that supports the underwriting candidate or opposes other candidates for the same office. (“This program brought to you by Dudley Doorright, the man with the right plan for Hadleyville.”)

(2) The underwriting announcement may not be an “issue ad,” i.e., an announcement that expresses the candidate’s views on a matter of public importance or interest. (“This program made possible by Dudley Doorright, your candidate for lower taxes and better behaved children.”).

(3) The underwriting announcement should not be a “use.” Although there are no rulings on this point, an argument can be made that the voice of a candidate in an underwriting announcement would permit opponents to demand “equal opportunities” to use the station.

Because stations are prohibited from censoring candidates, the station could be powerless to prevent opponents from making statements that would constitute issue or political ads. The first candidate might then have a claim of discrimination, since the first candidate had been forced to conform to an underwriting format, but opponents had been allowed to say what they pleased.

(4) The announcement must comply with sponsorship identification requirements. For example, if the candidate’s campaign committee is the underwriter, the underwriting credit must clearly identify the committee, not the candidate, as the sponsor.

Conclusion

While amendments to the Communications Act have simplified political broadcasting requirements by giving public broadcasters the right to deny candidates “reasonable access,” other political broadcasting rules impose restrictions of potentially dizzying complexity. These complications are compounded by the fact that stations in the Ninth Circuit are at least temporarily exempt from restrictions imposed on other public stations. Most public stations are still prohibited from airing editorials that endorse or oppose any candidate and sponsored messages that express a view on a political issue, or that support or oppose any candidate. If one candidate is permitted to “use” a station’s facilities by appearing in a non-exempt program, the station must place an appropriate notation in its Public File and provide “equal opportunities” to opposing candidates who make a timely demand. Underwriting by political candidates remains fraught with danger.

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This memo contains information necessarily of a general nature that cannot be regarded as legal advice. We will be pleased to provide additional details and to discuss matters contained in this memo as they may apply in specific situations.