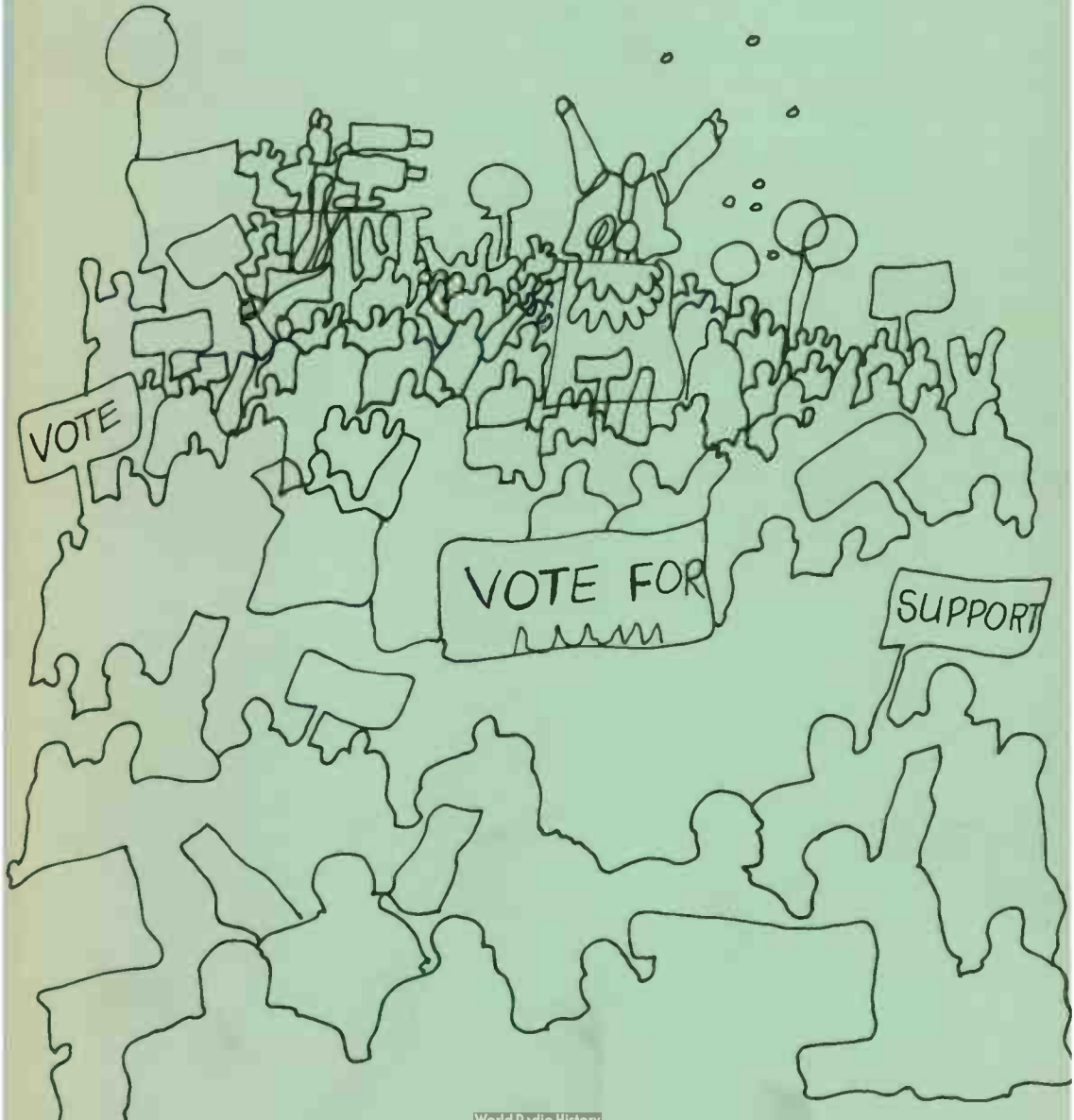


# The Law of Political Broadcasting And Cablecasting:

# A Political Primer 1984 Edition

*Dunn*

Federal  
Communications  
Commission







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## Foreword

This Primer is a Commission staff update of the 1978 Public Notice and Primer, and contains significant rulings issued by the Commission since 1978. Material which was overruled or superseded has been deleted. This document may be referred to as the 1984 Primer and will be printed in the FCC Reports.

Mark S. Fowler  
Chairman





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## Part I. Introduction

### Purpose of Primer

1. The FCC has prepared this booklet to inform you of the law on broadcasts and cablecasts by candidates for public office. The booklet, which we call the Primer, also includes the Commission's most important rulings and statements of policy on political broadcasting. In most cases, specific examples are given of how the law and the rules apply—sometimes in question and answer form—so as to make the Primer as understandable as possible. In this discussion of most questions in Part II, you will see citations to FCC rulings or court decisions so that you can review the full text of the ruling or decision if you wish to do so.\*

The Primer is organized according to subject matter so that the questions and answers about each aspect of political broadcasting are together. When necessary, cross references are made to other parts of the Primer. Unlike former editions, the Primer has an index.

The Primer cites only current interpretations of the law. Unlike former Primers, it omits old decisions that have been overruled, because citing them would tend to confuse the reader. On the other hand, this Primer includes many new rulings issued by the Commission since the last edition was published.

### All Political Laws and Rules Covered

2. This Primer tries to deal with all laws, rules and policies about political broadcasting. This includes not only "equal time" and "censorship," but

"reasonable access" for candidates for Federal office, the rates that may be charged candidates for time, the Fairness Doctrine as it applies to political campaigns, the personal attack and political editorializing rules, and the rules on sponsorship identification, logging of broadcasts and keeping a public file as they apply to broadcasts and cablecasts by or about political candidates.

Some Federal laws on political elections are not administered by this Commission, but rather by the Federal Election Commission. Even though our agency does not administer these laws, we have included short discussions of two of them in this Primer for your information.

### How the Primer is Organized

3. Part I of the Primer is entitled "Introduction." It includes the preceding introductory passages as well as an explanation of the importance of political broadcasting, instructions on where and how to file complaints and inquiries, and the text of the sections of the Communications Act of 1934 that govern political broadcasting and cablecasting.

Part II gives examples of how the law has been applied to specific situations. It also gives citations to the FCC rulings and court decisions that are the authority for the statements of law made in that Section.

The Appendix contains the Commission Rules and Regulations interpreting and administering the sections of the Communications Act that apply to political broadcasting and cablecasting.

Finally, there is a key word index we hope will enable you to find the answers to your questions quickly.

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\*This Primer serves as an accurate restatement of existing rules and precedent. The Commission's decisions summarized in this document were reached in specific factual contexts, and may contain concurring and dissenting views. Any reader having questions about the interpretations set forth in this Primer should examine the text of the specific case(s) cited.



## The Importance of Political Broadcasting

4. Congress has recognized the great importance of political broadcasting by passing laws which establish stricter standards for this type of broadcast and cablecast than for any other. Most of these are in Section 315 of the Communications Act which requires "equal opportunities" for candidates, forbids censorship of what they say, and puts a ceiling on the amounts that stations and cable systems may charge them for time. Another section of the Communications Act dealing with political broadcasts, 312(a)(7), requires stations to give or sell "reasonable access" to candidates for Federal elective office.

The U.S. Supreme Court also has recognized the great importance to the public of political broadcasts in more than one decision. For example, it held that since Section 315 forbids a station to censor a candidate's broadcasts and since stations should not be discouraged from carrying these broadcasts, a station was not subject to libel suits for anything that a candidate might broadcast. *Farmers Educational and Cooperative Union v. WDAY, Inc.*, 360 U.S. 525 (1959).

The FCC itself has stressed the importance of political broadcasting many times. In one statement, it said:

In short, the presentation of political broadcasting, while only one of the many elements of service to the public. . . is an important facet, deserving the licensee's closest attention, because of the contribution broadcasting can thus make to an informed electorate—in turn so vital to the proper functioning of our Republic. *Licensee Responsibility as to Political Broadcasts*, 15 FCC 2d 94 (1968).

Because of the importance of political broadcasts, the Mass Media Bureau and the Office of General Counsel have been given joint responsibility in connection with the issuance of rulings in the broadcasting field under authority delegated to them by the Commission,

and the making of recommendations to the Commission itself on the major cases which go to it for decisions rather than to the staff. Complaints and inquiries about political broadcasting and cablecasting are given special priority by the Commission so that rulings can be made on all complaints in time to put the rulings into effect before election day.

## Where to Send Complaints and Inquiries

5. Although we have tried to cover the most important, difficult and frequently asked questions about the laws on political broadcasts and cablecasts in this Primer, each day usually brings at least one new question of interpretation. If you have a question about the law on political broadcasts or cablecasts and cannot find the answer in this Primer, or if you have a complaint on this subject, write to:

Fairness/Political Programming Branch  
Enforcement Division  
Mass Media Bureau  
Washington, D. C. 20554

If time is short and does not permit use of the mails, you can obtain an oral staff opinion or ruling by placing a telephone call to (202) 632-7586, the Fairness/Political Programming Branch of the Enforcement Division.





## How To File a Complaint

6. No special form is needed for filing complaints about political broadcasting or cablecasting. However, in order to speed up our handling of complaints, we recommend that you follow these steps:

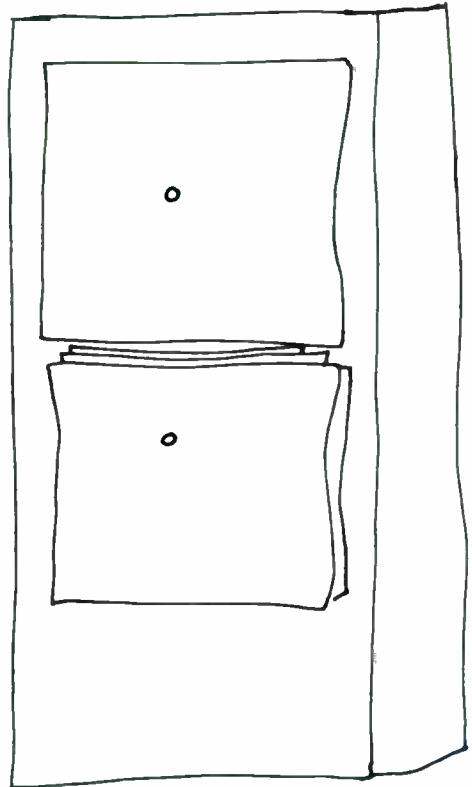
(1) Before complaining to the Commission, complain to the station or cable operator that you believe has denied you your legal rights. We encourage negotiation between candidates and stations or cable operators and have found that many disputes can be settled in that way, without our intervening.

(2) When you do file a complaint with the Commission, send a copy to the station or cable operator at the same time.

(3) The complainant and the station or cable operator should continue to send copies to each other of all correspondence between them and the Commission, thus saving time in settling the complaint.

(4) Unless it is within the last few days before an election so that a written complaint might arrive too late to be acted upon, send your complaint in writing. It should contain (i) the name, address and telephone number of the complainant; (ii) the call letters (or name) and location (city and State) of the stations or cable operator, (iii) a detailed statement of the facts of the case, including the public office involved, the date and kind of election to be held (primary or general election), and whether the complainant and his opponent or opponents are legally qualified candidates for public office under the laws of their State. When the complainant is seeking "equal opportunities," he or she should give the dates of prior broadcasts or cable originations, if any, by his or her opponents, the date on which a request for equal opportunities was made to the station or cable operator, and the

reasons the station or cable operator gave for refusing the request. Where the complainant alleges denial of "lowest unit rate" or, if a candidate for federal office, denial of "reasonable access" the complainant should furnish all essential facts on which the complaint is based.





## Sections 315 and 312(a)(7) of the Communications Act

7. Section 315 of the Communications Act of 1934, as amended, follows:

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*. That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any:

- (1) bona fide newscast,
- (2) bona fide news interview,
- (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
- (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed—

- (1) during the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and
- (2) at any other time, the charges made for comparable use of such station by other users thereof.

(c) For purposes of this section—

- (1) the term "broadcasting station" includes a community antenna television system; and
  - (2) the terms "licensee" and "station licensee" when used with respect to a community antenna television system mean the operator of such system.
- (d) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

Section 312(a)(7) of the Communications Act states:

(a) The Commission may revoke any station license or construction permit— . . .

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.





## Part II. Detailed Explanation of Political Broadcasting and Cablecasting Law

### Who is a “Legally Qualified Candidate for Public Office?”

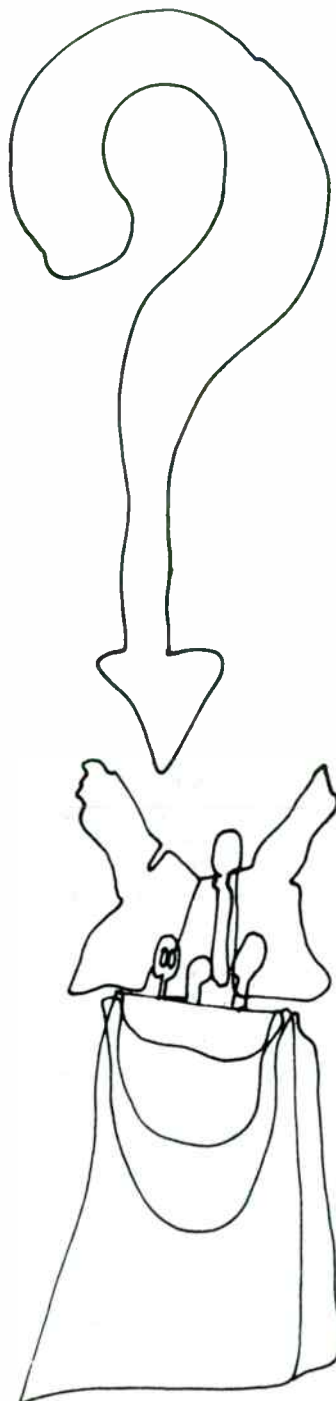
8. Since Sections 315 and 312(a)(7) of the Communications Act apply only to legally qualified candidates for public office, it is important to understand how the Commission and the courts have defined this term. The Commission’s rule states in substance, that a legally qualified candidate is a person who has publicly announced that he is a candidate *and* who meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate *and* who:

(1) Has qualified for a place on the ballot

or

(2) Has publicly committed himself to seeking election by the write-in method *and* is eligible under the applicable law to be voted for by sticker, by writing in his name on the ballot, or other method, *and* makes a substantial showing that he is a bona fide candidate for nomination or office. (See par. 6 below regarding “Candidates for Nomination by Convention.”)

Note the “ands” and “ors” in the above language. For example, a mere announcement that he is a candidate does not make a person legally qualified for the purposes of our rules. He must also be eligible to hold the office he is seeking and either have qualified for a place on the ballot or have qualified, as explained in (2) above, as a write-in candidate. The Commission will look to the laws of the State in which the election is to be held to determine whether a person has qualified as a candidate, regardless of whether the election is for national, State, county or municipal office. Below are answers to the most frequently asked questions on this subject.





## “Public Announcement” of Candidacy

9. A candidate may meet the “public announcement” requirement of the rules by simply stating publicly that he is a candidate for nomination or election to a certain office. Filing the necessary papers or obtaining the required certification under his State’s laws in order to qualify for a place on the ballot is considered to be the equivalent of a public announcement of candidacy. However, a public announcement of candidacy will not be presumed to have been made merely because a person is “expected to run” or because some of his friends and associates are seeking support for him in the expectation that he will run. Problems in this area are most likely to arise when a nomination is by convention or caucus instead of by primary election, since a person may be nominated by a convention even if he has made no prior announcement of his candidacy. In one of its rulings on such a situation, the Commission found that President Lyndon B. Johnson was not a “legally qualified candidate for public office” for purposes of Section 315 at the time the TV networks broadcast an interview with him on December 7, 1967, because he had not publicly announced his intention to seek reelection. During the TV interview he refused to speculate about running for reelection and stated that he had not made his decision on the subject. The complainant in the case, who had publicly announced his intention to seek the Democratic Presidential nomination, requested “equal time,” contending that he and President Johnson were opposing candidates for the nomination of their party. The Commission ruled that a person was not a legally qualified candidate within the meaning of the statute unless he had publicly announced his intention to be a candidate. The Commission stated that “In this area, there cannot simply be reference to applicable State law, which is the Commission’s customary approach in local primary and general elec-

tions. . . .” It said that unless it held to its long-standing requirement of public announcement of candidacy, a chaotic situation would result. “For example, incumbents often are eligible to run again, and, prior to a determination to seek another term, they may take many preliminary steps of varying nature (e.g., frequent trips to the election State, with speeches, conferences with financial sources and potential delegates). . . .” The Commission concluded that for it “to attempt to make findings on whether or when the incumbent has become a candidate during the usual, oft-repeated and varying preliminary period would render the statute unworkable. There would be a continual series of complex factual hearings, whose resolution . . . would be most difficult and indeed might remain stubbornly speculative.”<sup>1</sup>

In a contrasting case, a person had announced his intention to seek the Democratic party nomination for Governor of New York, but claimed that Section 315 did not apply to him, even though his name could be placed on the primary ballot by any one of three different methods. The Commission ruled that since under one of the three methods the person could become the party’s nominee if he received the majority of votes cast at a nominating session of the New York State Democratic Committee and had no opponents under the other methods, it was not unreasonable for the licensee of a station to decide that this person was now a legally qualified candidate for public office, since the Commission’s rules state, among other things, that “a legally qualified candidate means any person who has publicly announced that he is a candidate for nomination by a convention of a political party. . . .”<sup>2</sup>

<sup>1</sup> *Sen. Eugene J. McCarthy*, 11 FCC 2d 511, 512-13 (1968), *aff’d*, 390 F. 2d 471 (D.C. Cir. 1968); *see also*, *Anthony R. Martin-Trigona*, 67 FCC 2d 33 (1977); *National Citizens Committee for Broadcasting et al.*, 75 FCC 2d (FCC 79-440).

<sup>2</sup> *William Vanden Heuvel*, 23 FCC 2d 119 (1970).

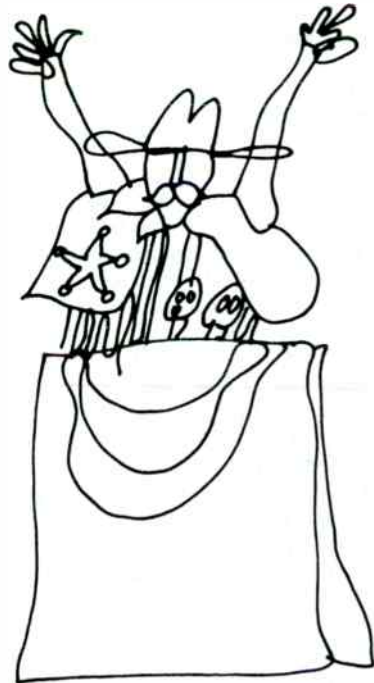


## Who is Eligible to Hold Office?

10. A party's candidate for President was 31 years old and her Vice Presidential running mate was 21 years old. They had publicly announced their candidacies and their party stated that it had filed for ballot status in 15 States, had been certified in 6, and had collected nearly 500,000 signatures on nominating petitions. Were they legally qualified candidates for purposes of Sections 315 and 312 of the Act? No. Under the Commission's rules a person must meet "the qualifications prescribed by the applicable laws to hold the office for which he is a candidate" before he will be considered a legally qualified candidate. Article II, Section I, Clause 4 of the United States Constitution states, among other things, that no one is eligible to the Office of President "who shall not have attained the age of thirty-five years." Article II of the Constitution states that "... no person constitutionally ineligible to the Office of President shall be eligible to that of Vice President of the United States."<sup>3</sup>

11. A station asked whether it was required to sell time to members of the Communist Party who were running for the offices of President and Vice President, in light of the Smith Act.<sup>4</sup> The Commission replied that Section 312(a)(7) of the Communications Act requires licensees to give or sell reasonable amounts of time to candidates for Federal elective office, including Communist Party candidates if they are otherwise legally qualified to be candidates for the Federal office they seek. The Smith Act provides criminal penalties for individuals who actively advocate or seek to bring about the overthrow of the Government of the United States, but it does not specifically refer to the Communist Party, and the U.S. Supreme Court has ruled that the following language from 18 U.S.C. 783 is applicable to the provisions of the Smith Act:

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or any other criminal statute.<sup>5</sup>



<sup>3</sup>*Socialist Workers Party*, 39 FCC 2d 89 (1972).  
418 U.S.C. 2385.

<sup>5</sup>*Scales v. U.S.*, 365 U.S. 203 (1961); *Ken Bauder (Station WLUC-TV)*, 62 FCC 2d 849 (1976).



## Ballot and Write-In Candidates

12. A candidate need not always be on the ballot to be legally qualified. It depends on the laws of the State in which the election will take place. In some states persons may be voted for as write-in candidates if they have not complied with the requirements for getting their names on the ballot. In such States, if a person makes a public announcement that he or she is a write-in candidate for a certain office, is eligible to hold the office if elected, and makes a "substantial showing" that he is a bona fide candidate who is actively seeking election (such as by establishing campaign headquarters, making campaign speeches, issuing press releases, etc.),<sup>6</sup> he will be considered a legally qualified candidate within the meaning of Sections 315 and 312. A mere announcement that he is a write-in candidate, by itself, does not entitle him to equal opportunities or other rights of candidates under the Communications Act.<sup>7</sup> The laws of each State will determine whether on the facts of each case a candidate is entitled to a place on the ballot or, if he cannot qualify for ballot status, whether he may run as a write-in candidate. See rules quoted in the Appendix.

In one case, the Commission determined that a licensee did not act unreasonably in refusing to sell time to an alleged write-in candidate because he had not substantiated his claim that he was a legally qualified candidate at the time of his request. Rather, he merely furnished conclusions that he had engaged in campaign activities without supplying any specific information in this regard.<sup>8</sup>

## Candidate Must Prove Qualifications

13. A candidate must prove that he is a legally qualified candidate in order to gain his rights under Sections 315 and 312(a)(7). Sections 73.1940 and 76.205 of the rules (47 CFR 73.1940 and 76.205) state that a candidate seeking equal opportunities has the burden of proving that he and his opponents are legally qualified candidates for the same public office. In one case, after qualifying for a place on the ballot for one office in a primary, a candidate notified State officials that he was withdrawing from that race, but later claimed that he had not intended to withdraw. However, the evidence indicated that he was actually supporting another candidate for that office and personally was now seeking nomination for a different office. The Commission ruled that he was not entitled to the rights of a candidate for the first office because he had not made a clear showing that he was now a legally qualified candidate for that office.<sup>9</sup> In another case, the Commission stated that "where initial doubt is present as to whether in fact a candidate is actually legally qualified for the office he seeks, then it is incumbent upon that candidate to prove his qualifications."<sup>10</sup>



<sup>6</sup>KGNS, 40 FCC 291 (1952); *Socialist Labor Party of America*, 40 FCC 239 (1951). For a leading case in which a write-in candidate was held to have made a substantial showing that she was a bona fide candidate, see *Socialist Workers Party*, 26 FCC 2d 244 (1970).

<sup>7</sup>See 47 CFR 73.1940 (a)(5) and 76.5(y)(5) for further information on "substantial showing."

<sup>8</sup>*Douglas S. Kraeger*, 87 FCC 2d 751 (1980).

<sup>9</sup>*Lar Daly*, 40 FCC 270] (1956).

<sup>10</sup>*American Vegetarian Party*, 40 FCC 278 (1956); see also *Socialist Workers Party*, 40 FCC 421 (1964); *Raymond Harold Smith*, 40 FCC 430 (1964); *Frank J. Kuhn, Jr.*, 48 FCC 2d 433 (1974); *Roy Anderson*, 14 FCC 2d 1064 (1968); *aff'd per curiam, Anderson v. Federal Communications Commission*, 403 F. 2d 61 (2d Cir. 1968).



## Candidates for Nomination by Convention

14. Except for Presidential or Vice Presidential candidates, candidates for nomination by convention or caucus must (i) publicly announce their intention to run for nomination; (ii) be eligible to hold the office they are seeking, and (iii) make a substantial showing that they are bona fide candidates. No one except a Presidential or Vice Presidential candidate will be considered a legally qualified candidate for nomination by convention or caucus earlier than 90 days before the convention or caucus is to begin.<sup>11</sup>

## Candidates for Presidency and Vice Presidency

15. A special situation arises in connection with candidates for President and Vice President, since they are running nationwide. Candidates for *nomination* to either of these offices must (i) make a public announcement of candidacy; (ii) be eligible to hold the office under the Constitution and other applicable laws and (iii) either the candidates or their proposed delegates must have qualified for the primary or Presidential preference ballot in the State in which they are running or have made a substantial showing of bona fide candidacy in that State, territory or the District of Columbia. Persons will be considered legally qualified candidates for nomination only in the State or States in which they qualify under the above standard, unless they qualify in 10 or more States (or 9 and the District of Columbia), in which event they will be considered legally qualified candidates for nomination in all States, territories and the District of Columbia.<sup>12</sup> Candidates for *election* to the Presidency or Vice Presidency must qualify in the same way as candidates for other offices; that is, make a public announce-

ment of their candidacies, be eligible to hold the offices sought and either qualify for a place on the ballot in the States in which they qualify as candidates, or qualify as write-in candidates by committing themselves to seeking election by that method and making a substantial showing that they are bona fide candidates for election. Like candidates for Presidential or Vice Presidential nomination, they will be considered legally qualified candidates only in the States in which they have met these requirements unless they meet the requirements in 10 or more States (or 9 and the District of Columbia) in which event they will be considered legally qualified candidates in all States, territories and the District of Columbia.<sup>13</sup> Thus a Presidential or Vice Presidential candidate who qualifies in less than 10 States will be entitled to equal opportunities, freedom from censorship, lowest unit rates, "reasonable access," etc., only in those States in which he or she qualifies, but candidates who qualify in 10 or more States will gain these rights in all States.

16. In one case, a complainant was found not to be a bona fide write-in candidate for U.S. President in New York State, because he had not met his burden of establishing to the stations from which he sought broadcast time that he had "engaged to a substantial degree in activities commonly associated with political campaigning." Rather, his limited campaign activities predominately took place in the Buffalo metropolitan area and, therefore, he did not establish a campaign presence in a "substantial part" of that state.<sup>14</sup>

<sup>11</sup>See §§73.1940(a)(3) and 76.5(y)(3) of the rules. Also, §§73.1940(a)(5) and 76.5(y)(5) for "substantial showing."

<sup>12</sup>See §§73.1940(a)(4) and 76.5(y)(4) of the rules in the Appendix.

<sup>13</sup>See §§73.1940(a)(2) and 76.5(y)(2) of the rules in the Appendix.

<sup>14</sup>Michael Stephen Levinson, 87 FCC 2d 433 (1980).

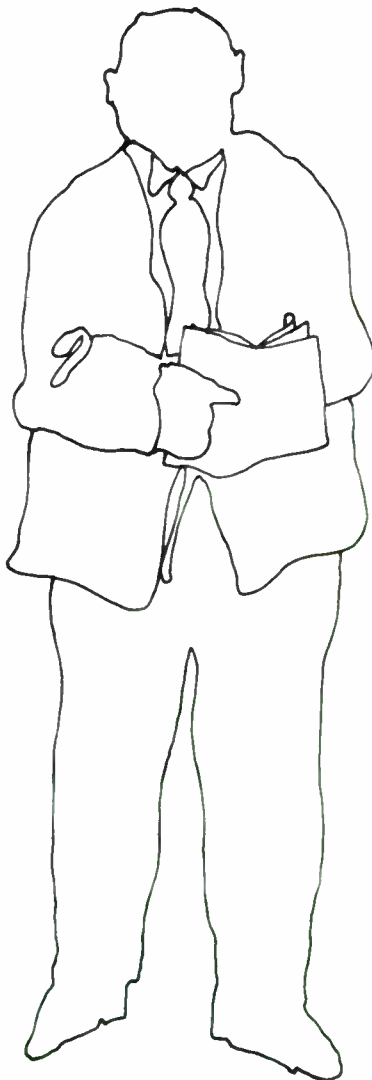


## Rulings by State Officials

17. When a State Attorney General or another State official who has authority to decide a candidate's legal qualifications has ruled that a candidate is not legally qualified under the State's election laws, a station normally is not required to make "equal opportunities" available to the candidate. The ruling of the authorized State official will normally be accepted as final unless there is a judicial decision to the contrary.<sup>15</sup>

18. A write-in candidate for mayor sought time equal to that given the only two candidates whose names appeared on the ballot. Under State law, only the two candidates receiving the largest number of votes in the primary election would become the "official candidates" in the final election. The Secretary of State, who was the "Ex Officio Chief Elections Officer" of the State, gave an opinion that write-in candidates were not "official candidates" and therefore were not entitled to equal time. However, the licensee of the station sought a ruling from the Commission because the write-in candidate was eligible to hold the office of mayor if elected and his name could be written on the ballot. The Secretary of State's opinion stated only that write-in candidates were not "official candidates" and did not state that they were not "legally qualified candidates." The Commission found that since the candidate here could be voted for by the write-in method and was eligible to hold the office he sought, he might, under the FCC rules, be a legally qualified candidate if he made a substantial showing that he was a bona fide candidate.<sup>16</sup> In a contrasting case that arose under the laws of a different State, the Commission held that since the Attorney General of the State had

ruled that there was no provision in the law for casting write-in votes in a primary election and that a person did not become a legally qualified candidate in a primary until he filed his "notification and declaration paper" with the office specified by law, the person was not a legally qualified candidate until this paper had been filed.<sup>17</sup>



<sup>15</sup>*Socialist Workers Party*, 40 FCC 280 ((1956); *Lester Posner*, 15 FCC 2d 807 (1968); *Malcolm Cornell*, 31 FCC 2d 649 (1971). (For an example of a somewhat different result in a case involving a State official's opinion, see par. 9.)

<sup>16</sup>*Tom Leonard*, 29 FCC 2d 177 (1969).

<sup>17</sup>*Rady Davis*, 40 FCC 435 (1965).

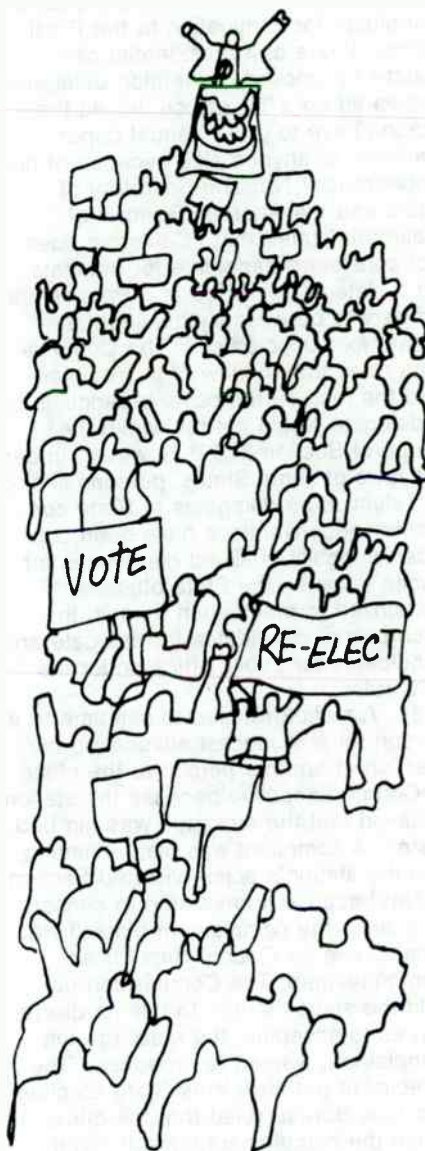




## Write-In Candidate Must Declare Self

19. Is a candidate entitled to "equal opportunities" as a write-in candidate while still seeking enough signatures on petitions to qualify for the ballot, if he tells the FCC that he intends to run as a write-in candidate should he fail to obtain a place on the ballot? In a ruling later appealed to the courts, the Commission found that the candidate was not entitled to equal opportunities as a write-in candidate since he intended to seek election by that method only if his current effort to obtain a place on the ballot failed.<sup>18</sup> The candidate appealed to the U.S. Court of Appeals for the 7th Circuit. Although for technical legal reasons the court did not vacate the particular Commission ruling that was challenged, it disagreed with the Commission's finding that the appellant could not obtain status as a write-in candidate while seeking ballot status by the petition method. The court said that "a candidate who has not yet qualified for ballot position under State election laws is nevertheless entitled to equal time if he is otherwise eligible under the [write-in rules] and commits himself to seeking election by the write-in method in the subsequent election." The court further stated that "it is sufficient that the candidate indicate to the stations from whom equal time is sought that he will continue to campaign as a write-in candidate regardless of the outcome of his petition efforts. We query whether it would be sufficient for a candidate merely to indicate that, if his petition effort failed, he would be agreeable to voters writing in his name, but that is not the case here. Flory [the candidate] indicated he would continue an active campaign."<sup>19</sup> As a result of this decision, the Commission amended its political broadcasting rules regarding

the requirements for becoming a write-in candidate to read as quoted in the Appendix to this Primer and require a write-in candidate to have "publicly committed himself to seeking election by the write-in method. . . ."<sup>20</sup>



<sup>18</sup>Ted Pearson, 48 FCC 2d 1091 (1974), review denied, 48 FCC 2d 1247 (1974).

<sup>19</sup>Flory v. Federal Communications Commission and the United States of America, 528 F. 2d 124, 131 (7th Cir., 1975).

<sup>20</sup>In the Matter of Amendment of Part 73 of the Commission's Rules, 60 FCC 2d 615 (1976).



## Who is Not A Candidate For Public Office?

20. The names of candidates for delegates to the Democratic National convention did not appear on the ballot in the California Presidential primary. Instead, the electorate voted solely for the candidate for nomination to the Presidency. If one of a presidential candidate's proposed convention delegates appeared on a TV station, would the station have to grant "equal opportunities" to anyone else because of his appearance? No. The Secretary of State and the Attorney General of California stated that "California does not consider a candidate for delegate on a slate of delegates in a Presidential primary to be a legally qualified candidate for public office." The Commission ruled that in view of this opinion and the facts of the case, broadcasts by a delegate would not fall within the scope of Section 315.<sup>21</sup> However, under the laws of some States, persons seeking election as delegates to State constitutional conventions have been considered legally qualified candidates for public office by the State officials authorized to make such rulings. In such cases, candidates for delegate are candidates for public office under the FCC rules.

21. A station refused to sell time to a person for a broadcast advocating the election of another person to the office of County Executive because the station believed that the message was "in bad taste." A complaint was filed, claiming that the station's action violated Section 315(a) because it amounted to censorship since the complainant himself was a candidate for County Republican Committeeman. The Commission upheld the station's right to use its discretion as to accepting the message the complainant wanted to broadcast. The Director of the New York State Election and Law Bureau ruled that the office which the complainant himself sought—County Republican Committee-

man—was a "party position" and not a public office. Therefore the complainant was not a candidate for public office and the no-censorship provision of Section 315(a) did not apply to him.<sup>22</sup>

22. Under State law, the Maryland General Assembly was authorized to fill a vacancy in the office of Governor created by the resignation of the former Governor. A complainant sought air time on the grounds that he was a legally qualified candidate for the office of Governor. The station claimed that the complainant was not a legally qualified candidate for public office within the meaning of Section 315. The station forwarded a letter from the Deputy Attorney General of Maryland which stated that "the impending legislative action (by the General Assembly) is not an election" as defined by Maryland law and that "the present contest for the office of Governor is not a process by which the voters of this State shall elect a Governor." The Commission found that the position of the station was not unreasonable in view of the circumstances of the case.<sup>23</sup>

23. A person who meets the definition of a candidate as given in the Federal Election Campaign Act is not necessarily a legally qualified candidate for purposes of the Communications Act. The only definition of a candidate appearing in the Federal Election Campaign Act applies only to Chapter 14 of that Act and does not affect the definition of a legally qualified candidate for purposes of Section 315 of the Communications Act.<sup>24</sup>

24. Several New York City mayoralty candidates have filed "the necessary authorization of candidacy under Section 481 of the New York State Election Law," which apparently is required

<sup>22</sup>Malcom Cornell, 31 FCC 2d 649 (1971).

<sup>23</sup>Lester Posner, 15 FCC 2d 807 (1968).

<sup>24</sup>In re Federal Election Campaign Amendments of 1974, 55 FCC 2d 279 (1975); Anthony Martin-Trigona, 67 FCC 2d 33 (1977); National Citizens Committee for Broadcasting et al., 75 FCC 2d (FCC 79-440). For further discussion of the Federal Election Campaign Act. see paragraph 95 re: "Identifying Sponsor of Broadcast."

<sup>21</sup>KNBC-TV, 23 FCC 2d 765 (1968); see also, Russell H. Morgan, 58 FCC 2d 964 (1976).



before fund-raising operations may begin. Are they legally qualified candidates for public office under the Communications Act? Not necessarily. Unless such filings under State law "would also qualify such candidates for places on the ballot, such filings would not make these candidates 'legally qualified' so as to bring the equal opportunity provisions of Section 315 into play."<sup>25</sup>

### Broadcasts On Distant Stations

25. Do "equal opportunities" apply to a broadcast by a candidate for Mayor of City "A" on a station in City "B" whose service area does not extend as far as City "A"? No. The candidate for Mayor of "A" is not a legally qualified candidate for public office in the area served by the station in "B" for the purposes of Section 315. The purpose of Section 315, as shown by the legislative history, is to prevent a candidate from obtaining an unfair advantage over an opposing candidate by broadcasting to the voters in the election in which both are taking part where the opposing candidate is denied a chance to broadcast to these voters. Here the candidate would not be broadcasting to the persons who were to vote in his election.<sup>26</sup>

### Rivals in Recall Balloting are Candidates

26. Citizens of a Colorado city were to vote whether to recall a District Attorney. On the same ballot, two other persons were listed as candidates to succeed the incumbent if the voters should decide to recall him. The incumbent asked to buy time on a TV station to defend his record and attack his critics. The station sought a declaratory ruling on whether the incumbent District Attorney was a legally qualified candidate for public office within the mean-

ing of Section 315. The Colorado Attorney General stated that the two alternative candidates on the ballot were legally qualified candidates for public office, but he had not decided whether the incumbent office holder was a legally qualified candidate. If he were a legally qualified candidate, Section 315(a) would prohibit censorship of his broadcasts. The U.S. Supreme Court has held that since a station cannot censor a legally qualified candidate, the station will not be subject to liability for civil damages for any libelous statements the candidates may broadcast.<sup>27</sup> The Commission ruled that the incumbent and the two alternative candidates on the ballot all should be considered legally qualified candidates for public office. It stated that to rule otherwise would be unfair to the incumbent who could be censored while defending himself, whereas his two opponents could not be censored. Also, the alternative candidates, but not the incumbent, could obtain the station's lowest unit charge for time. Even the alternative candidates might be at a disadvantage if the incumbent were ruled not to be a legally qualified candidate, since they would not be entitled to opportunities equal to those of the incumbent if he should appear on the air. Thus, a contrary ruling would result in inequities to both the District Attorney and the alternative candidates.<sup>28</sup> However, when the recall ballot lists only the official on whose recall the public is to vote and does not list any candidates seeking to succeed him, the incumbent official is not a "legally qualified candidate for public office" for purposes of Section 315. The Fairness Doctrine would, of course, apply to the recall proposition.

<sup>25</sup>Letter to Hon. Percy E. Sutton, 67 FCC 2d 188 (1977).

<sup>26</sup>Letter to Peter A. Mobilia, Jr., June 17, 1977; *Bob White*, 87 FCC 2d 748 (1980).

<sup>27</sup>*Farmers Educational and Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959).

<sup>28</sup>*Petition of Station KOAA-TV*. FCC 78-286 (April 25, 1978).



## Candidates "With No Chance To Win"

27. A station may not deny "equal opportunities" to a candidate because it believes he has no chance of being nominated or elected. If a candidate is legally qualified as defined in the rules and further explained in this section, he is entitled to his rights under Sections 315 and 312(a)(7) regardless of whether a station licensee thinks he has any chance of success.<sup>29</sup>

## Election Ends "Equal Time" Rights

28. If a candidate does not prove his legal qualifications until after the date of nomination for the office which he was seeking, or if, although a candidate was qualified from the beginning, he files a complaint after the nomination has taken place, he is not entitled to the "equal opportunities" that would have been available to him if he had proved his qualifications or filed a complaint before the nomination date. The occurrence of nomination or election ends the possibility of affording equal opportunities. However, the Commission itself can take post-election action against a broadcaster who is found to have violated the law before the election.<sup>30</sup>

## When Are Candidates "Opposing Candidates?"

29. When Congress adopted Section 315 it indicated that its reason for requiring equal opportunities was to make sure that opposing candidates receive the same treatment—that, if one candidate for an office gets air time, his opponent "for that office" will be entitled to equal time. The FCC has for many

years interpreted Section 315 to mean that before the primaries or the nominating conventions take place, only those candidates who seek the nomination of the same party for the same office are entitled to opportunities equal to those of each other, since only *they* are opponents at that point. The U.S. Court of Appeals for the District of Columbia Circuit upheld the Commission's position on this question in *Kay v. FCC*,<sup>31</sup> stating, in part,

...Congress intended by the language it did employ to . . . restrict the benefits of "equal opportunities" to candidates of the same class or character as the candidate or candidates who may have been permitted to use a broadcasting station in the first place.

This interpretation of the statute also allows a station to serve the public interest more fully in some instances by devoting more time to one primary race than to another. For example, an incumbent office holder may have little or no opposition to renomination by his party, and consequently there may be little public interest in that party's nomination for that office, whereas half a dozen candidates may be waging vigorous campaigns for nomination to the same office by the other major party. The station may rightly decide that the public interest will be better served by allocating more time to the hotly contested race than to the other one.

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<sup>29</sup>*Columbia Broadcasting System, Inc.*, 40 FCC 244 (1952).

<sup>30</sup>*Lar Daly*, 40 FCC 273 (1956), *aff'd* by order dismissing appeal entered March 7, 1957, *Lar Daly v. U.S.A. and FCC* Case No. 11946 (7th Cir., 1957), rehearing denied by order entered April 2, 1957, cert. den., 355 U.S. 826, rehearing denied 355 U.S. 885 (1957); *Lar Daly*, 40 FCC 317 (1960).

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<sup>31</sup>*Kay v. FCC*, 443 F. 2d 638, 645 (D.C. Cir. 1970).



## Examples of Application of the Law

30. Examples of how the "equal opportunities" law applies to different situations are given in the following paragraphs:

(a) *Candidates for nomination by same party to same office.* A, B, and C are candidates for nomination for sheriff by the Good Government Party. If a station makes time available to A, and if B and C request equal opportunities, the station must grant their request because they are opposing candidates for nomination by the same party to the same office.

(b) *Candidates for nomination by different parties.* A station makes time available to A, B, or C, candidates for nomination for sheriff by the Good Government Party. X, Y, and Z are seeking the nomination for sheriff by the Square Deal Party. If they demand time equal to that made available to A, B, or C, the station need not make it available to them so far as Section 315 is concerned, since at this point X, Y, and Z are opponents of each other but not of A, B, or C. The Commission has long held that, while both primary and general elections fall within the scope of Section 315, such elections must be considered independently of each other, and equal opportunities, within the meaning of Section 315, need be afforded only to legally qualified candidates for the same office in the same election.<sup>32</sup> However, it should be noted that a station's actions in such cases are also subject to its general public interest responsibility to present discussion of important political matters and to comply with the Fairness Doctrine; moreover, if the nomination is for a Federal elective office, Section 312(a)(7) of the Communications Act requires the station to provide "reasonable access"

to all of the candidates upon request. For further discussion of these subjects, see paragraphs 72-77 and 89-94 on, "How Much Time Must a Station Provide" and "The Fairness Doctrine in Political Broadcasting."

(c) *Candidates for Different Offices.* May a station make time available to all candidates for one office in a general or primary election and refuse time to all candidates for another office? Yes. So far as the requirements of Section 315(a) are concerned, a licensee may limit the sale of time to candidates for those offices which the licensee determines are particularly important.<sup>33</sup> However, see paragraph 30(b) above on other factors to be considered, including the "reasonable access" requirement for Federal elective candidates.

(d) *Candidates in primary elections and general election for same office.* A station which makes time available for candidates for nomination to an office in a primary election need not make time available to a candidate for the same office in the general election unless it has made time available to another candidate for the office in the general election. Primary and general elections must be considered independently of each other, as explained in 30(b) above.<sup>34</sup>

(e) *When does nomination take place?* On May 3, 1964, a Congressman from New York made a television appearance. At this time, he was the only person who had been designated by petition under New York law as Republican nominee for election to his Congressional seat. The only designated Democratic-Liberal nominee filed a complaint requesting equal time. Primaries of both parties were to be held on June 2, 1964, but if no petitions for write-in nominees were filed by May 5, 1964, no primaries would be held, since the incumbent and the complainant each would have the uncontested nomination of his party. In fact, no peti-

<sup>32</sup>Hon. Joseph S. Clark, 40 FCC 332 (1962); Hon. Clarence E. Miller, 23 FCC 2d 121 (1970); Richard B. Kay, 24 FCC 2d 426 (1970); aff'd; Kay v. FCC, 443 F. 2d 638 (D.C. Cir. 1970); *KTTs*, 23 FCC 2d 771 (1970); reconsid. denied, 24 FCC 2d 541 (1970), Mr. William A. Barnstead, 72 FCC 2d 499 (1979).

<sup>33</sup>Lew Breyer, 31 FCC 2d 548 (1968); *Foster Furcolo*, 48 FCC 2d 565 (1974).

<sup>34</sup>*KWFT, Inc.*, 40 FCC 237 (1948).



tions for write-in status were ever filed. Was the station right in refusing equal opportunities to the complainant on the ground that on May 3 each was merely a candidate for his party's nomination, and thus they were not opposing candidates? The Commission found that the station was right. The issue must be decided according to New York election laws, and the Commission normally would rely upon the interpretation of the laws by State officials. However, neither the complainant nor the Commission was able in this case to get such an interpretation from State officials, so the Commission was compelled to make its own interpretation. It ruled that as of May 3, the date of the broadcast, neither the incumbent Congressman nor the Democratic-Liberal complainant had become the nominee of his party since two more days remained in which other persons could file write-in petitions for nomination. Therefore, the incumbent and the complainant were not opposing candidates for Congress at the time of the broadcast.<sup>35</sup> It should be noted that the rulings in these cases were based upon the laws of New York, which under certain circumstances allow a person to become his party's nominee without the holding of a primary election. The cases with different results cited in 30(b) of this section arose in states with different legal requirements for qualifying as a party's nominee.

### **What is a "Use" of a Station by a Candidate?**

31. In general, any broadcast or cablecast of a candidate's voice or picture is a "use" of a station or cable system by the candidate if the candidate's participation in the program or announcement is such that he will be identified by members of the audience. However, Section 315 of the Communications Act lists four types of broadcasts by candidates which are not considered to be uses. These exceptions are discussed in paragraphs 38 to 55 under the heading, "What Appearances by Candidates Are Not 'Uses'?"

### **Supporter's Appearance Is Not a "Use"**

32. If a supporter of a candidate appears on the air to urge his election, is it a use? No. Only a personal appearance by a legally qualified candidate for public office, by voice or picture, is a use. The legislative history of Section 315 shows conclusively that when Congress enacted it in 1934, it understood that the provisions of that section "applied only to the personal use of radio facilities by the candidates themselves. . . ."<sup>36</sup> Although the "equal opportunities," lowest unit charge, "no-censorship" and "reasonable access" (for Federal candidates) provisions of the law apply only to appearances by candidates themselves, the Fairness Doctrine may require that "quasi-equal opportunities" be made available to the supporters of a candidate if supporters of the candidate's opponent have been given or sold time by a station.<sup>37</sup> For further discussion of the Fairness Doctrine as it applies to political campaigns, see paragraphs 89-93 dealing with the Fairness Doctrine.

<sup>35</sup>Mrs. Eleanor Clark French, 40 FCC 417 (1964); see, also, Thomas G. Dignan, 62 FCC 2d 59 (1976).

<sup>36</sup>*Felix v. Westinghouse Radio Stations, Inc.*, 186 F. 2d 1, 5 (3d Cir. 1950); cert. denied, 341 U.S. 909 (1951).

<sup>37</sup>*Nicholas Zapple*, 23 FCC 2d 707 (1970).



### Most Appearances by Candidates Are "Uses"

33. Even if a candidate does not discuss his candidacy during a broadcast, his opponent is entitled to equal opportunities except in certain situations specified by law. As noted in the first paragraph of this section, Section 315(a) lists four types of broadcasts which are not considered to be uses. However, with these exceptions, all appearances on the air by candidates are considered to be uses, and licensees of stations are not authorized to base their grant or denial of time to candidates on their judgment of whether the use of the time will aid or even be connected with their candidacies.<sup>38</sup> This interpretation of "use" has at times led to rulings which may seem far-fetched to some persons, but as the Court of Appeals for the Ninth Circuit noted in upholding this position,<sup>39</sup> neither the wording of Section 315 nor the legislative history of it or its subsequent amendments indicate that Congress intended the Commission to distinguish between political and non-political uses by candidates. The court stated:

...[U]nless a clear rule exists that all broadcast use by a political candidate subjects a station to equal time obligations... ultimately the FCC would be forced to examine the nature of a candidate's every appearance to determine whether it falls under Section 315.

The court agreed with the Commission that attempting to distinguish between a political and nonpolitical use of broadcast facilities by candidates would require the Commission to make "highly subjective judgments concerning the content, context, and potential impact of

a candidate's appearance." The court also stated:

If the Section [315] were invoked only when political issues actually were discussed... a station could support one candidate by inviting him or her to appear on numerous shows but strongly discouraging the discussion of political issues. True, Paulsen might not benefit from such treatment if, as he says, he is already well known to the viewing public, but a less popular or less well-exposed candidate could surely benefit from the exposure. To define such appearances as nonpolitical is to apply a rather narrow and perhaps a bit naive definition of "political"... A candidate who becomes well-known to the public as a personable and popular individual through "non-political" appearances certainly holds an advantage when he or she does formally discuss political issues to the same public over the same media.

Moreover, since Section 315 generally prohibits any censorship by a station of material broadcast by a candidate, the station itself would be violating the statute if it attempted to limit candidates' broadcasts to material advocating their election or even merely referring to their campaigns. But see paragraphs 61 and 63(g), below, as to whether Section 315 would require the broadcast of obscene material in violation of applicable Federal criminal laws.

<sup>38</sup>*Socialist Labor Party*, 40 FCC 241 (1952); *Fordham University*, 40 FCC 321 (1961).

<sup>39</sup>*Paulsen v. FCC* 491 F. 2d 887, 891 (9th Cir., 1974).



## Examples of "Uses"

34. If a candidate makes a broadcast in some capacity other than as a candidate, his opponent still is entitled to equal opportunities. With the exception of appearances in news programs as cited in Section 315(a), all personal appearances by candidates are uses. Examples in which the Commission has ruled an appearance to be a use, even though the appearance was in some other capacity than that of candidate, include the following, in some of which the candidate's opponent would be entitled to free time, since the candidate himself did not pay for his time.

(a) *The President of the United States.* The President traditionally has broadcast a 5-minute message "kicking off" the United Fund and Community Chest campaigns. The message is filmed, videotaped and audiotaped far in advance of its broadcast. If the President is a candidate for reelection at the time the message is broadcast, his opponents are entitled to equal time, since the broadcast cannot "reasonably be said to constitute 'on-the-spot' coverage of bona fide news events within the meaning of section 315(a)(4)," and the law makes no exceptions for messages carried "in the public interest" or as a "public service."<sup>40</sup> However, for examples of broadcasts by Presidents running for reelection which have been ruled exempt from the "equal opportunities" provision of Section 315 because they were official reports to the public on matters of major importance, see paragraphs 47 to 48 "What Appearances by Candidates Are Not 'Uses'?"

(b) *Congressman's Report to His Constituents:* After he becomes a legally qualified candidate for reelection, a Congressman's Reports are uses.<sup>41</sup> A weekly Report is a use even when broadcast in its entirety within a newscast, which is normally not a use

under Section 315(a)(1).<sup>42</sup> In the latter decision, the Commission cited the legislative history of the 1959 amendments of 315(a) as showing that Congress did not intend for Congressmen's Reports to constituents to become exempt from the equal opportunities requirements of Section 315 merely by being aired in newscasts.

(c) *Judge's Appearance on Panel.* A judge who was a candidate for reelection appeared in a panel discussion of an important subject with a number of other persons. The judge's candidacy was not mentioned nor was the election in which he was to take part. Nevertheless, his appearance was a use since the panel discussion was not an exempt news-type program.<sup>43</sup>

(d) *Movie Actor.* If an actor becomes a legally qualified candidate for public office, his appearances on telecasts of his movies thereafter will be uses, entitling his opponents to equal time, if the actor is identifiable in the movies.<sup>44</sup>

(e) *Radio or TV Performer.* If he is identified or identifiable on the air, appearances on radio or television in the course of a performer's regular duties, such as announcing, singing, acting or newscasting, are uses, entitling his opponent to equal time.<sup>45</sup> However, the Commission has ruled in the case of the host of a teenage dance show, who also was a candidate for public office, that opponents of the performer were entitled only to time equal to that during which the performer appeared on camera rather than to time equal to the duration of the entire program.<sup>46</sup> The same principle would apply to other appearances by radio or TV performers; for example, the political opponent of a

<sup>42</sup>Letter to Hon. Clark W. Thompson, 40 F.C.C. 328 (1962).

<sup>43</sup>Rev. Charles E. Reichenbach, 35 F.C.C. 2d 568 (1972).

<sup>44</sup>Adrian Weiss (*Ronald Reagan films*), 58 F.C.C. 2d 342 (1976), review denied 58 FCC 2d 1389 (1976); *Pat Paulsen*, 33 F.C.C. 2d 297 (1972); *aff'd*, 33 F.C.C. 2d 835 (1972); *aff'd sub nom. Paulsen v. F.C.C.*, 491 F.2d 887 (9th Cir. 1974).

<sup>45</sup>Kenneth E. Spengler, 40 F.C.C. 279 (1956); *KUGN*, 40 F.C.C. 293 (1958).

<sup>46</sup>WNEP-TV, 40 F.C.C. 431 (1965).

<sup>40</sup>United Way of America, FCC 75-1091.

<sup>41</sup>Clinton D. McKinnon, 40 F.C.C. 291 (1957); Hon. Joseph S. Clark, 40 F.C.C. 325 (1962).





radio disc jockey would be entitled only to the amount of time in which the disc jockey's voice was heard—not to the time used for playing records. If the announcer's voice is neither identified nor identifiable to the public, his air appearance is not a use.<sup>47</sup> However, where the newscaster on a radio station is identified by name up to the date of his candidacy but not thereafter, his continuing newscasts are uses.<sup>48</sup> Note: In some instances, when on-air employees of stations have become candidates for public office, the stations have sought waivers or partial waivers of their "equal time" rights from opposing candidates. Some partial waivers have been based on an agreement by an opposing candidate to settle for use of a certain number of free spots and/or programs rather than using the whole amount of time to which he might be entitled each week if the station employee were, for example, a disc jockey, an announcer or a newscaster. Opposing candidates have no obligation to grant waivers, and when they have granted them, the waivers have usually included a condition that the station employee make no reference to his candidacy during his regular broadcasts. The Commission has stated that:

Waivers given with full knowledge of the relevant facts concerning the broadcast[s] (and assuming of course the . . . conditions were adhered to) would generally be binding. . . .<sup>49</sup>

- (f) *Appearance on Variety Program.* A Presidential candidate's appearance on a network variety program is a use.<sup>50</sup>
- (g) *Speech by Candidates.* A Presidential candidate made a speech which was broadcast by a station "as a public service." The Commission ruled that

regardless of the station's evaluation of the speech, the broadcast was a use.<sup>51</sup>

(h) *Minister on Religious Program.* A church sponsored a 30-minute religious program. The minister appearing on the program became a candidate for public office. The minister's appearance on the program was a use and opponents would be entitled to equal time. The opponents would be entitled to free time (since the minister himself did not pay for it) unless the church congregation or board of trustees which paid for the program stated that they were buying the time to advance the candidacy of their minister.<sup>52</sup>

(i) *More Examples of Uses.* A political party buys TV time to distribute to individual candidates for use as they choose. Is there a use by a candidate in any of the following situations? (a) The camera pans a group of candidates seated in a studio while a non-candidate reads a political spot; (b) a non-candidate reads a political spot while movie film of a candidate is on the screen; (c) a photograph of a candidate appears on the screen while a non-candidate reads a political spot. Yes, each of these situations is a use.<sup>53</sup>

(j) *Advertiser-Candidate Reads Own Commercials.* An advertiser on a station regularly voices his own commercials. If he runs for city council, will his commercial appearances be uses? If so, will he have to buy "equal time" for his opponents? His identified appearances are uses but since he is paying for his time, his opponents also would have to pay for their time.<sup>54</sup>

(k) *Drawings of Candidate.* A campaign committee prepares 60-second spot announcements in which a drawing of the face of a candidate appears during the sponsorship identification section of the ad. Will the entire spot be a use? Yes.

<sup>47</sup>WENR, 17 F.C.C. 2d 613 (1969); KYSN Broadcasting Co., 17 F.C.C. 2d 164 (1969).

<sup>48</sup>Assuming his voice is identifiable. See *Public Notice: Newscaster Candidacy*, 40 F.C.C. 433 (1965); see, also, *Station WBAX*, 17 F.C.C. 2d 316 (1969) and *OKO General, Inc.*, 25 F.C.C. 2d 117 (1970).

<sup>49</sup>WBTW-TV, 5 F.C.C. 2d 479, 480 (1966).

<sup>50</sup>Lar Daly, 40 F.C.C. 314 (1960).

<sup>51</sup>KFI, 40 F.C.C. 257 (1952).

<sup>52</sup>Rev. Billy Robinson, 23 F.C.C. 2d 117 (1970).

<sup>53</sup>KWWL-TV, 23 F.C.C. 2d 758 (1966).

<sup>54</sup>Georgia Association of Broadcasters, 40 F.C.C. 343 (1962); see, also, *KTTV*, 40 F.C.C. 282 (1957) and *Joseph V. Gartlan, Jr.*, 32 F.C.C. 2d 609 (1971).



The use of a drawing or other pictorial representation of the candidate will be a use if it is identified or identifiable as that candidate, and will make the whole commercial a use.<sup>55</sup>

### “Fleeting” Appearance Not a Use

35. The National Urban Coalition requested a declaratory ruling on a two-minute public service TV announcement featuring 120 people, many of them leading personalities in the political, sports and entertainment fields, all singing as a group the song, “Let the Sun Shine In.” No one’s name was mentioned nor were any voices separately identifiable. After the announcement was filmed, one of the persons appearing in it became a candidate for public office. In an edited version of the spot which eliminated a close-up of the candidate, the candidate was nevertheless visible in two shots—one for 4.2 seconds in a long-range shot of 100 persons, and the other for 2.8 seconds in a medium-range shot of about six people, in which only the lower half of his face was seen. Would the spot be a use? No. The Commission ruled that this was not a use because the candidate was not readily identifiable in either spot.<sup>56</sup> Also of interest in connection with the question here raised was the Commission’s *Interpretative Opinion on Section 315 of the Act*,<sup>57</sup> in which, at p. 749, the Commission referred to an earlier case in which a candidate’s fleeting appearance at a public ceremony had been held not to be a use. The Commission stated:

To have held otherwise [in the earlier case] would have required the station to afford an opportunity for an appearance by an opponent for a period ranging from a fraction of a second to perhaps a few seconds. If

the *de minimis* principle of law is applicable to matters such as this, it was clearly applicable to the facts of that case.

### Broadcasts on Foreign Stations

36. Broadcasts by American political candidates on foreign stations whose signals are received in this country do not come within the scope of Section 315, because it applies only to broadcasting and other communications systems regulated by the FCC.<sup>58</sup>

### How Much of an Appearance Makes a Use?

37. How much of an appearance on a spot or program must a candidate make in order for the spot or program to be ruled a use? In the case of *spots*, if a candidate makes any appearance in which he is identified or identifiable by voice or picture, even if it is only to identify sponsorship of the spot, the whole announcement will be considered a use.<sup>59</sup> In the case of a *program*, the entire program is a use if “the candidate’s personal appearance(s) is substantial in length, integrally involved in the program, and indeed the focus of the program, and where the program is under the control and direction of the candidate.” The Commission stated in this case that it believed that under such circumstances the station would have immunity from liability for libelous statements made by other persons appearing with the candidate, since the entire program would be a use by the candidate and the station could not censor statements made by either the candidate or other persons appearing on the program.<sup>60</sup>

<sup>55</sup>*Carter/Mondale Reelection Committee*, 80 FCC 2d 285 (1980).

<sup>56</sup>*National Urban Coalition*, 23 FCC 2d 123 (1970).

<sup>57</sup>*Interpretative Opinion on Section 315 of the Act*, 26 FCC 715 (1959); *Time Inc.*, \_\_\_ FCC 2d \_\_\_, (Mimeo No. 2192, released January 31, 1984).

<sup>58</sup>*Gregory N. Pillon*, 40 F.C.C. 267 (1955).

<sup>59</sup>*Charles F. Dykas*, 35 F.C.C. 2d 937 (1972); *Station WITL*, 54 F.C.C. 2d 650 (1975).

<sup>60</sup>*Gray Communications Systems, Inc.*, 14 F.C.C. 2d 766 (1968); reconsid. denied, 19 F.C.C. 2d 532 (1969).



## What Appearances by Candidates Are Not "Uses?"

38. Almost all appearances by legally qualified candidates for public office are "uses" except in four types of news programs which have been declared by Congress *not* to be uses. These exempted types of programs, as listed in Section 315(a), are:

- (1) bona fide newscasts.
- (2) bona fide news interviews.
- (3) bona fide news documentaries (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
- (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).

Thus, pictures of candidates, statements made by candidates and interviews with them on any of these types of news program do not entitle their opponents to equal opportunities, since they are not uses. For the same reason, a station may select what part or parts of a candidate's statements it will broadcast on such programs, because the no-censorship restriction of Section 315(a) does not apply.

## Examples of Appearances Which Are Not Uses

39. (a) A candidate, legally qualified for reelection to federal office, was designated as the spokesman for the Republican party and Ronald Reagan, and was to appear in political advertisements in that capacity. The Commission ruled that the advertisements in question would not constitute uses for the candidate on stations not serving his district since he was not a legally qualified candidate in those areas. Also, the advertisements would not constitute uses for Mr. Reagan because neither his picture nor his voice was used. Of course, on stations serving the candidate's district, the advertisements

would be uses, since he was a legally qualified candidate in his own district.<sup>61</sup> (b) A complainant alleged that a bona fide news interview program had lost its exemption because the station allowed the candidates to argue between themselves and thus did not exercise sufficient control over the program.

However, the only two examples offered in support of the claim were that a candidate interrupted a reporter to rebut her opponent directly, and that a candidate read from a book to rebut her opponent, not to answer a question. These two brief incidents were held to be insufficient to indicate that the station had lost control of the 30-minute program, and thus the program retained its Section 315(a)(2) exemption.<sup>62</sup>

(c) An independent presidential candidate (Candidate A) appeared on the "Today Show"—a program previously ruled to be exempt under Section 315(a)—for five straight days during NBC's coverage of the Republican National Convention. Candidate B protested the network and stations' denial of his request for equal opportunities in response to the candidate's appearances. He argued that the coverage given Candidate A, who was on a trip abroad, "was not an exercise of good faith, journalistic judgment of the newsworthiness of the event and was 'intended to promote [Candidate A's] candidacy.'" The Commission rejected this argument and held that the candidate's appearances fell within the exemptions for bona fide news events, including convention coverage, and bona fide news interviews. The Commission indicated that when determining whether a particular program falls within an exemption, the Commission examines the bona fides or good faith judgment of *the broadcaster* in carrying the interview or event, rather than the "bona fides" of *the news events* or the personality who appears.<sup>63</sup>

<sup>61</sup>Jan Tucker, (Letter of October 31, 1980, Mimeo No. 01348), review denied, 88 FCC 2d 429 (1981).

<sup>63</sup>H. Richard Mayberry, Jr., Esq., 87 FCC 2d 757 (1980).

<sup>61</sup>Bob White, 87 FCC 2d 748 (B/C Bur. 1980).



## Commission Given Broad Discretion

40. In amending Section 315(a) in 1959 to insert the news-program exemptions, Congress stated that the Commission should have broad discretion in interpreting the new policy. The Senate Report stated:

It is difficult to define with precision what is a newscast, news interview, news documentary, or on-the-spot coverage of a news event

... That is why the committee in adopting the language of the proposed legislation carefully gave the Federal Communications Commission full flexibility and complete discretion to examine the facts in each complaint which may be filed with the Commission. . . . In this way the Commission will be able to determine on the facts submitted in each case whether a newscast, news interview, news documentary, [or] on-the-spot coverage of news event . . . is bona fide or a "use" of the facilities requiring equal opportunity.<sup>64</sup>

## Bona Fide Newscasts

41. Commission rulings on various aspects of the "bona fide newscast" exemption include the following:

(a) *Interviews with candidates on newscasts.* A candidate complained that four local TV stations had violated Section 315 by interviewing his opponents on their regular news programs but not interviewing him. The complainant was not entitled to equal opportunities since the appearances of his opponents were on bona fide newscasts. The Fairness Doctrine might be applicable but the complainant here had not furnished enough information for the Commission to decide whether it had been violated.<sup>65</sup>

(b) *"Today" and "Tonight" programs.* A candidate requested time equal to that given two opposing candidates, one of whom was interviewed on the "Today" program and the other on the "Tonight" program. The appearance of the candidate on the "Today" program fell within the news program exemption of Section 315(a) "since it was a regularly scheduled network program containing different features and emphasizing news coverage, news interviews, news documentaries and on-the-spot coverage of news events. . . the determination of the content and format of Senator Symington's interview and his participation therein was made by NBC in the exercise of its news judgment and not for the Senator's political advantage. . . questions asked of the Senator were determined by the special projects director of the program, and . . . the Senator was selected by reason of his newsworthiness and NBC's desire to interview him concerning current problems, issues and events." On the other hand, the appearance on the Jack Paar "Tonight" program was not exempt. NBC itself listed the program on its program log as a "variety program."<sup>66</sup>

(c) *Five-Part Interview with Candidate.* A candidate for the Republican Presidential nomination complained that a Florida television station had denied him time equal to that devoted to five interviews with an opposing candidate. The interviews had been broadcast on successive days on a regularly scheduled news program, shortly before the Florida primary was to take place. The complainant alleged that the station had recorded one 30-minute interview with the opposing candidate and had broken the interview down into five segments for use on the news program. The complainant stated that because of the content of the interviews and the facts that they were prerecorded, were unusual in length for a news program, and were telecast shortly before the primary, they did not gain exempt status by being

<sup>64</sup>Sen. Rep. No. 562, 86th Cong., 1st Sess. 12 (1959).

<sup>65</sup>KRON-TV, et al., 47 FCC 2d 1204 (1974).

<sup>66</sup>Lar Daly, 40 FCC 314, 315 (1960).



broadcast on a news program. In reply, the licensee of the station stated that it had broadcast many similar series of interviews on news programs in the past; that in this instance it had sought for two years to obtain an interview with the opposing candidate (who was the incumbent President) and had succeeded in obtaining one only on the day that the first segment of the interview was broadcast; and that it already had broadcast a half-hour interview with the complainant and intended to carry his scheduled appearance on the NBC "Meet the Press" program on the Sunday preceding the State primary. The Commission denied the complaint. It stated that "The inclusion of an interview within a newscast, which it broadcast outside the newscast would not be exempt, is within a station's journalistic discretion and, in and of itself, would not preclude the interview from exempt status pursuant to Section 315(a)(1) unless it has been shown that such a decision is clearly unreasonable or in bad faith. You have failed to submit sufficient evidence of bad faith or unreasonableness on the part of WCKT which would compel us to question its actions. . . you have not shown that the licensee, in deciding to air [the interviews], considered anything other than their newsworthiness."<sup>67</sup>

(d) *Religious News Programs.* A minister who conducted a weekly religious news program asked if the news program exemption would apply to interviews on his program with two other ministers who were candidates for public office. The FCC ruled that the exemption would apply since the program dealt with current news in the field of religion and was a bona fide newscast.<sup>68</sup>

(e) *No News Exemption for Newscaster-Candidate.* A station claimed that broadcasts of news by its news director, who also was a candidate for public of-

fice, were exempt from the equal time requirement because Section 315(a)(1) exempts appearances of legally qualified candidates on bona fide newscasts. The Commission ruled that the exemption did not apply. It said that Congress indicated that its main purpose in amending Section 315 to create an exemption for news programs "was to allow greater freedom of the broadcaster in reporting news to the public, that is to say, in inserting appearances of candidates as part of the contents of news programs." It said, "The amendment did not deal with the question of whether the appearance of station employees who have become candidates for office should be exempted on a news-type program where such employees are announcing the news (rather than being a part of the content of the news). . . ."<sup>69</sup>

(f) A television station broadcast two nonregularly scheduled special news programs about the ABSCAM tapes. Candidate A claimed that he was entitled to equal opportunities since his opponent for federal office was featured in the tapes. The Commission denied the complaint because the program fell within the newscast exemption. In making its decision the Commission considered the facts that the tapes were released shortly before the programs occurred; the programs centered exclusively on the tapes; the licensee considered the subject of the tapes an extremely newsworthy event in its area which warranted immediate coverage because they involved a congressman from the area served by the station; and, the opponent's appearance was incidental to the coverage of a newsworthy event.<sup>70</sup>

<sup>67</sup>Letter to Citizens for Reagan (WCKT-TV), 58 FCC 2d 925, 927 (1976).

<sup>68</sup>Telegram to Reverend Donald L. Lanier, October 26, 1972.

<sup>69</sup>Public Notice: Use of Station by Newscaster Candidate, 40 FCC 433, 434 (1965).

<sup>70</sup>Robert R. Burke, 87 FCC 2d 438 (1980).



## Bona Fide News Interviews

42. The principal questions considered by the Commission in interpreting the law on exemption of news interviews from the equal opportunities requirement of Section 315 are:

- (a) Does the interview take place on a bona fide news program? If so, the interview is exempt regardless of its subject matter, the type of person interviewed or whether the news program always contains interviews. (See discussion of "Today" and other news programs in 41(b), (c), (d), and (e) of this part of the Primer.)
- (b) If the interview does not take place on a bona fide news program, does it take place on a bona fide news interview program? (Many "interview" and "talk" programs do not qualify as news interview programs.)

In its rulings on whether a program is a news interview program, the Commission has considered the following factors:

- (i) Whether it is regularly scheduled;
- (ii) How long it has been broadcast;
- (iii) Whether the broadcaster produces and controls the program;
- (iv) Whether the broadcaster's decisions on the format, content and participants are based on his reasonable, good faith journalistic judgment rather than on an intention to advance the candidacy of a particular person;
- (v) Whether selection of persons to be interviewed and topics to be discussed are based on their newsworthiness.

## News Interview Programs Ruled Exempt

43. Some examples of interview programs which the Commission has ruled exempt are:

- (a) "Meet the Press," "Face the Nation," "Issues and Answers." These are typical news interview programs of the kind Congress indicated it had in mind

when it created the "bona fide news interview" exemption in 1959.<sup>71</sup>

- (b) "Youth Wants to Know." This program also was mentioned in the Senate debates on the 1959 amendments to Section 315(a) as being a news interview program of the type Congress intended to exempt, thus revealing that Congress did not intend to limit such programs to those in which the questioners are professional newsmen.<sup>72</sup>
- (c) "Phone In" Question-and-Answer programs. A program called "Phone Forum" was prepared and produced by a station's news department and had been regularly scheduled for almost 2 years. The news director selected the guests on the basis of newsworthiness. Members of the public telephoned in questions for the guest, which were screened by the moderator. The program was ruled a bona fide news interview on the condition that it be effectively controlled by the licensee and that the station's news department controlled the selection of the phone-in questions which actually were asked the guests, so as to make sure "that the program cannot be taken over by either the supporters or opponents of the guest candidate."<sup>73</sup> Another program in which part of the questions were called in by viewers of the program, but those actually used were selected by employees of the station, also was held to be an exempt news interview program.<sup>74</sup>
- (d) "Governor's Radio Press Conference." In a regularly scheduled program, the Governor spoke from his office in answering questions asked him by newsmen from stations participating in the program, who spoke to the

<sup>71</sup>Letters to Andrew J. Easter, 40 FCC 307 (1960), Lar Daly, 40 FCC 310 (1960), Hon. Frank Kowalski, 40 FCC 355 (1962); Telegram to Yates for U.S. Senator Committee, 40 FCC 368 (1962).

<sup>72</sup>Hon. Russell B. Long, 40 FCC 351 (1962); Socialist labor Party, 7 FCC 2d 857 (1967); also, see Lar Daly, 40 FCC 310 (1960), dealing with "College News Conference."

<sup>73</sup>Socialist Labor Party, 7 FCC 2d 857 (1967).

<sup>74</sup>Martin B. Dworkis, 40 FCC 361 (1962); see, also, Letter to Storor Broadcasting Co., July 22, 1977.



Governor by telephone. The answers were communicated back to the stations by radio line. Neither the questions asked nor the answers were screened or edited by the Governor's office. The program was unrehearsed and the newsmen were free to ask any questions they wished. Each broadcast was under the control of the participating stations. It was found to be an exempt news interview program because it had been regularly scheduled for some two years, was under the sole control of the broadcasters and was not conceived or designed by them to further the candidacy of the Governor.<sup>75</sup> (This case arose before the Aspen Institute ruling, which exempted press conferences, so it was decided on the basis of the news interview exemption. In the same ruling, the Commission found that another program by Governor Di Salle was not exempt. See "Governor's Forum" below.)

(e) "NET Journal" and "60 Minutes." Questions have been raised at various times about interviews with political candidates on the "NET Journal" and "60 Minutes." Both programs have been ruled exempt. In view of the fact that "NET Journal" was a regularly scheduled program, the news interview format was one that was regularly used, the format and questions and the news interviewees were decided by NET and the factors in selecting the interviewees were the public significance of the individuals and their news interest, the Commission concluded that the interviews on "NET Journal" met the requirements of a bona fide news interview within the meaning of Section 315(a)(2).<sup>76</sup> The "60 Minutes" program has these same characteristics and therefore interviews with candidates on it do not create equal opportunity rights for their opponents.<sup>77</sup>



<sup>75</sup>Hon. Michael V. DiSalle, 40 FCC 348 (1962).

<sup>76</sup>Socialist Workers Campaign Committee, 14 FCC 2d 858 (1968).

<sup>77</sup>Letter to CBS, 58 FCC 2d 601 (1976).



## Interview Programs Ruled Not Exempt

44. Some examples of question-and-answer programs which the Commission has ruled are not exempt news interview programs are:

- (a) *"Governor's Forum."* In this program the Governor sat in his office and answered questions submitted by members of the public. Questions either were written directly to the Governor's office or telephoned to the stations participating in the program. Questions written to the Governor's office were selected by his staff for the broadcast, and after the Governor had recorded answers to these and to questions forwarded by the stations, his office sometimes edited the tape before sending the recorded program to the participating stations. In contrast to its ruling on *"Governor's Radio News Conference"* above, the Commission ruled that *"Governor's Forum"* was not a news interview program within the meaning of section 315(a)(2), because the selection and compilation of the questions, as well as the supervision, production and editing of the program, were not solely under the control of the stations.<sup>78</sup>
- (b) *One-Time "Special" Interview.* A station interviewed a candidate for reelection as Congressman about his experiences as a new Congressman. The station said it did not have any regularly scheduled news interview programs, but that the interview with the Congressman was based on the licensee's news judgment that a staff member conducted the program and asked questions relating to newsworthy current events; that the program was initiated, produced and controlled by the station, and that the interview, the format and the nature of the questions were the same as those of other special one time interviews broadcast by the station. The Commission ruled, however, that the program did not fall within the news interview program exemption of Section 315(a)(2)

because, in creating the exemption, Congress had clearly indicated that a basic element of a bona fide news interview program is that it be regularly scheduled.<sup>79</sup>

- (c) *Program Starting 11 Weeks Before Election.* A station asked for a declaratory ruling on a proposed news interview program titled *"Know Your Congressman,"* which would feature as guests local members of Congress. The program would be presented every other week and would begin only 11 weeks before the primary election. After reviewing the legislative history of the 1959 amendments to Section 315(a), the Commission stated that "it is apparent that Congress was concerned about news interview programs created and/or scheduled shortly before an election. . . . The program for which you seek a ruling is scheduled to begin only 11 weeks before the Pennsylvania primary elections, and will feature incumbent Congressmen. Under these circumstances and in light of the legislative history, we do not believe that we can rule at this time that 'Know Your Congressman' falls within the category of programs that are exempt from the 'equal opportunities' provision of Section 315."<sup>80</sup>

- (d) *"Tomorrow" program.* Time equal to that devoted to interviewing an opposing candidate was sought on the NBC *"Tomorrow"* program on the grounds that it was not a bona fide news interview program. NBC asserted that its basic format was an interview with one or more guests, conducted by an experienced journalist, and that many public officials and office seekers had appeared on it. The complainant submitted a sampling of 66 *"Tomorrow"* programs as showing that it had no regularly scheduled news interview format. It cited 27 programs which discussed "a broad range of topics not associated with any recent news or current event issue, including interviews or panels on "monsters in films to sexual

<sup>78</sup>Hon. Michale V. DiSalle, 40 FCC 348 (1962).

<sup>79</sup>Station KFDX-TV, 40 FCC 374 (1962).

<sup>80</sup>WIC-TV, 33 FCC 2d 629 (1972).

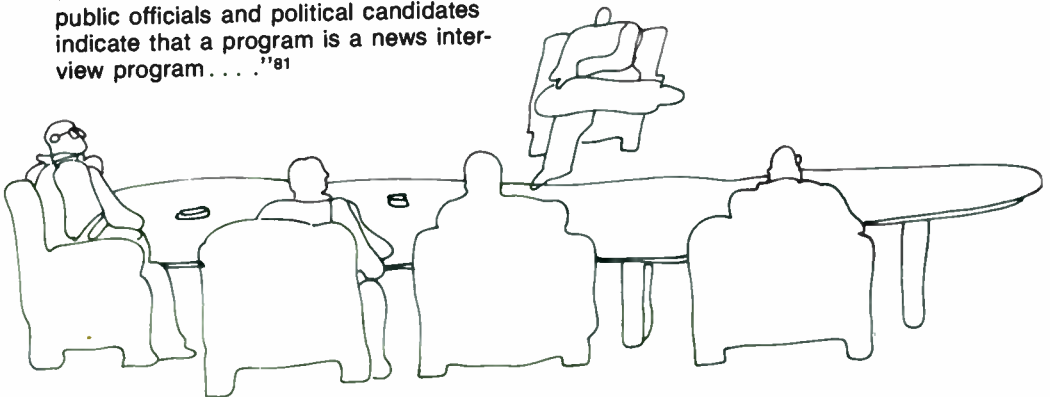




fantasies to psychic healing and TV soap operas." The complainant stated that 19 of the guests were interviewed "solely in regard to their occupation or their hobbies. Strippers, handwriting analysts, travel agents and baseball card collectors discuss their interests. . . ." The Commission found that "Tomorrow" was not a news interview program for the purposes of Section 315(a)(2). It said Congress did not intend to exempt all programs and had specifically cited, during floor debate on the proposed amendments, certain programs such as "Meet the Press" and "Face the Nation" as being the type of interview programs it meant to exempt. One question considered by the Commission in ruling on interview programs is whether the guests have been chosen to appear on the basis of their newsworthiness. In the case of "Tomorrow," although some interviews had been newsworthy, many had not and "interviewees, as a matter of course, are not selected on the basis of their 'public significance or their newsworthiness. . . . There is simply no cognizable difference between this show and 'Tonight,' a program which also on occasion interviews newsworthy public figures. . . . We cannot accept the view that the intermittent appearances of public officials and political candidates indicate that a program is a news interview program. . . ."81

### Changes in Time and Length of News Interview Programs

45. Because of the importance of an upcoming election, networks or stations sometimes increase the length of regularly scheduled news interview programs featuring one or more candidates. They also may change the times at which the programs are broadcast in order to reach larger audiences. Unless there is evidence that a station's or network's decision to lengthen the program or change its time period was unreasonable or made in bad faith, the program does not lose its news interview exemption. A broadcaster may "in the exercise of its good faith news judgment, lengthen a 'bona fide news interview' without destroying the exemption provided. . . . Also, the mere change in placement of a program which would otherwise qualify for exemption does not remove the exemption because it is broadcast in other than at its regularly scheduled time slot."<sup>82</sup>



<sup>81</sup>*Socialist Workers Party*, 65 FCC 2d 234, 241 (1976); see also, *Socialist Workers Party*, 66 FCC 2d 1080 (1976).

<sup>82</sup>*Letter to Theodore Pearson*, December 8, 1976, which cited as precedents: *Martin Dworkis*, 40 FCC 361 (1962); *Honorable Terry Sanford*, 35 FCC 2d 938 (1972); *Honorable Sam Yorty*, 35 FCC 2d 572 (1972).



## Rebroadcasts of News Interviews by Other Stations

46. With the permission of the originating station, a noncommercial TV station regularly broadcasts a bona fide news interview program originated by another station. The program is taped and played back by the ETV station three weeks later. The rebroadcasts do not lose the exemption, since they are regularly scheduled and since the program as broadcast by the originating station fulfilled all requirements for a bona fide news interview. Although, as rebroadcast by the ETV station, the program has not been produced or controlled by the station rebroadcasting it, neither does a network affiliate "produce or control" a network news interview program that it broadcasts. It has delegated these functions to the network, relying on the network to fulfill the requirements for the news interview exemption. The fact that the rebroadcast is three weeks late is not significant in determining whether the program remains exempt from equal opportunities obligations, since it is not claimed to be "on-the-spot coverage of bona fide news events."<sup>83</sup> However, in another case a noncommercial station wished to rebroadcast only one of a series of bona fide news interviews broadcast by another station. This changed the facts so significantly as to compel an opposite ruling. Here, so far as the rebroadcasting station was concerned, the news interview program was not regularly scheduled. The Commission has always emphasized that one of the critical factors in qualifying for exempt status is that the news interview program be regularly scheduled.

## Bona Fide News Documentaries

47. A candidate complained that he had been denied 93 seconds of time which were due to him because of appearances of his two opponents on a network program titled "Television and Politics." The complaint was denied. The program was a news documentary which was exempt from the equal opportunities requirement under Section 315(a)(3) because an appearance by a particular candidate was incidental to the presentation of the general subject matter of the documentary, which was the use of television by candidates rather than the candidacy of any particular candidate or candidates.<sup>84</sup>

The Commission has held that it prefers to take a case-by-case approach in determining whether a "significant" appearance of a candidate in a documentary denies the documentary exemption under Section 315(a)(3).<sup>85</sup>



<sup>84</sup>Richard B. Kay, 26 FCC 2d 235 (1970); see, also, Judge John J. Murray, 40 FCC 350 (1962).

<sup>85</sup>Henry Geller, FCC 2d (FCC 83-529, November 16, 1983).

<sup>83</sup>(See discussion of "on-the-spot coverage" exemption, starting in paragraph 9).



## On-the-Spot Coverage of Bona Fide News Events

48. The fourth type of news broadcast on which a candidate's appearance is not a use is "on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto.)" The scope of this exemption was considerably increased by the Commission in 1975 when it reversed earlier decisions and held that, under certain conditions, broadcasts of debates between candidates and of press conferences of candidates would fall within the on-the-spot coverage exemption.<sup>86</sup>

### (a) *President's Report on Suez Crisis.*

Three TV networks requested a ruling as to whether their broadcast of a 25-minute report to the Nation by the President on an important international situation (the Suez crisis) required them to afford equal time to all opposing candidates, since the President was at the time a candidate for reelection. The majority of the Commission ruled that equal time for other candidates was not required because they believed that when Congress enacted Section 315 it did not intend to grant equal time to all Presidential candidates "when the President uses the air lanes in reporting to the Nation on an international crisis."<sup>87</sup> (Note that this ruling came before the adoption by Congress in 1959 of the exemptions to the equal opportunities requirement of Section 315, including the exemption for "on-the-spot coverage of bona fide news events.")

(b) *President's Report on Other Major Developments.* While a candidate for reelection, the President broadcast a report to the Nation on an important announcement by the Russian Government of a change in its leadership and on the explosion by Communist China of a nuclear device. Two opposing candidates requested equal time. On the

basis both of the Suez crisis decision, above, and of the later amendment by Congress of Section 315 so as to exempt on-the-spot coverage of bona fide news events from the equal opportunities requirement, the President's broadcast did not entitle opposing candidates to equal time. The case fell within "the reasonable latitude for the exercise of good faith news judgment on the part of the [licensee]" which Congress said it intended to grant stations and networks when it adopted the exemption for on-the-spot coverage of bona fide news events.<sup>88</sup> In a later case, the broadcast of a President's State of the Union Message also was found to fall within the "on-the-spot coverage of a bona fide news event" exemption of Section 315(a)(4).<sup>89</sup>

(c) *Political Conventions.* Section 315(a)(4) specifically mentions on-the-spot coverage of political conventions "and activities incidental thereto," so the Commission has uniformly ruled such coverage to be exempt. In one case, a candidate for Presidential nomination called a press conference at the convention site immediately prior to the convention. Although this case preceded the 1975 *Aspen* ruling on debates and press conferences, coverage of the press conference was ruled exempt under Section 315(a)(4).<sup>90</sup> The broadcast of acceptance speeches of successful candidates for a party's nomination for the President and Vice President are exempt as activities incidental to the convention.<sup>91</sup> During its coverage of the 1976 Democratic National Convention, a network interviewed a candidate for nomination. An opposing candidate alleged that the interview was "remote from and unrelated to the Convention." The station replied

<sup>86</sup>*Republican National Committee*, 40 FCC 408 (1964); affirmed per curiam by an equally divided court, sub nom. *Goldwater v. FCC and U.S.A.*, Case No. 18963 (D.C. Cir. 1964); cert. denied, 379 U.S. 893 (1964).

<sup>89</sup>*Lar Daly*, 59 FCC 2d 97 (1976); rev. den., June 16, 1976.

<sup>90</sup>*Lar Daly*, 40 FCC 316 (1960).

<sup>91</sup>*DeBerry-Shaw Campaign Committee*, 40 FCC 394 (1964).

<sup>86</sup>For discussion of this ruling and cases that have arisen under it, see "Aspen Institute Rulings," paragraphs 10 and 11 below.

<sup>87</sup>*Telegram to ABC, CBS, and NBC*, 40 FCC 276 (1956).



that the interview occurred during on-the-spot coverage of the convention and was therefore exempt under Section 315. The Commission ruled the interview exempt because it was broadcast as part of the coverage of the convention. The Commission stated that it "will not substitute its judgment for that of the broadcaster in determining what 'activities' are 'incidental' to a political convention."<sup>92</sup>

(d) *St. Patrick's Day Parade*. A Chicago television station broadcast the annual St. Patrick's Day parade in that city. The Mayor, who was a candidate for reelection, was on camera for approximately 2 minutes. An opposing candidate sought equal time. Since the appearance of the Mayor was during "on-the-spot coverage of a bona fide news event" it was exempt from the equal opportunities requirements of Section 315.<sup>93</sup>

(e) *Broadcast of Court Proceedings*. An Indiana station had broadcast for 14 years a program entitled "Gary County Court on the Air." It was broadcast live 3 days per week and taped 1 day in advance for broadcast on the 4th day. The program consisted of direct coverage of the proceedings of a typical city court and by its nature could not be tailored to suit the presiding judge. Its format had remained unchanged since it went on the air. Persons appearing in the court had the privilege of declining to have their cases heard during the broadcast time to prevent invasion of privacy, and if, in the opinion of the presiding judge, certain cases did not lend themselves to broadcasting, they were heard at times when the broadcasts were not in progress. The judge who had presided during the past 7½ years became a candidate for nomination for Mayor of Gary. His opponent demanded equal time based on broadcasts of the program. The Commission ruled that the program fell within the "on-the-spot coverage" exemption of Section 315(a)(4) because it covered the

operation of an official government body and the court proceedings were newsworthy. Thus, the program was within the reasonable latitude allowed to station licensees for the exercise of good faith news judgment.<sup>94</sup>

(f) *Announcement of Vice Presidential Candidate*. On August 5, 1972, Senator George McGovern, the Presidential nominee of the Democratic Party, announced that R. Sargent Shriver was his choice to replace Senator Thomas Eagleton as the Democratic Party's Vice Presidential candidate. The broadcast in which Senator McGovern made the announcement was approximately 16 minutes long and was carried live by four networks. Three other political parties complained that the networks had refused their candidates equal time. The Commission denied the complaints, stating:

"We believe that Senator McGovern's appearance was exempt within the meaning of Section 315(a)(4) because it was incidental to a political convention—namely, the special meeting of the Democratic National Committee which had been called to select a new candidate for Vice President. . . . Senator McGovern's announcement of his choice was an activity incidental to the final voting of Democratic Party officials at their August 8 special meeting called specifically to select a new Vice Presidential nominee. The August 8 meeting had many elements similar to those of a national party convention. . . . Although the meeting was extraordinary and not in the normal course of planning by the party, the Commission believes that, given the unique circumstances here present, it must be considered as having been the equivalent of a political convention

<sup>92</sup>Letter to Lester Gold, Esq., August 12, 1976.

<sup>93</sup>Lar Daly, 40 FCC 377 (1963).

<sup>94</sup>Thomas R. Fadell, Esq., 40 FCC 379 (1963); aff'd by order entered April 29, 1963, *Thomas R. Fadell v. U.S., FCC and WWCA Radio Station*, Case No. 14142 (7th Cir. 1963).



within the meaning of Section 315(a)(4). . . ."<sup>95</sup>

(g) *Jackie Robinson Award*. NBC, which held TV rights to the World Series, stated that it had been informed that during ceremonies preceding one game of the series an award would be presented by a legally qualified candidate for public office to Jackie Robinson commemorating the 25th anniversary of his joining the Brooklyn Dodgers as well as his work in the field of drug addiction. NBC stated that it would cover the presentation even if no candidates for public office were appearing and that it believed that the broadcast of the presentation should be ruled exempt from the equal opportunities provision of Section 315(a) as on-the-spot coverage of a bona fide news event. The Commission responded that on the basis of the facts presented it found no reason to believe that NBC's judgment about the proposed event was either unreasonable or made in bad faith, and no reason for overruling NBC's judgment that the proposed ceremony would be a bona fide news event within the meaning of Section 315(a)(4).<sup>96</sup>

## Aspen Institute Rulings

49. In 1975 the Commission overruled three of its earlier rulings and held that under certain conditions, broadcasts of debates between political candidates and broadcasts of press conferences held by candidates could be considered exempt from "equal opportunities" because they were on-the-spot coverage of bona fide news events. In this ruling and a further discussion of the subject in a later case, the Commission stated, in substance, that the broadcast of a debate might be considered on-the-spot coverage of a bona fide news event under the circumstances presented in the earlier cases which were reversed. In those cases, (a) the debate had been arranged by a party not associated with the broadcaster; (b) it took place outside the broadcaster's studios; (c) it was broadcast live and in its entirety; and (d) the broadcaster chose to cover the debate because of his reasonable, good faith judgment that it was newsworthy, and not for the purpose of giving a political advantage to any candidate. The Commission also ruled that press conferences of candidates could qualify for exemption under Section 315(a)(4) if broadcast live and in their entirety.<sup>97</sup>

50. A 1983 ruling expanded the Aspen decision and held that broadcaster-sponsored debates are entitled to the Section 315(a)(4) exemption. In reaching that decision, the Commission stated that although there is a chance that freedom and flexibility accorded to broadcasters in their news programming might result in favoritism among candidates, Congress intended to permit that risk in order to foster a more informed electorate. The Commission's view is that the common denominator of all exempt programming is bona fide news value.<sup>98</sup>

<sup>95</sup>*Complaints of Republican National Committee, Socialist Labor Party, Communist Party, U.S.A.*, 37 FCC 2d 799, 806 (1972).

<sup>96</sup>*National Broadcasting Co., Inc.*, 37 FCC 2d 678 (1972).

<sup>97</sup>*Aspen Institute*, 55 FCC 2d 697 (1975); affirmed sub nom. *Chisholm et al. v. FCC*, 538 F. 2d 349 (D.C. Cir., 1976); cert. denied, 97 S. Ct. 247 (1976).

<sup>98</sup>*Henry Geller*, FCC 2d (FCC 83-529, November 16, 1983).



## Does Delayed Broadcast of Debate Destroy Exemption?

51. No, in a 1983 ruling,<sup>99</sup> the Commission eliminated the so-called one-day rule, which required nearly contemporaneous broadcast coverage, calling it unduly restrictive. The Commission held that a broadcaster's good faith determination to delay or rebroadcast a newsworthy debate later than the day after the event in order to maximize audience potential may come within the exemption. The "rule-of-thumb" on the meaning of the Section 315(a)(4) exemption is that it encompasses news reports of any reasonably recent event intended in good faith by the broadcaster to inform the public and not intended to favor or disfavor any candidate.

## Ford-Carter Debates

52. Two Presidential candidates complained in September 1976 that they had not been included in the debates between President Ford and Democratic candidate Carter nor had they been given equal time. One complainant, Eugene McCarthy, asserted that exclusion of any "major" or "serious" candidate (which he said he was) from the debates took them outside the *Aspen Institute* exemption. The other, Lester Maddox, stated that the debates promoted only the interests of the two participating candidates, that the two candidates themselves controlled some of the debate arrangements, and that the so-called "debates" actually were panel discussions. Both complaints were turned down. As for the McCarthy complaint, the Commission had no authority to compel either the organization sponsoring the debates or the networks broadcasting them to invite a particular candidate to take part, nor could it force any candidate to appear and debate another candidate. As for the Maddox complaint, the Commission said the critical factor in determining whether a

debate falls within the "on-the-spot coverage" exemption was the role and intent of the broadcaster in covering it—whether it did so on the basis of its good faith, reasonable journalistic judgment of the newsworthiness of the event, or whether it did so to serve the political advantage of a candidate. The Commission quoted the court decision affirming the *Aspen* ruling to the effect that "a candidate's partial control over a press conference or debate does not, by itself, exclude coverage of the event from Section 315(a)(4). "As for the claim that the Ford-Carter appearances were actually panel discussions, the Commission cited a dictionary definition of "debate" as "contention by words or arguments . . . as . . . a regulated discussion of a proposition between two matched sides." The Commission said that in the absence of a stronger showing than Maddox had presented that the debates should not be considered debates, "it would be inappropriate and in violation of the intent of Congress for the Commission to attempt to establish or sanction a particular qualifying format or structure as a 'debate' to the exclusion of all other face-to-face confrontations between candidates."<sup>100</sup> (Both McCarthy and Maddox also alleged violation of the Fairness Doctrine in their complaints. For discussion of that policy as it applies to political campaigns, see the discussion in paragraphs 89-94 of "The Fairness Doctrine in Political Broadcasting.")

<sup>99</sup>Henry Geller, FCC 2d (FCC 83-529, November 16, 1983).

<sup>100</sup>*American Independent Party and Eugene McCarthy*, 62 FCC 2d 4 (1976); affirmed *sub nom.*, *McCarthy v. FCC*, D.C. Cir., Oct., 1976, Case No. 76-1915; *Cert. denied*, 430 U.S. 955 (1977).

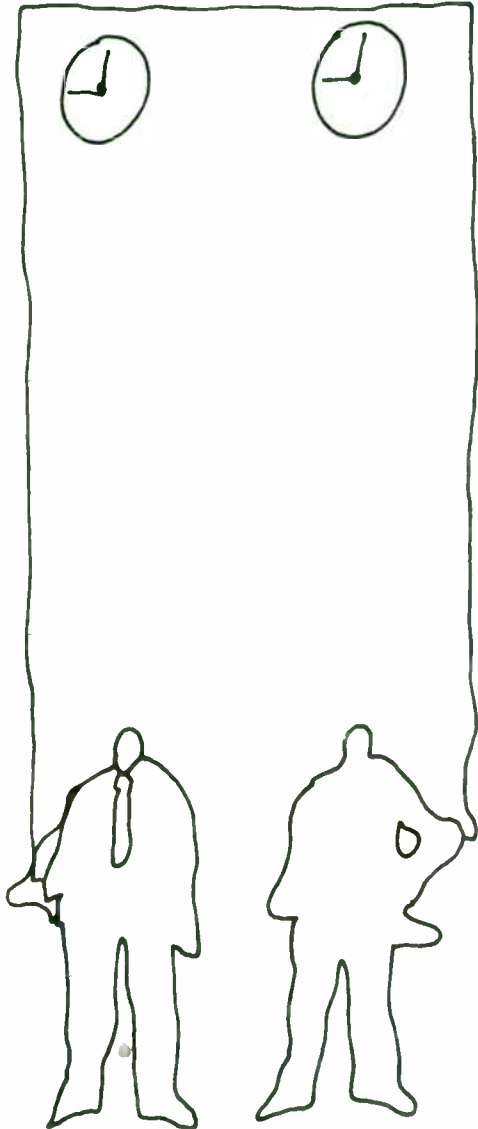


## Cases Held Not To Fall Within “Aspen” Exemption

53. Inquiries were received from two stations in 1976 as to whether the *Aspen* ruling discussed above would grant exemption from equal time requirements to stations broadcasting “forums” or “town meetings” in which only one candidate appeared, gave an address or opening statement and then answered questions from the audience or from a panel of community leaders. The Commission ruled that neither kind of appearance came within the scope of the *Aspen* ruling, since neither could be characterized as either a debate or a press conference as defined in that ruling.<sup>101</sup>

## What are “Equal Opportunities?”

54. Many persons use the term “equal time” when referring to the rights of political candidates, but the correct phrase is “equal opportunities,” which does not necessarily mean the same thing as “equal time.”<sup>102</sup> For example, if Candidate Smith receives an hour of free time at 8 p.m. on a television station and his opponent Jones merely gets an hour early in the morning or after midnight, Jones will be getting “equal time” but not “equal opportunities,” since he probably won’t be seen or heard by nearly as many people as Smith. Similarly, if a station gives Smith free time but charges Jones for his time, Jones again will get “equal time” but not “equal opportunities.” The Commission’s rules forbid any kind of discrimination by a station between competing candidates.<sup>103</sup>



<sup>101</sup>*Chicago Educational Television Association (WTTW)*, 58 FCC 2d 922 (1976); *Station WCLV (FM)*, 59 FCC 2d 1376 (1976).

<sup>102</sup>In order to avoid repetitious language, we have sometimes referred to “equal time” in this Primer, but we mean “equal opportunities” unless otherwise indicated.

<sup>103</sup>See §§73.1940(c) and 76.205(c) of the rules.



## Examples of Lack of Equal Opportunities

55. Cases in which the Commission has found a denial of equal opportunities include the following:

(a) *Unequal audience potential of periods.* There is a violation if a station makes available to a candidate the same amount of time his opponent has received, but the time is likely to attract a smaller audience.<sup>104</sup>

(b) *Letting one candidate preview opponent's message.* Letting Candidate A listen to a recording of his opponent B's broadcast before it is aired and before A records or broadcasts his own statement without affording opponent B the same opportunity violates the anti-discrimination rule.<sup>105</sup>

(c) *Forcing one candidate to submit script in advance.* It is a violation to compel one candidate but not his opponent to submit the text of his proposed message in advance of its broadcast.<sup>106</sup>

(d) *Unequal rates.* Charging one of two opposing candidates a higher rate than the other violates the rules, as does letting one candidate combine his totals of 30 and 60 second spot announcements to arrive at a cumulative total entitling him to a discount which is denied his opponent.<sup>107</sup>

(e) *Failure of candidate-station owner to pay for spots.* The Commission refused to renew the license of a station because, among other things, the station manager and one-third owner, who also was candidate for mayor, sold himself time at a lower rate than he charged his opponent and never even paid the station for the time he used. The Commission stated here, as in an earlier case, that where a licensee or principal of a station also is a can-

didate, he has a special obligation to make sure the station deals fairly with opposing candidates.<sup>108</sup>

(f) *Sales or contracts that result in excluding candidates.* Section 73.1940(c) of the rules forbids a station to make any agreement or contract that has the effect of letting one candidate broadcast to the exclusion of his opponents for the same office. Therefore, wise station operators have learned to look ahead when one candidate seeks to buy large amounts of time to make sure that they will be prepared to make equal opportunities available to his opponents if they request time.

(g) *Special "all-candidate" programs.* A station wishes to make a full broadcast day or a large part of a day, available free to candidates for various offices. It proposes to ask all candidates who do not take part in the broadcast to sign a waiver of their rights to appear on a later date. It also proposes to inform all candidates that if any of them do not take part in the special program and refuse to sign a waiver the licensee will cancel all invitations to candidates for that particular office and notify the other candidates for that office of the reason for cancellation. The Commission has commended stations for trying to set up special programs in which the voters will be able to see and hear all candidates. It also has stated that a station may make an offer of time to candidates for a certain office contingent on all candidates agreeing to appear or to waive their rights to a later opportunity to appear. It has stated that such waivers, when given by a candidate with full knowledge of the facts, would be binding on the candidate. However, it has emphasized that under Section 315, a candidate not appearing on such a program and refusing to sign a waiver is exercising rights expressly given him by Congress. Blaming a candidate on the air for refusing to waive his rights may create a Fairness Doctrine obliga-

<sup>104</sup>E. A. Stephens, 11 FCC 61 (1945).

<sup>105</sup>Station WANV, 50 FCC 2d 177 (1974); forfeiture affirmed, 54 F.C.C. 2d 432 (1975).

<sup>106</sup>Western Connecticut Broadcasting Co. (WSTC-AM-FM), 43 F.C.C. 2d 730 (1973). (For a discussion of a licensee's right to require advance scripts or recordings of all candidates, see paragraph 2(d) of the section below on "Censorship" (page 58).

<sup>107</sup>Station KAHU, FCC 71-959; KAYS, Inc. (KFEQ), FCC 73-1121.

<sup>108</sup>WPRY Radio Broadcasters, Inc., 40 FCC 2d 1183 (1973); see, also, Emerson Stone, Jr., 40 FCC 385 (1964).





tion on the part of the station. An attempt by a licensee to dictate program format, participants, length of program and times of taping and broadcast, and then offering the package to the candidates on a "take it or leave it" basis, does not deprive a candidate who refuses such an invitation of his right under Section 315 to appear subsequently.<sup>109</sup>

(h) *Failure of station to follow its interview format.* All five candidates for Governor appeared in a special one-time news interview which was not exempt from equal opportunities. A panel of newsmen asked questions of the candidates. During the first part of the program, the newsmen asked a series of questions to each of the candidates in rotation. During the remainder of the program, each newsman questioned the candidate or candidates of his choice. In a briefing session before the broadcast, all candidates were promised a chance to volunteer comments about answers given by other candidates during the second part of the program, but they were requested first to seek recognition from the moderator. One candidate later complained that during the second part of the program (i) she never was recognized although she continually raised her hand; (ii) even during the first part of the program the newsmen asked the Democratic and Republican candidates multiple questions which gave them almost twice the time allowed to the other candidates; (iii) the two major party candidates talked back and forth to each other without being recognized by the moderator; and (iv) when the complainant tried to comment on another candidate's answer without being recognized, she was interrupted by the moderator. The station conceded the accuracy of much of her complaint but said there was no attempt to exclude her in particular and all of the candidates often raised their hands

without being recognized. The Commission stated that it was proper for a station and candidates to agree in advance on a format and procedures for such a program, but that here the station had not enforced the agreement and the complainant got less than five minutes of time whereas one candidate received over 16 minutes and another nearly 14. Therefore, the complainant was entitled to some additional time.<sup>110</sup>

<sup>109</sup>Letters to *Senate Committee on Commerce*, 40 FCC 357 (1962), and *WBTW-TV*, 5 FCC 2d 479 (1966); *Licensee Obligations in Political Campaigns*, 14 FCC 2d 765 (1968).

<sup>110</sup>*Socialist Workers Party*, 26 FCC 2d 485 (1970). (See (g), below, for a somewhat similar case with a different outcome.)



## Cases Where Equal Opportunities Were Given

56. Situations in which the Commission has found there was no violation of the equal opportunities requirement include the following:

(a) *No need to notify candidate of opponent's time.* If a station sells or gives time to one candidate, it need not notify his opponents of the fact. However, 73.1940(d) of the rules requires stations to keep and permit public inspection of a complete record of all requests for time made by candidates, how each request was disposed of, and what charges, if any, were made. Thus, by inspecting the records of stations in the area of his candidacy, a candidate can learn what time has been given or sold to his opponents.<sup>111</sup>

(b) *Particular time periods and programs.* All a station need do is to make available periods of approximately equal audience potential to competing candidates to the extent that this is possible. They need not make available exactly the same time of day on the same day of the week or accept competing political advertisements on exactly the same programs or series of programs.<sup>112</sup> Even if a candidate's opponent has made no broadcasts at all, a station need not sell him the particular time period he requests.<sup>113</sup>

In another case, the candidate accepted an offer from the network of a later afternoon time period in response to a prior use in prime time. He subsequently contended that his appearance did not constitute an equal opportunity. The Commission rejected the complaint on the facts, finding that the candidate's acceptance, without objection, of the time slot the network offered was dispositive of the station's equal opportunities obligation. The Commission, in

making its decision, also noted that the candidate's appearance was "likely to attract approximately the same size audience as that of his opponent."<sup>114</sup>

(c) *No need to halt sales to "A" because "B" doesn't buy.* If one candidate or political committee buys considerably more time than the opposing candidate or committee, a station need not halt sales to the first candidate or committee. All it need do is to be prepared to afford equal opportunities if a candidate seeks them.<sup>115</sup> (However, see 55(f) above regarding contracts for time that result in denying equal opportunities to opposing candidates for the same office).

(d) *Withdrawal of time offer by station.* A station which offers time to all candidates for an office for a joint appearance on one program or an appearance in a special series of programs may withdraw the offer if one or more of the candidates refuses to appear. The equal opportunities requirement of Section 315(a) applies only to actual uses of a station's facilities by candidates.<sup>116</sup>

(e) *"News coverage" is not involved in "equal opportunities."* The appearance of a candidate on any of the four kinds of news broadcasts listed in Section 315(a) as not involving "uses" of a station does not entitle his opponent to equal exposure on such a news broadcast or series of broadcasts, nor do news items about a candidate on such broadcasts entitle his opponent to equal news coverage. However, the Fairness Doctrine applies to news programs.<sup>117</sup>

(f) *All opposing candidates not entitled to appear on same program.* A station that puts two opposing candidates on a non-exempt debate, interview or panel discussion need not include in the same program all other candidates for that of-

<sup>111</sup>Norman William Seemann, Esq., 40 FCC 341 (1962); also, see discussion of "political files" in paragraph 99 under "Miscellaneous Rules and Policies."

<sup>112</sup>Major General Harry Johnson, 40 FCC 323 (1961); Socialist Workers Party, 40 FCC 256 (1952); Harry Dermer, 40 FCC 407 (1964).

<sup>113</sup>KTRM, 40 FCC 331 (1962).

<sup>114</sup>Citizens for LaRouche, Inc., 88 FCC 2d 443 (1980).

<sup>115</sup>Hon. Frank M. Karsten, 40 FCC 269 (1955).

<sup>116</sup>Stations KHJ-TV and KABC-TV, 23 FCC 2d 767 (1966); also, see H. John Rogers, 59 FCC 2d 1109 (1976).

<sup>117</sup>See discussion of Fairness Doctrine in paragraphs 89-93.



fice, provided the others are given time separately.<sup>118</sup> If two candidates share an hour's time which is approximately equally divided between them, a third candidate seeking separate time needs to be given only half an hour in order to gain equal opportunities.<sup>119</sup>

(g) *News interview with all candidates.* All eight candidates for Democratic Senatorial nomination appeared on a program in which newsmen asked them questions and the moderator relayed other questions telephoned in by viewers. One candidate complained that one of the candidates got nine minutes of time in answering questions, another six and a half minutes and none of the others more than about three minutes. The Commission denied the complaint because the station's invitation to the candidates had not made any representations that were not carried out. It merely had stated that questions would be asked by the newsmen and the moderator and that after the questioning, each candidate would be given one minute for a closing statement, which was done. In contrast to the case in 55(h) of this section, the station here had followed the format agreed to by the candidates in advance.<sup>120</sup>

(h) *Minor technical failure doesn't destroy "equal opportunities."* A debate between opposing candidates which was not exempt from the equal opportunities requirement was videotaped by one station. Another station arranged to have a copy of the tape made for broadcast at 10:30 that night. At approximately 6 p.m. it learned that because of technical failure of the first station's videotape recorder, the video portion of two minutes and 50 seconds of Candidate A's closing remarks was lost, although the audio recording was not affected. In broadcasting the tape that night, the station substituted a still

picture of the candidate on screen when the playback of the final remarks began, but the image of the still picture became defective and the station then substituted a slide entitled "Technical Difficulties" while it continued to broadcast the audio portion. Candidate A demanded an opportunity to telecast that part of his remarks in which the picture was lost. The Commission denied the complaint because the station had substantially complied with the rules, the audio portion was broadcast without interruption, and the licensee appeared to have made a reasonable effort to remedy the defect in the video portion.<sup>121</sup>

(i) *"Make good" announcements or programs.* In contrast to the situation in (h) above, a station sometimes will have more serious technical problems in broadcasting a program or an announcement, so that only part of the candidate's message gets on the air, or the message is so badly garbled that it cannot be understood. When this happens to commercial advertisements, most stations broadcast "make good" programs or announcements without charging the advertiser for them, in order to give him his money's worth. However, when stations broadcast "make good" political announcements, other candidates for the same office sometimes demand free time equal to that in the "make good" on the grounds that the original candidate is getting more time than he paid for. If it is a station's policy to give "make goods" to commercial advertisers and if there is a substantial failure in the first broadcast of a spot or program sponsored by a candidate, then the station will incur no "equal time" obligations to other candidates if it broadcasts a "make good." This policy applies only when "make good" announcements are given because of technical difficulties. Other "make good" situations are dealt with on a case-by-case basis. For example, when a station has broadcast an announcement which is a "use" by a

<sup>118</sup>*Constitutional Party and Frank W. Gaydosh*, 14 FCC 2d 255 (1968); rev. den'd, 14 FCC 2d 861 (1968).

<sup>119</sup>*Conservative Party*, 40 FCC 1086 (1962); *Andrew J. Watson*, 26 FCC 2d 236 (1970).

<sup>120</sup>*William A. Albaugh (WBAL-TV)*, 59 FCC 2d 1023 (1976).

<sup>121</sup>*Sen. Birch Bayh*, 15 FCC 2d 47 (1968).



candidate at the wrong time or has broadcast a different announcement by him than the one he ordered used at a particular stage of his campaign, any free "make good" time given to the candidate might entitle his opponent to free time of equal length. Other situations may call for different conclusions. These interpretations have been given informally by the staff in response to questions, but they are affirmed by the Commission. (See also, paragraph 104 on a related subject—disputes between stations and candidates over the performance of contracts for the sale of time.)

### Free v. Paid Time

57. In September 1980 the Commission was faced for the first time with the implications of large broadcast purchases by organizations outside the control and authorization of any candidate.<sup>122</sup> A reelection committee sought a declaratory ruling that a broadcast "use" by Candidate A in a presidential election campaign, which is paid for by a committee purporting to be independent of Candidate A, entitles opposing candidates to free equal time. The Commission rejected this, stating that in deciding whether free as opposed to paid equal opportunities should be made available, the controlling factor is the nature of the broadcaster's role in the initial use. For example: (a) where a station presents a program featuring a candidate and merely sells commercial spots around the broadcast, the candidate's opponent will be entitled to free time;<sup>123</sup> (b) where the broadcaster acquires a program which contains a use by a candidate, from a syndicator or from some other source, the candidate's opponent will be entitled to free time;<sup>124</sup> (c) where the broadcaster sells either a spot or a larger block of time to the candidate, an authorized agent or

any third person and a "use" is presented, free time need not be afforded regardless of the nature of the third party or its relationship to the candidate.<sup>125</sup> This case overruled prior cases which dealt with the issue of when free or paid time need be afforded.

58. In another case, an "unauthorized political committee" sponsored several television commercials which were critical of a U.S. Senator who was seeking reelection. The ads did not contain the voice or image of the Senator's opponent. The Senator requested free equal time to respond to the ads. The station denied his request for free equal time but said it was willing to extend "equal opportunities" to the Senator's committee on a paid basis. The Commission applied the reasoning in the *Carter/Mondale* case, and held that the station acted reasonably by offering the Senator's Committee comparable time to respond on a paid basis to advertisements sponsored by a "third party."<sup>126</sup>

<sup>122</sup>*Carter/Mondale Reelection Committee*, 81 FCC 2d 409 (1980).

<sup>123</sup>*Id.* at 417.

<sup>124</sup>*Id.*

<sup>125</sup>*Id.*

<sup>126</sup>*Hon. Thomas E. Eagleton*, 81 FCC 2d 423 (1980).



## Miscellaneous Rulings

59. The Commission has ruled on a variety of other equal opportunities inquiries and complaints that do not fall under any of the headings in 55 or 56 above. Examples of these follow:

(a) *Must a station furnish anything more than the use of a microphone?* Regardless of what it furnishes in connection with a broadcast by a candidate, it must treat him and his opponents in the same way.<sup>127</sup> In television, if such facilities as background scenery, use of film, or videotape equipment or more than one studio camera are furnished to one candidate, they must be made available to opposing candidates.

However, if a candidate pays extra for such facilities, his opponents also must pay for them.

(b) *Local or State candidate appearing on network program.* If a local or State candidate appears on a national network program, an opposing candidate is entitled to equal opportunities over the stations which carried the network program whose signals cover the area in which the local or State election is taking place.<sup>128</sup>

(c) *How much time for a candidate nominated by three parties?* If three political parties nominate A to the same office and only one party nominates B for the office, A and B are entitled to the same amount of time. Section 315 refers only to persons who are candidates for public office, not to political parties, and if time is made available to one candidate, equal opportunities must be afforded every other candidate for that office, regardless of how many party nominations the first may have received.<sup>129</sup>

(d) *Candidate enters primaries of two parties.* Candidate A entered both the Democratic and Republican primaries for mayor. His opponent in the Democratic primary, B, received half an

hour of time, whereupon A demanded and received an equal amount of time. A's opponent in the Republican primary, C, then demanded and received half an hour, based on the fact that A, his opponent in the Republican primary, had received that amount of time. A thereafter requested another half hour of time to reply to C. He was not entitled to it. The same principle applied here as (c) above.<sup>130</sup>

(e) *Candidate running for two offices at same time.* Under the laws of one State, a candidate may run simultaneously for two different offices and if elected to both, decide at that time which to accept. Candidate A runs for both governor and State senator. A station sells him time to advance his candidacy for governor and then receives a request for equal opportunities from other candidates for State senator. It must honor such requests and A will not be entitled to buy time to respond to their broadcasts as candidates for State senator. This decision was based on the same principle as those in (c) and (d) above.<sup>131</sup>

(g) *Buying network and local station time.* If a candidate buys advertising on a network program, what kind of a rate may affiliates of the network charge his opponent if the opponent seeks to buy time on individual affiliates? The Commission has stated that the rate charged an opposing candidate by an individual affiliated station need not be related to the rate charged by the network. The network rate is, in effect, a "package rate" for a certain number of stations which must be bought together, whereas a candidate who buys time on a single affiliate is buying less time and buying it under an arrangement which does not constitute a similar "package" deal. If the second candidate went to the network, it would be expected to sell him time at comparable network rates, but a single affiliate may charge

<sup>127</sup>D. L. Grace, Esq., 40 FCC 297 (1958)

<sup>128</sup>Hon. Mike Monroney, 40 FCC 251 (1952).

<sup>129</sup>Greater Broadcasting Corp. of New York, 40 FCC 253 (1946).

<sup>130</sup>Lar Daly, 40 FCC 302 (1959).

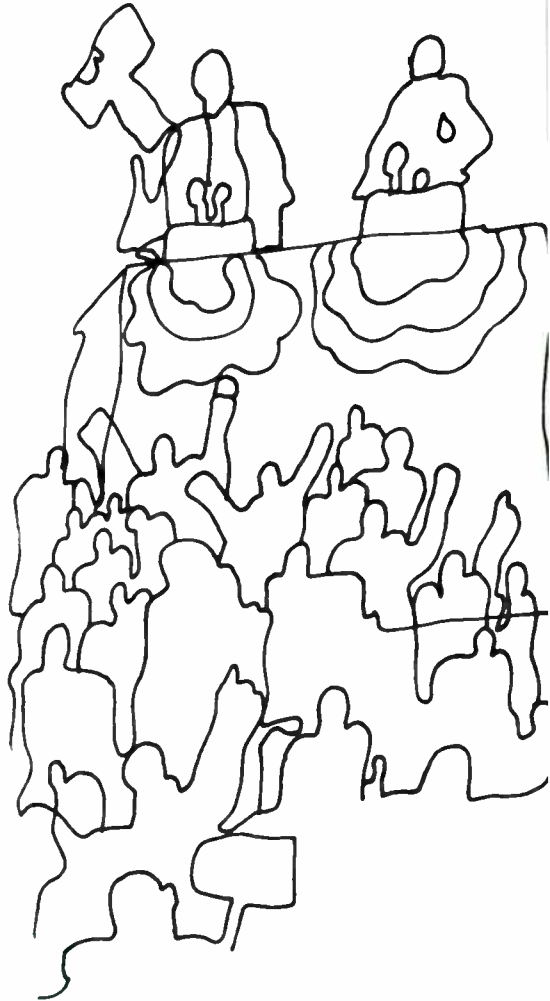
<sup>131</sup>Station KATC, 31 FCC 2d 403 (1971).



the rate it normally would charge a candidate.<sup>132</sup>

(h) *45-Minute Program Equals How Many Spots?* Candidate A conducted an interview program (which was not an exempt news interview program under Section 315(a)(2)) on a station from 8:15 to 9:00 p.m., five nights a week. He also broadcast commercial announcements in which he was not identified by name between midnight and 5 a.m. Candidate B, A's opponent, requested (i) that the station remove A from the air; (ii) and that she be given "equal time" in the form of announcements of short duration which would occupy a total amount of time each week equal to that occupied by A's 45-minute nightly broadcasts and the commercial announcements he broadcast. The station offered Candidate B (i) either an opportunity to be co-host with A on A's program or to conduct a similar program of her own from 11:15 to midnight five nights a week and (ii) a sixth 45-minute program to be broadcast at 11:15 p.m., on Saturdays to offset the commercial announcements broadcast by A each week. Candidate B refused the offer and complained to the Commission. The Commission stated that it had no authority under the Communications Act to order the station to remove A from the air, particularly in view of Section 326 of the Act which prohibits censorship of broadcast programs by the Commission. As to the other matters: (i) both kinds of appearances by A were "uses," since his voice was well known and readily recognizable on the commercial announcements; (ii) the "take-it-or-leave-it" offer by the station of only 45-minute programs at times specified by the station was not an offer of equal opportunities; (iii) Candidate B's demand for a sufficient number of one-minute spots each week to equal the

total time occupied by A in all of his appearances was a demand for more than equal opportunities, since that number of spots was considerably more valuable than A's 45-minute programs (three times as costly, in fact, under the station's rate card). The Commission directed both parties to undertake good faith negotiations "governed by a rule of reason." (Nothing further was heard from either party.)<sup>133</sup>



<sup>132</sup>*Mullins Broadcasting Co.*, 24 FCC 2d 264 (1970). For a discussion of rates generally and the "lowest unit charge" amendment to Section 315 enacted in 1972, see "Rates Which May Be Charged Candidates" beginning with paragraph 65.

<sup>133</sup>*AKO General, Inc.*, 25 FCC 2d 117 (1970).

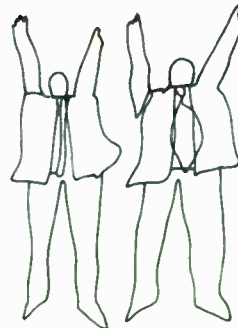


### “Last Minute” Use of Time

60. Many questions have arisen based on one candidate's use of time shortly before election day, when it is presumed more valuable than time used early in the campaign. For example, Candidate A buys time and uses most of it during the early stages of the campaign. Candidate B makes a request for equal opportunities within seven days of A's first appearance and the request also applies to all subsequent broadcasts by A. However, the time that B buys is used only during the last week of the campaign. Candidate A then requests additional time during the last week on the grounds that B's appearances so near to election day will give him more than equal opportunities. Is A entitled to additional time? There is no fixed standard for determining the rights of candidates in this respect, nor can there be, in view of the many different situations that may arise. However, as the Commission stated in one case, "It must be obvious that, to take the extreme case, a candidate cannot use Section 315 of the Act to delay his request for time and expect the 'equal opportunities' provision of that section to give him the right to saturate pre-election broadcast time."<sup>134</sup> In another case, involving interpretation of the "seven-day rule,"<sup>135</sup> the Commission cited the *Hunter* case and said that "even if timely requests have been made by a candidate under the rule, a licensee may be called upon to exercise reasonable judgment in affording 'equal opportunities,' particularly where there has been an accumulation of time"<sup>136</sup> In still another case, the Commission held that a request by a candidate six days before election day to buy time equal to that used by his opponent during the preceding seven days and still to be used by his opponent before the election should have been honored by the station under the equal oppor-

tunities requirement, but a different conclusion might have been warranted "had the complainant waited until the last day or two before the election."<sup>137</sup> In another case, a station announced a policy of selling only three prime-time spots per week to candidates for nomination to the office of mayor. Candidate A bought three spots per week for the final five weeks of the campaign. Candidate B made a timely request for equal opportunities but later claimed he could not produce his spots on time and was allowed to use fifteen prime time spots in the last two weeks of the campaign. Candidate A complained that B had been afforded more than equal opportunities. A asked to buy six more spots in the last two weeks of the campaign. The Commission ruled that A was entitled to buy the extra spots since he had relied upon the station's announced policy of limiting prime time spots to three per week and the station had failed to enforce that policy.<sup>138</sup>

1	A	2	A	3		4	A	5	
6		7		8	B	9		10	
11	A	12		13	A	14		15	
16		17		18		19	A	20	A
21		22	A	23		24		25	
26		27		28		29		30	B
								31	B



<sup>134</sup>Hon. Allen Oakley Hunter, 40 FCC 246 (1952).  
<sup>135</sup>See "The 'Seven Day Rule'" beginning in paragraph 78.  
<sup>136</sup>Emerson Stone, Jr., 40 F.C.C. 385 (1964).

<sup>137</sup>Summa Corp. (KLAS-TV), 49 F.C.C. 2d 443 (1974).  
<sup>138</sup>William R. Singer, 51 F.C.C. 2d 766 (1975).



## Censorship; Other Restrictions on Candidates

61. Section 315(a) of the Communications Act prohibits censorship by a broadcaster of any "use" of the station by a legally qualified candidate for public office. A station not only cannot censor a candidate, it cannot censor anything said or shown by anyone else on a program in which a candidate appears to the extent that it becomes a "use." The U.S. Supreme Court has held that since stations are not allowed to control what candidates say or do on these programs, the stations cannot be held liable for damages in civil lawsuits for libel. Recently, however, a specific question has arisen over whether the no-censorship provision of Section 315 is intended to override the proscription against the broadcast of obscene material contained in Section 1464 of the Federal Criminal Code.

### Examples of Censorship of Candidates

62. Examples of practices that have been ruled to violate the no-censorship law include the following:

- (a) *Refusing to broadcast a candidate because of libelous material.* A station may not refuse to broadcast a candidate's program on the ground that it contains libelous remarks, even though no opposing candidates have made broadcasts. If a station invites a candidate to appear or agrees to broadcast his program or accepts his order for time, it may not cancel the program because it believes the proposed material to be libelous, because this would amount to censorship.<sup>139</sup>
- (b) *Material that is "vulgar" or "in bad taste."* A station may not reject or change a candidate's material on the

grounds that it is "vulgar" or "in bad taste."<sup>140</sup>

(c) *Possible incitement to racial violence.* A station may not reject a candidate's material on the grounds that it is likely to incite racial hatred and might even lead to violence, so long as "there does not appear to be that clear and present danger of imminent violence which might warrant interfering with speech which does not contain any direct incitement to violence."<sup>141</sup>

(d) *Candidate who does not discuss his candidacy.* A candidate may not be refused time on the grounds that he plans to discuss subjects other than his candidacy.<sup>142</sup> An invitation to a candidate to speak may not be conditioned on his limiting his remarks to a certain subject.<sup>143</sup>

(e) *Candidate who wants to discuss his candidacy.* A station may not limit a candidate to discussion of non-partisan subjects on the grounds that the candidate's opponent limited his appearance to such subjects. A candidate may use a station's facilities as he wishes.<sup>144</sup>

(f) *No requirement that candidate appear "live."* A station may not require a candidate to appear "live" rather than by film or video recording.<sup>145</sup> The same principle applies in reverse: A station may not require a candidate to appear on tape or film if he wants to appear "live." However, if the station customarily charges extra for the production of live performances, it may charge a candidate on the same basis.

(g) *Submitting script or tape in advance.* A candidate may not be required to submit a script or tape in advance for the purpose of reviewing its contents for possible censorship. However, see 63(d) below for the reasons why scripts or tapes may be required in advance.

<sup>140</sup>*Ms. Gloria Sage*, 62 FCC 2d 135 (1976); *rev. den'd*, 63 FCC 2d 148 (1977); *Western Connecticut Broadcasting Co.*, 43 FCC 2d 730 (1973).

<sup>141</sup>*Atlanta NAACP*, 36 FCC 2d 635, 637 (1972).

<sup>142</sup>*WMCA, Inc.*, 40 FCC 241 (1952).

<sup>143</sup>*WANV, Inc.*, 50 FCC 2d 177 (1974); forfeiture affirmed, 54 FCC 2d 432 (1975).

<sup>144</sup>*Hon. Allen Oakley Hunter*, 40 FCC 246 (1952).

<sup>145</sup>*WOR-TV*, 22 FCC 2d 528 (1969).

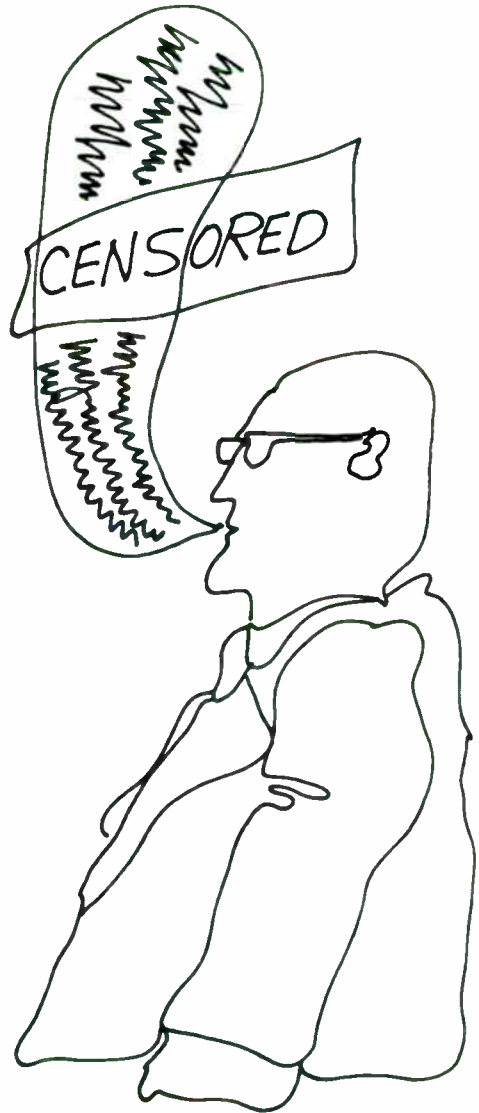
<sup>139</sup>*Port Huron Broadcasting Co.*, 12 FCC 1069 (1948); *WDSU Broadcasting Corporation*, 16 FCC 345 (1951).





(h) *Noncommercial TV stations and "campaign film"* Noncommercial TV stations have the same rights as commercial stations to decide initially how much time to make available to a candidate, but they may not reject a candidate's program on the basis of its content or on the grounds that it "was originally produced for use on commercial television stations [and is a] five minute campaign film." Noncommercial stations are not exempt from the no-censorship provision of Section 315.<sup>146</sup>

(i) *Restricting program or spot to candidate's personal appearance.* A station may not insist that a candidate be the sole person taking part in a program or political spot or that he appear continuously throughout the program or spot along with other people.<sup>147</sup>



<sup>146</sup>*Public Broadcasting Council of Central New York, Inc., et al.*, January 24, 1977. (The FCC's original ruling in this case was dated October 27, 1976 (FCC 76-1005).)

<sup>147</sup>*Gray Communications Systems Inc.*, 14 FCC 2d 766 (1968); reconsid. denied, 19 FCC 2d 532 (1969).



## Cases Where There Is No Censorship Violation

63. Examples of cases in which the Commission or the courts found there was no violation of the no-censorship provision of Section 315(a) include the following:

(a) *Rejection of spots that are not "uses" by candidates.* If a candidate or his organization buys time but the candidate's voice or picture does not appear on the spots, a station may use its judgment on whether to broadcast or reject the spots if it believes they are inaccurate, unfair, libelous, etc.—provided that the station is acting in good faith.<sup>148</sup>

(b) *Appearance on an exempt news program.* The no-censorship restriction in Section 315 applies only to "uses" of stations by candidates. Therefore, stations may edit or delete statements by, or pictures of, candidates in any of the four types of news programs that Section 315(a) says are not uses.

(c) *Offering candidates time for debate.* Offering the only two candidates for an office time for a debate is not censorship by means of dictating format of program, because the offer is contingent on acceptance by both candidates, and either or both may reject it.<sup>149</sup>

(d) *When a script or tape may be requested in advance.* A station is not allowed to require that a tape or text of a candidate's proposed "use" be submitted in advance of broadcast if the purpose is to review its contents for "suitability," "good taste," "accuracy," "libel" or any other basis for possible censorship. However, a broadcaster may ask for an advance script or tape for the limited purpose of complying with the law; for example, (i) to learn whether the candidate himself will take part in the broadcast so as to make it a use and, therefore, subject to the

"equal opportunities," "no-censorship," and possibly the "lowest unit charge" provisions of Section 315; (ii) if it is a paid appearance, to learn whether it carries proper sponsorship identification; (iii) to learn whether the program or spot is longer or shorter than it is represented to be, which not only will affect the station's scheduling but may affect its obligations toward opposing candidates in granting them equal opportunities and the "lowest unit charge" or "comparable rates." If a broadcaster does ask for a script or tape in advance, he should explain clearly that the request is made only for the limited purposes outlined above and that he is prohibited from censoring the content of the proposed spot or program. If the candidate answers by stating that he has no tape or script and plans to ad-lib, he must be allowed to do so, but the broadcaster may warn him that the spot or program, if sponsored, must include: (i) proper sponsorship identification within the agreed broadcast period; and (ii) that if the program appears to be about to run longer, the broadcaster reserves the right to stop carrying the broadcast sufficiently far in advance of the end of the agreed time period to insert sponsorship identification on the broadcaster's own initiative. Even if a spot or program will not be ad-libbed, a candidate may refuse to submit the tape or text in advance. In that event, he should be given the same advance notice as the ad-libbing candidate about sponsorship identification and length of program time.

(e) *Reply to personal attack on candidate or to political editorial.* If a station broadcasts a personal attack which is not exempt from the personal attack rule on a legally qualified candidate for public office, it need not offer him an opportunity to reply personally because if it did so, his opponents would be entitled to "equal opportunities," which would mean equal time to use as they saw fit. However, the candidate "should, of course, be given a substantial voice in the selection of a spokesman to respond to such

<sup>148</sup>Patton Echols, 43 FCC 2d 479 (1973); rev. den'd., 43 FCC 2d 1121 (1973); see also, *Felix v. Westinghouse Radio Stations* 186 F.2d 1 (3d Cir. 1950); cert. denied, 341 U.S. 909 (1951).

<sup>149</sup>Letter to Station WANV, October 30, 1975.



attack."<sup>150</sup> The same principle applies when a broadcaster editorializes against, or in favor of, a candidate. The rules require that an offer be made of a reasonable opportunity "for a candidate or a spokesman of the candidate to respond . . ." (Emphasis added.)<sup>151</sup>

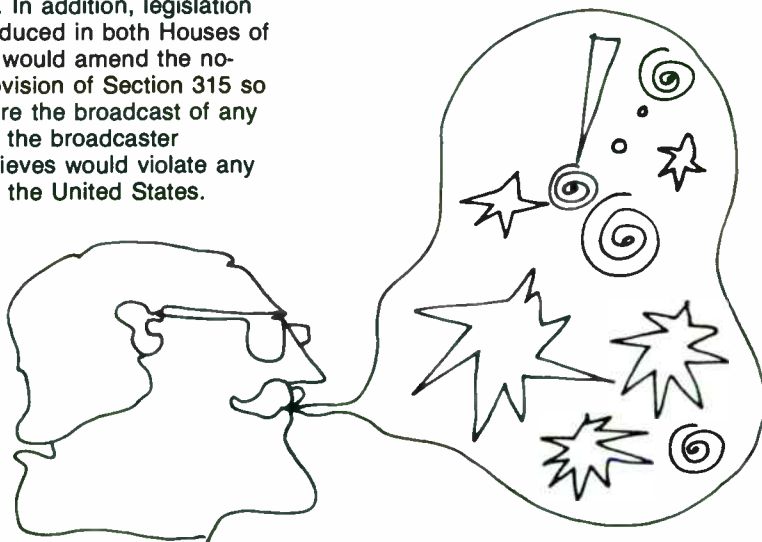
**(f) Rejection of Spot that Does Not Comply with FCC Technical Standards.**

Where a licensee does not accept ads from commercial advertisers that do not comply with FCC technical standards and has not obtained a waiver of those standards, it is not required to accept nonconforming commercials from political candidates; even if those commercials constitute a use, because such refusal would not constitute censorship of content, but would be for the limited purpose of complying with the law.<sup>152</sup>

**(g)** In a memorandum prepared for members of Congress who had made inquiries, the Commission's staff concluded that the prohibition against censorship in Section 315 did not apply to the broadcast of obscene material that is proscribed by Section 1464 of the Criminal Code. In addition, legislation has been introduced in both Houses of Congress that would amend the no-censorship provision of Section 315 so as to not require the broadcast of any material which the broadcaster reasonably believes would violate any criminal law of the United States.

**Liability for Libel or Defamation Actions**

64. A broadcast is immune from liability for damages in civil actions based on libel or defamation if the basis for the suit is something said or done by a candidate during a "use" of the station, since Section 315 generally prohibits the station from censoring a candidate.<sup>153</sup> In the opinion of the FCC, the same immunity would apply to statements made by noncandidates on a program in which the candidate takes part so as to make it a "use."<sup>154</sup> However, if the candidate himself does not take part in a program, the broadcast is not a "use" and the station itself is liable.<sup>155</sup>



<sup>150</sup>*Times-Mirror Broadcasting Co.*, 40 FCC 538, 539 (1962).

<sup>151</sup>See section on the personal attack and political editorializing rules, paragraphs 85 to 88.

<sup>152</sup>*Christopher J. Reynolds, Esq.*, 69 FCC 2d 941 (1978).

<sup>153</sup>*Farmers Educational and Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959).

<sup>154</sup>*Gray Communications Systems, Inc.*, 14 FCC 2d 766 (1968).

<sup>155</sup>See *Felix v. Westinghouse* cited in (2)(a) above.



## Rates Which May be Charged Candidates

65. The rate that a station is allowed to charge a political candidate depend in part on how near to election day the candidate's broadcasts will be made. If they fall within 45 days of primary election or with 60 days of a general election, the most that a station may charge is its "lowest unit charge. . . for the same class and amount of time for the same period." For example, if a TV station, charges \$1,000 for a single prime time 60-second spot on Saturday nights, but reduces this rate for commercial advertisers to \$750 a spot if they buy at least 100 spots, then it must sell a candidate a prime-time Saturday night 60-second spot for \$750 even if he buys only one. On the other hand, if the candidate's spots are broadcast earlier than the 45 or 60 day period, he may be charged the same rate as a commercial advertiser; if he buys only one spot he has to pay the one-spot rate of \$1,000. Section 315(b) of the Communications Act contains these provisions. The Commission's rules interpreting Section 315 require that all candidates for the same office be charged the same rates and that, even outside the 45 and 60-day periods, a candidate may be charged no more than the station would charge a commercial advertiser which is promoting its business in the same area as that in which the candidate is running for office. All statutes and rules need interpretation. The following paragraphs take up the most important and frequently asked questions about rates for political candidates.

### What Rates Apply to What Candidates?

66. Section 315(b) should be read carefully to learn when and how the rate restrictions apply:

(a) *They apply only to legally qualified candidates.* See paragraphs 8 to 28 and the definitions of legally qualified candidates in the rules for explanations of the term "legally qualified candidate." The Commission believes Congress

meant to apply the lowest unit charge "only in situations where an election is being held in the service area of the station on which time is being purchased." Thus, a candidate for a party's Presidential nomination would be able to buy time at this rate in a State in which the primary was to be held within 45 days and in which the candidate had either qualified for a position on the primary ballot or had made a substantial showing of being a write-in candidate. However, if the primary already has been held in a State (and he is seeking to buy time in that State prior to the nominating convention of his party), he is not entitled to the lowest unit charge in that State, nor in a State in which the delegates to the national nominating convention are chosen by a State convention.<sup>156</sup> (The citation is to the original Primer on the lowest unit rate. It will be referred to, hereafter, in this section as "*Public Notice.*")

(b) *The rates apply only to "uses" of stations by candidates.* A "use" is an appearance on the air by a candidate personally. However, there are exceptions and qualifications to this simple definition. See paragraphs 31 to 52 for information on what is and is not a "use."<sup>157</sup>

(c) *They apply only to "uses" in connection with a political campaign.* Section 315(b) states that the limitations on rates for candidates apply when a candidate uses his time "in connection with this campaign for nomination for election, or election. . . ." Congress evidently did not want to make the lowest unit rate available to a candidate who also is a department store owner who wants to use his time to advertise a current sale at the store rather than to promote his candidacy.

(d) *"Lowest unit charge" applies only to candidates for election.* The language of Section 315(b)(1) about the "lowest unit charge" refers only to the 45 days

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<sup>156</sup>Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 34 FCC 2d 510, 531-532 (1972).

<sup>157</sup>For an example of "non-uses," see Sig Rogich (KVOV), 48 2d 230 (1974).



preceding a "primary or primary runoff election and . . . the 60 days preceding the date of a general or special election . . ." (Emphasis added.) It does not apply the "lowest unit charge" to persons who are candidates for nomination by a party convention or caucus.<sup>158</sup> However, where the caucus system for choosing delegates involves public participation, the caucus functions as a primary election. Thus, the candidates being voted for in the caucus are entitled to lowest unit charge 45 days prior to the caucus.<sup>159</sup>

(e) "Comparable use" rates apply to pre-convention candidates. Section 315(b)(2), which states "at any other time" candidates may be charged more than other time buyers would pay for "comparable use" of the station, does not mention primary or general elections, so the Commission interprets it as applying at all times to persons who seek nomination by a party convention or caucus—as well as applying to pre-primary and pre-election candidates outside of the 45 and 60-day periods.<sup>160</sup>

(f) Rates apply to networks as well as stations. The rate restrictions apply to networks as well as to individual stations, since networks are, in effect, selling time on behalf of their affiliated stations. This also means that the compensation an affiliate receives from a network for carrying a sponsored network program will not be considered in computing the affiliate's "lowest unit charge" for direct sales to candidates. This principle applies to "non-wired networks" like Keystone as well as to interconnected networks like ABC, CBS, NBC, and MBS.<sup>161</sup>

(g) Rate restrictions do not apply to production charges. The "lowest unit charge" applies only to time sales. It does not apply to charges normally made by a station for other services, such as use of a television studio, audio

or videotaping, or line charges and remote technical crew charges when the broadcast originates outside the station. The "lowest unit charge" also does not apply to any additional charges that may be made if a candidate buys full sponsorship of an existing program for which there is an established program charge in addition to a time charge.<sup>162</sup>

(h) *Per-Inquiry Advertising*. The lowest unit charge provision does not apply to per inquiry advertising, since the amount paid to the station for such advertisements cannot be determined in advance, "is based upon the number of responses it receives from its audience," and is therefore outside the control of the broadcaster.<sup>163</sup>



<sup>158</sup>Public Notice, 34 FCC 2d 510, 523 (1972).

<sup>159</sup>Reagan for President Committee, 80 FCC 2d 225 (1980), recon. denied, 19 FCC 2d 212 (1980).

<sup>160</sup>Public Notice, 34 FCC 2d 510, 523 (1972).

<sup>161</sup>Public Notice, 34 FCC 2d 510, 525-27 (1972); Robert L. Olender, 61 FCC 2d 694 (1976).

<sup>162</sup>Public Notice, 34 FCC 2d 510, 530 (1972).

<sup>163</sup>Robert B. McKenna, Esq., 87 FCC 2d 1016 (1981).



## Lowest Unit Charge

67. Section 315(b)(1) refers to "the lowest unit charge of the station for the same class and amount of time for the same period. . . ." The following definitions of these terms and examples of the ways in which the lowest unit charge is to be computed and applied are based on the Commission's 1972 Public Notice on this subject cited above, unless otherwise indicated:

(a) *What does "class" of time mean?* It refers to the kinds of rates that most radio and TV stations have, such as rates for fixed-position spots, preemptible spots, run-of-schedule spots, and special discount packages.

(b) *What is the "amount" of time?* This term refers to the length of the period purchased, such as 30 seconds, 60 seconds, 5 minutes or 1 hour.

(c) *What is the "same period?"* This term refers to the time of the broadcast day, such as prime time in TV, "drive time" in radio and Class A, Class B and other classifications of time which a station may establish for rate-making purposes.

(d) *What does "lowest unit charge" mean?* Briefly it means that candidates must be given all discounts, based on volume, frequency or any other factor, that are offered to the station's most favored commercial advertiser for the same class and amount of time for the same period, regardless of how few programs or spots the candidate buys. This includes discounted rates given to commercial advertisers but not published on the rate card. Following are some examples:

(i) A station sells one fixed-position one-minute announcement in prime time to commercial advertisers for \$15. If an advertiser buys 500 spots, however, he pays only \$5,000 or \$10 each. If a candidate buys one spot he may not be charged more than \$10.

(ii) A station sells one preemptible 30-second spot in drive time to commercial advertisers for \$10. It sells 100 such spots for \$750. It must sell one such spot to a candidate for no more than \$7.50.

(iii) A station's lowest rate per spot for run-of-schedule one-minute spots is 1,000 for \$1,000, but it charges \$4 for a single run-of-schedule spot. It must sell one such spot to a candidate for not more than \$1.

Several Commission rulings give examples of the application of the "lowest unit charge": *Eugene T. Smith*, 34 F.C.C. 2d 622 (1972); *Martin A. Blumenthal*, 34 F.C.C. 2d 828 (1972); *Waldron Broadcasting Corp. (WCIR-AM-FM)*, Notice of Apparent Liability for Forfeiture, 43 F.C.C. 2d 619 (1973); *Newhouse Broadcasting Corporation (WSYE-TV)*, Notice of Apparent Liability for Forfeiture released August 25, 1975; *Harbenito Radio Corporation (HGBT)*, 58 F.C.C. 2d 645 (1976); *WBGR*, 58 F.C.C. 980 (1976).

(e) *"Package plans."* If a station offers its advertisers a special package plan for buying spot announcements, it must make a similar plan available to political candidates and charge them proportionately. For example, Station XXXX offers a "Summer Special" 12 spot package consisting of three spots in morning "drive time," three during the midday period, three in afternoon "drive time" and three during the 7 to 11 p.m. evening hours—12 spots per day for a package price of \$60, which is less than the cost of buying three spots in each of the four periods. Normally, six "drive time" spots would cost \$48 and the other six spots (mid-day and evening) would cost \$30. If a candidate seeks to buy the same package, he naturally will be entitled to buy it for \$60. If he wishes to buy only four spots per day—one each in morning and afternoon "drive time" and one each during the mid-day and evening periods—he may buy them at a proportionate rate—in this case, one-third of \$60 or \$20. If he wishes to buy spots only in morning and afternoon "drive time", he must pay whatever the station's lowest unit charges to advertisers are for spots in these preferred periods. He is not entitled to pay at the same special low package rate unless he buys spots in all of the time periods specified in the



package plan.

**Note:** The foregoing does not apply to a "package" plan which consists only of spot announcements of the same class and amount of time for the same time period. Such plans are in reality volume discount plans discussed in paragraph (d) above.

(f) *"National" and "Local" rates.* Some stations charge lower rates to local merchants than to national advertisers. During the "lowest unit rate" period, a political candidate may not be charged more than the lowest rate of the station, regardless of whether it is the "national" or "local" rate and regardless of whether the candidate is running for local, county, State or national office. However, see paragraphs 69 and 70 about "comparable use" rates for different political offices when the lowest unit rate does not apply.

(g) *When "rate card" and rate actually charged are different.* Stations sometimes sell time to advertisers at less than the rate quoted on their rate cards. On the other hand, the rate card may show a special discounted "package" or "plan" which works out to a lower rate than the station has actually charged an advertiser during the 45 or 60-day period preceding a primary or general election. The Commission has ruled that whichever charge is lower (that on the rate card or that actually charged) is the one that must be used in computing "lowest unit charge" for candidates.

(h) *Advertising agency discount.* Stations usually allow advertising agency commissions to be taken out of the charges made for time. If they do, and if a candidate buys time through an agency, the station may include the usual agency commission in the lowest unit charge it makes to the candidate. However, if the candidate buys time directly from the station using an agency, the amount usually paid for agency commission must be deducted from the lowest unit charge. For example, if the lowest rate for a one-minute spot is \$100 and the agency commission is 15 percent or \$15, a candidate

buying time through an agency must pay \$100, but if the candidate places the spot directly, without use of an agency, he pays only \$85. However, a candidate buying time directly must furnish his advertisement or other program matter to the station unless it is the policy of the station to prepare the material for commercial advertisers without charge in such non-agency situations.

**Note:** The foregoing applies to "commissionable" rates. If the station's rates are "net to the station" any advertising agency commission is added to the net rate. Regardless of whether commissionable or net rates are used, the determination of the lowest unit charge is based on the amount that a station actually receives for paid advertising.

(i) *Station representative commissions.* Most stations contract with "station representative" firms to represent them in selling to national or regional advertisers. The stations pay their "reps" a commissions on sales made for them. Unlike the situation in (h) above regarding advertising agencies, the commission paid to a sales representative need not be considered in computing the station's lowest unit charge. Such a representative is similar to a station's own sales staff, which frequently is paid on a commission basis, at least in part. Thus, a candidate who does not buy time through a sales representative is not entitled to a lower rate than one who does.<sup>164</sup>

(j) *Rates for "legal notices."* The laws of some states fix the rate which stations may charge for broadcasting legal notices. This rate may be well below that charged other advertisers. The Commission has ruled that since rates for legal notices are set by statute rather than by the station, they are not to be used in calculating the lowest unit rate for candidates.

(k) *"Trade-out" and barter deals.* Stations sometimes trade time for the goods or services of commercial advertisers. The Commission has ruled that

<sup>164</sup>WPSD-TV, 34 FCC 2d 828 (1972).



such "trade-out" or barter deals need not be considered in calculating a station's lowest unit rate. Only sales involving payment of money to the station need be considered.

(l) *Stations may charge candidates less than lowest unit rate, but must make the same rate available to all.* Section 315(b)(1) states that a station's rates during the 45- or 60-day period shall "not exceed" its lowest unit charge to other purchasers. It does not state that a station may not charge candidates a lower rate than other purchasers.

However, if one candidate or group of candidates is given a lower rate, this in itself becomes the "lowest unit rate" and other candidates may not be charged more than this.<sup>165</sup>

(m) *Post-election restitution to candidates does not excuse overcharge.* A station charged a rate based on an agency commission, although no agency was involved. Later, it claimed it intended to "reconcile" all political accounts after the election. The Commission ruled that an "intention to make restitution . . . will not serve to excuse past violations."<sup>166</sup>

(n) *Free spots to non-profit organization that also buys spots.* Normally, if a station offers free "bonus" spots to an advertiser as an inducement to buy spots on the station, the bonus spots will be considered as sponsored and must be included in computing that station's charge for spots to the advertiser. Thus, if a station sells 10 spots at \$10 each to an advertiser but promises him an additional 10 spots "free," the average price per spot for "lowest unit charge" purposes will be \$5 instead of \$10. However, when a station customarily provides additional free spots to non-profit organizations which may buy spots to advertise Christmas tree sales, concerts, etc., the free spots need not be averaged with the paid

spots in arriving at the lowest unit rate.<sup>167</sup>

### **When Rates for Candidates Take Effect**

68. The phrase "lowest unit charge of the station" in Section 315(b)(1) refers to the lowest unit charge to a station's most favored advertiser for broadcasts that are made during the 45 days preceding a primary election or the 60 days preceding a general election. If a station's lowest rate for a spot had been \$10 but it increased the rate to \$12 one week before the beginning of the 45 or 60 day period, the station could charge candidates \$12 thereafter. However, if there was an indication that the station was changing its rate only temporarily so as to deprive candidates of their rights during the pre-election period, the Commission would investigate to determine whether the law was being evaded; if so, it would view the violation most seriously. Many other questions have arisen as to the rates on which a station may base its lowest unit charge and when the charges are effective. Examples of these are given below:

(a) *45 and 60-day periods refer to dates of broadcasts.* If a candidate signs a contract on the 70th day before a general election, covering the purchase of time for broadcasts within the 60 days before the election, he is entitled to the lowest unit rate, regardless of the date of the contract. However, if some of his announcements are to be broadcast between the 70th and the 60th day before the election, the station need not change its lowest unit rate for these particular spots. It is the date or dates of broadcasts that are important in applying the lowest unit charge.

(b) *Low charge to a single advertiser controls lowest unit rate.* A station may have had a contract with one advertiser over a period of many years at a rate less than that charged others who

<sup>165</sup>Letter to Robert A. Marmet, Esq., June 2, 1977.

<sup>166</sup>Turner Communications Corporation, 54 FCC 2d 1129 (1975); affirmed in reduced amount, February 19, 1976; see, also, KAYS, Inc., 43 FCC 2d 1183 (1973).

<sup>167</sup>Allan R. Page (KGWA), 34 FCC 2d 1103 (1972); Robert W. Sterling, 48 FCC 2d 531 (1974).





began advertising at a later date, after rate had been increased. Even though only one advertiser gets the special low rate, that rate is in the station's lowest, and the same charge must be made to a candidate for that class and amount of time for that period.<sup>168</sup> However, if the contract with the long-standing advertiser expires during a 45 to 60-day pre-election period and there is no intention ever to renew it at the low rate, the station may base its lowest unit charge after the contract expires on its charges for commercial advertisements still being broadcast.

(c) *Unsold time at special discount.* During the 60 days before a general election a station manager finds himself with a considerable amount of unsold time on a particular date. In order to obtain something rather than nothing for the time, he sells it at an extremely low rate on that day only. The Commission has ruled that this becomes the lowest unit charge not only for time sold to candidates thereafter but for time previously sold in that 60-day period, so that rebates must be made to candidates who have used that station prior to that date. This is because the manager could have made such a special offer, at his discretion, on any day of the 60-day period and because of the possibility of abuse by favoring commercial advertisers or one candidate over another.<sup>169</sup>

(d) *Rates may vary with days of the week.* If a station charges commercial advertisers more for a one-minute spot between 7:00 and 7:30 on one night of the week than on another night because of the higher rating or otherwise greater desirability of the period on that night, it may take that fact into account in computing its lowest unit charge to candidates for spots in that period on that night.<sup>170</sup>

(e) *Change in rates because of audience ratings.* Many television stations raise or lower their rates for spot an-

nouncements next to programs on the basis of new audience ratings in their markets. If a new rating shows that Program A now has a greater audience than before, and Program B a smaller audience, the station may increase its rate for spots adjacent to Program A and lower the rate for adjacencies to Program B. In such cases, candidates buying spots adjacent to Program A for broadcast after the rate change may be charged more after the change, and those buying adjacencies to Program B for broadcast after the rate change will be entitled to a low "lowest unit rate" than before the rate change.<sup>171</sup>

(f) *Change from summer to winter rates.* Assume that the 60-day period preceding a general election begins on September 3. On September 20, as is its annual practice, a station changes from its lower "summer" rates to its higher "winter" rates. When this happens, the "lowest unit rate" between September 3rd and September 20 is based on the summer rate. From September 20 until election day, it is based on the winter rate.<sup>172</sup> However, there may be variations in these cases. Two examples follow:

(i) A station increases its rates on September 20 as stated above. Candidate A buys 50 fixed-position one-minute spots in prime time to be broadcast before the rate change takes effect. Candidate B is entitled to equal opportunities to respond under Section 315(a), and he buys 50 similar spots to be broadcast after the seasonal rate change. The situation here becomes different from the one described under (f) above, because "equal opportunity" requires that B be charged no more than his opponent A. Therefore, the rate charged B may not be greater than that charged A.

(ii) A station increases its rates because of the season on September 20. Candidate A has bought 50 fixed-position prime-time spots to be broadcast before the rate change. Candidate B wants to

<sup>168</sup>Public Notice, 34 FCC 2d 510, 528-29 (1972).

<sup>169</sup>Public Notice, 34 FCC 2d 510, 527 (1972).

<sup>170</sup>Public Notice, 34 FCC 2d 510, 524-25 (1972).

<sup>171</sup>Public Notice, 34 FCC 2d 510, 525 (1972).

<sup>172</sup>Public Notice, 34 FCC 2d 510, 525 (1972).



buy 100 spots to be broadcast after the seasonal rate change. He is entitled to buy 50 spots at the same rate as his opponent. If the station sells him another 50 spots, it may base its charge on the higher seasonal rate after September 20.<sup>173</sup>

(g) *If rate goes down after contract is signed, candidate gets lower rate.* Before the beginning of the 45-day period preceding a primary election, a candidate signs a contract for time to be used during the 45-day period. The price for the time is stated in the contract. After he signs it, and before his broadcasts begin, the station's rates change, either because it is switching from winter to summer rates or because of higher or lower audience ratings. If the changes in rates results in a lower unit charge than that specified in the contract, the candidate gets the benefit of the new lower rate, since it will be in effect during the 45-day period. However, if the new lowest unit charge is higher than that stated in the contract, the candidate gets the benefit of the rate quoted in the contract.<sup>174</sup>

## Charges for "Comparable Use" of Stations

69. Except during the 45 days before a primary election and the 60 days before a general election, a station is allowed to charge a political candidate as much as it charges others for "comparable use" of the station. "Comparable use" means use of the same amount and class of time in the same period. For example, if a station's lowest rate to commercial advertisers for a one-minute announcement at 8 p.m. on Saturdays is \$10 for one spot or \$75 for ten spots, the station may charge a political candidate \$10 for a single spot, and he or she must buy ten spots in order to get the reduced rate of \$7.50 a spot. (He or she would have to pay only \$7.50 for a single spot if it were broadcast during the 45 or 60-day pre-election period.)



<sup>173</sup>Public Notice, 34 FCC 2d 510, 527-28 (1972).

<sup>174</sup>Public Notice, 34 FCC 2d 510, 529 (1972).



## Examples of How “Comparable Use” Rates Apply

70. Following are examples of ways in which the “comparable use” provision of Section 315(b)(2) of the Communications Act applies:

(a) *Time must be “used” by a legally qualified candidate.* Section 315(b) refers only to broadcasts by legally qualified candidates in which the candidates themselves take part. (See paragraphs 8 to 24 for definition of a legally qualified candidate and paragraphs 31 to 52 for information on what a “use” of a station is). Although Section 315(b) does not prohibit a station from charging higher than its regular commercial rates for political broadcasts that are not “uses,” such charges might raise serious questions as to whether the station was serving the public interest. The U.S. Supreme Court and the Commission have stated that broadcasting discussion of important public issues is one of the most important services a station can perform, and both the Court and the Commission have recognized the special importance of political broadcasts. Trying to discourage them by discrimination in rates would not be consistent with this policy. (See discussion of “The Importance of Political Broadcasting” in Part I of the Primer.)

(b) *“National” and “Local” rates.* Some stations offer lower “local” rates to merchants who seek to attract customers from only the area near the city in which the station is located. They charge higher “national” rates to national advertisers which wish to reach the entire population. The Commission’s rules recognize this difference for “comparable use” rates but not for “lowest unit rate.” Thus, if a sponsored political program or spot is to be broadcast outside the 45 or 60 day pre-election period and the sponsor is a candidate for mayor of the city, a station which offers advertisers a “local” rate must offer the mayoral candidate the local rate because he or she is appealing to persons in the same area as local merchants who are given the “local” rate

Section 73.1940(b)(2) of the rules states, in part:

A candidate shall be charged no more than the rate the station would charge if the candidate were a commercial advertiser whose advertising was directed to promoting its business within the same area as that encompassed by the particular office for which such person is a candidate.

On the other hand, if a candidate’s district extends beyond the territory for which local rates are customarily charged, the station is allowed to charge him the “national” rate if it has one. The essential point is that the rates charged candidates be no higher than those charged others for “comparable use.”

(c) *May a station charge less than “comparable” rates?* Section 315(b) merely sets an upper limit on what a station may charge candidates. The station may charge them less than commercial advertisers if it wishes.

(d) *30-minute and 5-minute rates.* A station charges \$50 for a 30-minute time period, and \$15 for a five-minute period. A candidate who has prepared only 5-minute recordings demands that the station sell him six separate 5-minute periods for the same price it charges for 30 minutes. The Commission has held that the station may refuse to do so, since the law does not require a station to sell time to candidates at lower rates than they charge commercial advertisers.<sup>175</sup>

(e) *Run-of-schedule spots.* A station customarily sold packages of “run-of-schedule” (ROS) spots to commercial advertisers at lower rates than those charged for fixed position spots. The run-of-schedule spots could be placed wherever the station wished and could be moved in order to make room for fixed position spots. The station refused to sell ROS spots to political candidates because it feared that if it sold them to

<sup>175</sup>William V. Rawlings, 18 FCC 2d 746 (1969).



Candidate A and one or more of his spots happened to fall within prime time, it also would have to sell ROS spots to A's opponent, B, and B might demand that an equal number of his ROS spots be broadcast in prime time. The Commission ruled that since the station sold ROS spots to commercial advertisers it must make them available to candidates. However, if some of A's spots happened to be broadcast in prime time, B would not be able to demand prime time for his ROS spots. He would have to take the same chances that A took. If B wanted to be assured of any particular time periods, he would have to pay the higher rate charged for fixed position spots. In selling ROS spots to candidates, station licensees are expected to act in good faith and follow normal procedures in scheduling the spots.<sup>176</sup> In another case,<sup>177</sup> it was held that all candidates, both local and federal, are entitled to buy ROS and preemptible spots when the station offers these types of commercials to other advertisers. In addition, ROS and preemptible spots were held to be both classes of time and discount privileges.

(f) *Preemptible spots.* Preemptible spots are sold at low rates on a "time available" basis. Although the purchase orders specify the times in which the spots are scheduled to be broadcast, a later purchaser of non-preemptible fixed position spots may preempt the time originally allocated to the preemptible spots. In that case, no charge is made for the originally scheduled preemptible spots. If a station normally sells preemptible spots to commercial advertisers, it must make them available to political candidates, but candidates buying them must take their chances on getting on the air. Thus, if Candidate A bought 10 preemptible spots and all of them actually were broadcast, and his opponent B later bought 10 preemptible spots which were not all broadcast, B

would have to keep ordering preemptible spots until 10 of them actually were broadcast. If he wanted to make sure that each spot he bought was aired, he would have to buy non-preemptible spots at a higher rate.<sup>178</sup>

(g) *A station raises its rates.* After Candidate A buys spots at \$10 each, the station raises its rates to \$15. Candidate B, who is A's opponent, then seeks to buy spots. He must be given the same rate that A paid. Section 73.1940(b)(2) of the rules states that "the rates, if any, charged all such candidates for the same office shall be uniform. . . ."

(h) *Advertising agency commissions.* If a station normally pays a commission to an advertising agency for time purchased through the agency, it cannot refuse to pay a commission to an agency through which a candidate orders time; otherwise, a commercial advertiser would be favored over a candidate since it would receive the services of an agency merely by paying the station's established rate whereas a candidate would receive only broadcast time if he paid the same rate.<sup>179</sup> However, if a station has announced and followed a policy of refusing to pay agency commissions for local advertising and a candidate for local office seeks to buy time through an agency, the station need not pay an agency discount, since it will be following the same policy with respect to local commercial advertisers and candidates seeking local office.<sup>180</sup>

(i) *Candidate buys time on his own station.* A candidate owns a station personally or is the principal owner and president of the corporate licensee. He buys time on the station at its regular commercial rates, using his personal funds to pay the station for it. If, thereafter, an opposing candidate seeks time on the station, it may charge him the same rate that its owner paid for time. The Commission stated, "The fact

<sup>176</sup>WFBG, 23 FCC 2d 760 (1967).

<sup>177</sup>State Senator William H. Hernstadt, 79 FCC 2d 944 (1980), review denied, 84 FCC 2d 570 (1980), rev'd, *Hernstadt v. FCC*, 677 F.2d 893 (D.C. Cir. 1981).

<sup>178</sup>WHDH, Inc., 23 FCC 2d 763 (1967).

<sup>179</sup>KNOE-TV, 40 FCC 388 (1964).

<sup>180</sup>KSEE, 23 F.C.C. 2d 762 (1968).



that you have a financial interest in the corporate licensee does not affect the licensee's obligation under the act. Thus, the rates which the licensee may charge to other legally qualified candidates will be governed by the rate which you actually pay to the licensee. If no charge is made to you, it follows that other legally qualified candidates are entitled to equal time without charge."<sup>181</sup> However, in these circumstances, the candidate-owner should enter the payment to the station on the station's books so that it will be subject to income tax and he included in the annual financial report to the Commission. Also, the Commission has stated that "where the licensee, or a principal of the licensee, is also the candidate, there is a special obligation upon the licensee to insure fair dealing. . . ."<sup>182</sup>

(j) *Candidate uses own advertising agency.* A candidate buys time through an advertising/public relations agency which he heads and whose profit he shares. The Commission was asked if the usual 15 percent agency commission would be considered a rebate or "kick-back" to the candidate. The FCC stated that it would not be so construed since "the Commission has no rule or regulation which would prevent or forbid him from using the services of his own advertising agency. The fact that he may ultimately share in a portion of the proceeds of the transaction is not inconsistent with the statute or our rules."<sup>183</sup>

(k) *Candidate buys time for debate with opponent.* A committee for a candidate buys time and the candidate offers to debate his principal opponent in the purchased period. The opponent agrees if all other candidates also are invited to debate. All are invited, but only one accepts. He takes part in a second debate in time paid for by the committee of the first candidate. The other candidates who did not participate in the debates

would not be entitled to free time. Rather, "equal opportunities" would entitle them only to time they or their supporters paid for.<sup>184</sup>

(l) *Candidate uses some of bulk time-purchaser's spots.* A station normally charges \$2 per spot but if 100 or more are contracted for the rate is \$1. A candidate arranges with a commercial advertiser which bought more than 100 spots to use five of its spots at \$1 each. The candidate's opponents would be entitled to the same low rate since the rates charged all candidates for the same office must be uniform.<sup>185</sup>

(m) *Group of candidates buys block of time.* A group of candidates for different offices pool their resources to buy a block of time at a discount. An individual candidate opposing one member of the group seeks to buy time on the station. The FCC ruled that candidates must be treated individually and that the individual candidate was entitled to be charged the same discount rate as his opponent, since the provisions of Section 315 run to the candidates themselves.<sup>186</sup>

<sup>181</sup>WKOA, 40 FCC 288 (1957).

<sup>182</sup>Emerson Stone, Jr., 40 F.C.C. 385, 386 (1964).

<sup>183</sup>Jason L. Shrinisky, 23 FCC 2d 770 (1966);  
KTRM, 40 F.C.C. 331 (1962).

<sup>184</sup>KTVU-TV, 23 FCC 2d 757 (1967).

<sup>185</sup>Hon. Mike Monroney, 40 FCC 252 (1952).

<sup>186</sup>Political Broadcast Rates, 40 FCC 1975 (1954).



## Recent Cases

71. Most of the original rulings on rates for "comparable use" of stations cited above date back a number of years. However, the Commission has followed the same principles in ruling on more recent cases, including the following: *KAHU*, Notice of Apparent Liability for Forfeiture, 71-959 (charging candidates higher rates than commercial advertisers); *Waldron Broadcasting Corp.* Notice of Apparent Liability for Forfeiture, 43 FCC 2d 619 (1973) (charging one candidate more than his opponent and charging candidates more than lowest unit charge); *Newhouse Broadcasting Corporation*, Notice of Apparent Liability for Forfeiture, August 26, 1975 (charging candidates higher rates than commercial advertisers and charging one candidate a higher rate than his opponent); *Letter to KFAR*, April 6, 1977 (admonition for charging candidates for the same office different rates and charging some more than the lowest unit rate).

## How Much Time Must a Station Provide?

72. Political broadcasting is recognized by the Commission, the Congress and the U.S. Supreme Court as one of the most important services a station can provide to the public. The Commission has stated that it is one of the major elements of a station's service "because of the contribution broadcasting can make to an informed electorate—in turn so vital to the proper functioning of our Republic."<sup>187</sup>

Congress amended Section 312(a) of the Communications Act in 1972 to give the Commission authority to revoke a station license for:

...willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for use of the broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

This does not exempt stations from making time available to candidates for non-Federal offices such as Governor, State legislator, mayor or city councilman. Stations are expected to devote time to campaigns of State and local candidates in proportion to the significance of the campaigns and the amount of public interest in them. However, the law does not require stations to permit access to candidates for every non-Federal office, whereas it does require them to permit access to all candidates for Federal office if the candidates request it.<sup>188</sup>

Regardless of whether candidates are for Federal or non-Federal office, a station may not refuse all requests for time simply because they do not fit into the station's particular format. For example, a station that normally broadcasts only music and spot announcements will not be meeting its obligations if it refuses to accept or schedule any political discussion running longer than one minute.<sup>189</sup>

<sup>187</sup>*Licensee Responsibility as to Political Broadcasts*, 15 FCC 2d 94 (1968); see, also, *Farmers Educational and Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959); *Red Lion Broadcasting Co., Inc. v. Federal Communications Commission*, 395 U.S. 367-94 (1969).

<sup>188</sup>*Mr Warren J. Moity, Sr.*, 88 FCC 2d 580 (1979) review denied FCC 2d (FCC 80-438).

<sup>189</sup>*Licensee Responsibilities as to Political Broadcasts*, 15 FCC 2d 94 (1968).



## Reasonable Access for Federal Candidates

73. Like all general terms, "reasonable access" needs some sort of a definition so candidates and broadcasters will know their rights and obligations. It cannot be defined exactly, however, because what is reasonable for station A may not be reasonable for station B. Suppose that station A is a powerful New York City station whose signal covers an area including parts of three States in which there are at least six Senatorial candidates in the current election campaign, plus scores of Congressional candidates in dozens of districts and hundreds of State and local candidates. On the other hand, station B is in a sparsely populated area, and the only Federal candidate within range of its signal are two candidates for one U.S. Senate seat and two candidates in each of two Congressional districts—a total of six Federal candidates. Also, there are few State and local races in the station's area during the period of the current national campaign. A station with as few candidates to accommodate as B would be expected to provide more access to Federal candidates than A. However, the Commission has stated:

Congress clearly did not intend, to take the extreme case, that during the closing days of the campaign, stations should be required to accommodate requests for political time to the exclusion of all or most other types of programming or advertising. Important as an informed electorate is in our society, there are other elements in the public interest standard, and the public is entitled to other kinds of programming than political. It was not intended that all or most time be preempted for political broadcasts. The foregoing appears to be the only definite statement that may be made about the new section, since no all-embracing standard can be set. The test of whether a licensee has met the requirement of the new section is one

of reasonableness. The Commission will not substitute its judgment for that of the licensee but, rather, it will determine in any case that may arise whether the licensee can be said to have acted reasonably and in good faith in fulfilling his obligations under this section.

We are aware of the fact that a myriad of situations can arise that will present difficult problems. One conceivable method of trying to act reasonably and in good faith might be for licensees, prior to an election campaign for Federal offices, to meet with candidates in an effort to work out the problem of reasonable access for them on their stations. Such conferences might cover, among other things, the subjects of the amount of time that the station proposes to sell or give candidates, the amount of types of its other programming. . . .<sup>190</sup>

Thus, "reasonable access" for Federal candidates will depend on a number of factors, as will be explained in the following paragraphs. First, however, the reader should note that under Section 312(a)(7) of the Act the reasonable access requirement applies only to:

- (a) Uses of stations by candidates themselves. See paragraph 31 for definition of a "use."
- (b) Uses of stations by *legally qualified candidates* for Federal elective office. See paragraphs 8-28 for definitions of legally qualified candidates.

The reader also should note that the law does not require a station to provide time free. It says the station either must provide reasonable access free or "permit purchase of reasonable amounts of time." Thus, if a station gives away enough time to a candidate to amount to "reasonable access" under the circumstances of the case, it

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<sup>190</sup>Public Notice, *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 536 (1972).



is not required to sell time to the candidate, and if it sells the candidate "reasonable amounts" it need not provide free time.<sup>191</sup>

### Principles To Be Followed In Applying Statute

74. On July 12, 1978, the Commission adopted a *Report and Order* clarifying its policy in enforcing Section 312(a)(7).<sup>192</sup> The document reaffirmed the Commission's policy of relying "generally on the reasonable, good faith judgments of licensees as to what constitutes reasonable access under all of the circumstances present in particular cases." (par. 55). It stated, however, that in deciding whether a licensee's judgments on this subject can be considered reasonable, the Commission will follow these general principles:

- (a) Reasonable access must be provided to Federal elective candidates through the gift or sale of time for "uses" of the station by legally qualified candidates for public office.
- (b) Reasonable access must be provided at least during the 45 days before a primary and the 60 days before a general or special election. The question of whether access should be afforded before these periods begin and when access should apply before a convention or caucus will be determined by the Commission on a case-by-case basis.
- (c) Both commercial and noncommercial educational stations must make available program time during prime-time periods unless unusual circumstances exist. The Commission has recognized that there may be situations where the number of candidates in a Federal election may make it possible for a station to make prime-time program time available, and the Commission will continue to make exceptions to

the prime-time program time policy where circumstances dictate. ("Prime time" for purposes of enforcement of the reasonable access statute means the part or parts of the day in which the audience is likely to be largest. For TV, the 7-11 p.m. period is recognized as prime time in the Eastern and Pacific time zones, and the 6-10 p.m. period in the Central and Mountain time zones. For radio, prime time usually means "drive time," the periods when most persons are driving to or from work.)

(d) Commercial stations must make prime-time spot announcements available to Federal candidates. However, even though a noncommercial educational station may normally broadcast spot promotional or public service announcements, it generally need not make those spot times available to political candidates. If a commercial station chooses to donate rather than sell time to candidates, it must make available to Federal candidates under the reasonable access statute free spot time of the various lengths, classes and periods which are available to commercial advertisers.

(e) Licensees may not adopt a policy that flatly bans Federal candidates from access to the types, lengths and classes of time which they sell to commercial advertisers. Noncommercial educational stations need provide Federal candidates only with lengths of program time which are normal parts of the station's broadcast schedule (but see (d) above re: spot time).

(f) In view of the fact that Section 315(a) prohibits censorship of the material that a candidate uses during a personal appearance, noncommercial broadcasters may not reject material submitted by candidates merely on the basis that it was originally prepared for broadcast on a commercial station.

(g) Although both educational and commercial licensees may suggest the format for appearances by candidates who exercise their Section 312(a)(7) rights, candidates need not accept these suggestions and may not be penalized by loss of "equal opportunities" if they

<sup>191</sup>Dennis J. Morrisseau (WCAX-TV), 48 FCC 2d 436 (1974).

<sup>192</sup>*Report and Order in the Matter of Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 FCC 2d 1079 (1978).





decline to appear on programs designed by the broadcasters.

("Classes of time" means such kinds as fixed-position spots, preemptible spots, run-of-schedule spots, and special discount packages.) The Commission stated, however, that a Federal candidate "is not entitled to a particular placement of his or her announcement on a station's broadcast schedule." It recognized that this would be very difficult if a candidate wanted his or her spot placed next to a highly rated program that was broadcast only once, or very rarely and if opposing candidates demanded "equal opportunities." Also, some stations do not sell time to candidates during newscasts.<sup>193</sup>

In its *Report and Order*, the Commission also ruled that subscription TV stations need not make access available to Federal candidates during periods of time in which they are engaged in subscription TV programming.

## Carter/Mondale

75. In a case of major significance,<sup>194</sup> the complainant (Carter/Mondale Reelection Committee) alleged that the three major television networks had denied reasonable access to President Carter in violation of Section 312(a)(7). It stated that it had attempted to purchase one prime-time, 30-minute program slot for early December 1979 and was unreasonably refused. According to Carter/Mondale, the desired time was to be aired in connection with President Carter's formal announcement of his candidacy and was designed to set the tone for his entire campaign. Generally, the networks, in declining the requested access, informed Carter/Mondale that it was too early in the presidential race for the sales of such amounts of time. However, CBS did offer to sell five

minutes in prime time and five minutes in daytime.

The Commission found each network had acted unreasonably and directed them to advise the Commission of their intentions regarding compliance with Section 312(a)(7).

The Court of Appeals affirmed the Commission's orders, holding that the statute created a new affirmative right of access to the broadcast media for individual candidates for federal elective office, once the campaign is in "full swing." In responding to a candidate's request for time a broadcaster must weigh such factors as:

- (a) the individual needs of the candidate, as expressed by the candidate;
- (b) the amount of time previously provided to the candidate;
- (c) potential disruption of regular programming;
- (d) the number of other candidates likely to invoke equal opportunity rights if the broadcaster grants the request before him; and
- (e) the timing of the request.

The U.S. Supreme Court affirmed, holding that Section 312(a)(7) focuses on the individual 'legally qualified candidate' seeking air time to advocate 'his candidacy,' and guarantees him 'reasonable access' enforceable by specific governmental sanction." The Court further noted that the sanction may be imposed for "willful or repeated" failure to afford reasonable access.

To justify a negative response, the Court said, broadcasters would have to show "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." The Court noted that the Commission does not set the starting date for a campaign. Rather, it examines the objective evidence to find whether the campaign has already begun, considering the positions of both the candidates and the networks as well as other factors.

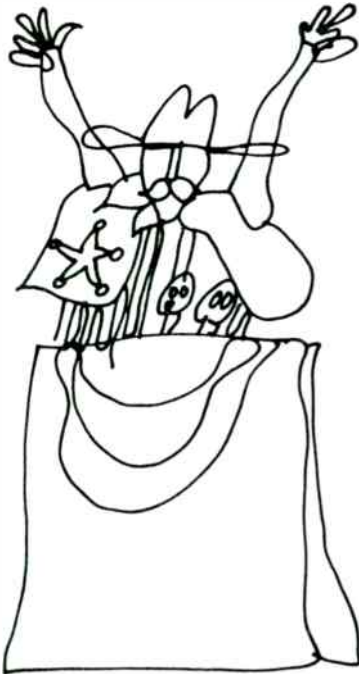
<sup>193</sup>Anthony R. Martin-Trigona; appeal dismissed, Anthony R. Martin-Trigona, FCC 78-109 (March 2, 1978).

<sup>194</sup>Carter/Mondale Presidential Committee, Inc., 74 FCC 2d 631 (1979), recon. denied, 74 FCC 2d 657 (1979), aff'd sub. nom. CBS Inc. v. FCC, 629 F. 2d 1 (D.C. Cir. 1980), aff'd, 453 U.S. 367 (1981).



## Time for State and Local Candidates

76. As explained at the beginning of this section, the law does not require stations to provide access to every State, county, and local candidate. However, the Commission, the courts, and Congress have recognized that political broadcasting is one of the most important services that a station can provide to the public. Therefore, stations are expected to allocate reasonable amounts of time to other political races, based on the licensee's judgment of the importance of the races and the amount of public interest in them.



## Examples of Rulings in Non-Federal Campaigns

77. Following are some examples of ways in which the Commission has applied Section 315 to non-Federal political candidates:

(a) *Station need not sell time at all if it gives time.* Even when a station decides a race is important enough to justify presentation of the candidates on the air, it need not sell time to them if it makes time available without charge.<sup>195</sup>

(b) *Station can limit sale of time to certain races.* A station may use its judgment as to which races are most significant and of greatest interest to the public, and refuse to sell or give time for "uses" of the station by candidates for other offices.<sup>196</sup>

(c) *Need not sell time far in advance of election or accept particular format.* A station need not sell time many months in advance of an election or accept a particular length of paid announcement that a candidate wishes to use.<sup>197</sup>

(d) *Need not sell a specific period of time.* Neither the Act nor the Commission's rules require a station to sell specific periods of time for political broadcasts.<sup>198</sup>

(e) *Need not sell less than 5 minutes to candidate.* A station which plans to make program time free to candidates in major races and to give "in depth" reports on news programs on these candidates is justified in exercising its judgment that the public interest will be better served by paid political appearances of five minutes or more.<sup>199</sup>

<sup>195</sup>*Rockefeller for Governor Campaign, (WAJR)* 59 FCC 2d 646 (1976); *Charles O. Porter, Esq.*, 35 FCC 2d 664 (1972).

<sup>196</sup>*Foster Furcolo (WCVB-TV)*, 48 FCC 2d 565 (1974); *Lew Breyer*, 31 FCC 2d 548 (1968).

<sup>197</sup>*Dan Walker (WMAQ)*, 57 FCC 2d 799 (1975).

<sup>198</sup>*W. Roy Smith*, 18 FCC 2d 747 (1969).

<sup>199</sup>*Louis Rosenbush, Jr. (WBAL-TV)*, 31 FCC 2d 782 (1971).



## The “Seven-Day Rule”

78. The so-called “seven-day rule” (Section 73.1940(e) of the broadcasting rules) is as follows:

*Time of request.* A request for equal opportunities must be submitted to the licensee within 1 week of the day on which the first prior use, giving rise to the right of equal opportunities, occurred: *Provided, however,* That where a person was not a candidate at the time of such first prior use, he shall submit his request within 1 week of the first subsequent use after he has become a legally qualified candidate for the office in question.

79. The basic thrust of the rule is clear: a candidate who wants equal opportunities must make his request within one week of the day on which his opponent made his broadcast.<sup>200</sup> Thus, if candidate A has been making broadcasts on a station for five weeks and his opponent B does not request equal opportunities until the end of the fifth week, B is entitled only to the amount of time that A has used during the fifth week. The Commission adopted this rule so broadcasters could make advance plans for allocating time to candidates during political campaigns, and to make sure that one candidate does not “lie in the bushes” until a day or two before election and then gain an unfair advantage over his opportunity by getting a block of last-minute time equal to all of the time his opponent used during the whole campaign. However, the way the rule works out is not always as simple as the example above.

## Rule Applies Only to “Uses” by Legally Qualified Candidates

80. The rule applies only to persons who are legally qualified candidates for public office at the time of the broadcast in question. For example, if A makes a broadcast *before* he becomes a legally qualified candidate and B is a legally qualified candidate at the time of A’s broadcast, A’s broadcast gives B no equal opportunity rights, no matter how soon he requests time from the station. On the same principle, if Smith is a legally qualified candidate when he makes a broadcast on August 1 but Jones does not become a legally qualified candidate for the same office until August 2, Smith’s August 1 broadcast gives Jones no right to equal opportunities. However, if Smith should then make a second broadcast on August 3, Jones can obtain equal opportunities based on Smith’s August 3 broadcast if Jones makes his request within one week of August 3. See the part of the rule beginning “*Provided.*”<sup>201</sup>



<sup>200</sup>As has been explained elsewhere in this Primer, a station is not required to notify a candidate that his opponent has asked for or obtained time. The station must keep a public file showing which candidates have requested either free or paid time and what the station did about the request, but it is up to the candidates to keep themselves informed by this or other means about what their opponents have done.

<sup>201</sup>Also, see *Hon. Joseph S. Clark*, 40 F.C.C. 332 (1962).



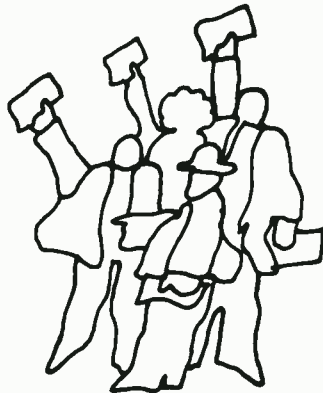
## Multiple Candidates for the Same Office

81. The first sentence of the rule says that a "request" for equal opportunities must be submitted within 1 week of the day on which the first prior use, giving right to equal opportunities, occurred. . . . An important word in that sentence is "first." Here's an example, As of August 1, A, B and C all are legally qualified candidates for the same public office. A makes a broadcast on August 1. On August 5, B asks the station to make equal opportunities available to him because of A's broadcast. The station agrees, but B does not use his time until August 15. On August 10, C makes a request for equal opportunities, claiming that his request should be granted because it was made within seven days of B's request. The station rightly denies C's request because the seven-day rule is not based on a time a request is made by another candidate. It is based on the date the time is used by another candidate, and here C did not make his request until 10 days after A's use. Moreover, if C had waited until after B's broadcast of August 15, and made another request on August 16 based on B's August 15 broadcast, he would not be entitled to equal opportunities, because he was a candidate on August 1, the date of the "first prior use" and he did not submit his request by August 8. The Commission has recognized the fact that the "seven-day rule" would have little meaning if each use based on a prior use were allowed to trigger still another grant of equal opportunities so that such requests could go on and on. Here C was a legally qualified candidate when A made his original broadcast on August 1, and C could have exercised his rights by making a request within one week of that date. On the other hand, as pointed out in paragraph 80, if C had not been a legally qualified candidate on August 1, but became one by the date of B's broadcast of August 15, then C could have made a valid request at any time within 1 week of August 15, since he would be submit-

ting "his request within 1 week of the first subsequent use after he became a legally qualified candidate for the office in question."

## Requests Made Before Opponent's Use

82. A and B are legally qualified candidates for the same office and it is announced that A is going to speak on a station on September 15. On September 12, B requests equal opportunities based on the fact that his opponent is going to speak. The Commission has ruled that such an advance request is valid "if it is directed to a specific future Section 315 use which was then known or announced prior to the actual broadcast."<sup>202</sup> (Other portions of the ruling in that case are no longer valid because the seven-day rule was amended in 1970). The Commission also has ruled that "where a licensee allows a candidate to use his facilities in a fixed and continuing pattern (as, for example, through the sale of a number of spot announcements to be broadcast over a specified period of time), a Section 315 request from an opposing candidate in reference thereto gives the licensee notice that equal opportunities are requested as to all uses in the 7-day period prior to the request and all subsequent uses pursuant to the pre-established schedule."<sup>203</sup>



<sup>202</sup>*Socialist Workers Party*, 15 FCC 2d 96, 97 (1968).

<sup>203</sup>*KLAS-TV*, 42 FCC 2d 894, 896-897 (1973).

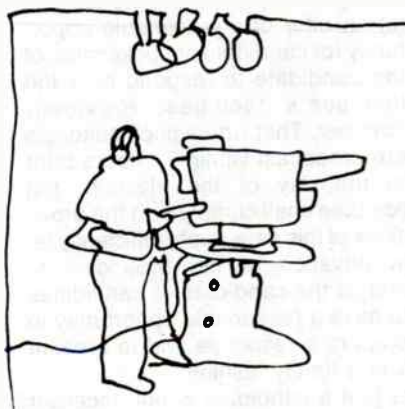


## When Station Erroneously Denies First Request

83. Candidate A requested equal opportunities based on appearances by his opponent within the past seven days. The licensee agreed, but put restrictions on the way in which A could use his time which the Commission found to be unreasonable. Between the time A filed his complaint with the Commission and the time the Commission ruled on it, A's opponent made still more broadcasts on the station, but didn't request equal opportunities within seven days of each broadcast. The Commission ruled (i) A was within his rights in refusing to appear on the program under the station's proposed restrictions and was entitled to use the station's facilities as he had originally planned; (ii) since the filing of the complaint with the FCC made the stations aware that if the complaint were found valid, A would be entitled to the time he had requested, A was not required to keep making weekly demands for equal opportunities; (iii) A was entitled to all of the time used by his opponent since A filed his first request with the station.<sup>204</sup>

84. A, who was part owner and president of several stations in Texas, became a candidate for Democratic Senatorial nomination. He wrote his opponent, B, that A was using a certain amount of time daily on his stations and that B was "entitled to equal time, at no charge." B wrote back about two weeks later, thanking A for advising him "of the accumulation of time" on A's stations and stating that A would be notified when B decided to start using the accumulated time. About six weeks later, B requested time equal to all that A had used. A replied that the seven-day rule applied and B was entitled only to the time used during the week preceding receipt of B's second letter. The Commission ruled in this unusual case that, having offered B time and learned from B's first response that B

misunderstood A's offer and assumed he would be allowed to accumulate time beyond one week, A should have notified B at the time that B's impression was mistaken. When a licensee is also a candidate, there is a special obligation on him to ensure fair dealings. B's first letter constituted a notification that B wished to avail himself of equal opportunities and if A had wishes, he could at that time have made reasonable scheduling plans. However, the Commission added that the seven-day rule was not the only thing to be taken into account, and that "even if timely requests have been made by a candidate under the rule, a licensee may be called upon to exercise reasonable judgment in affording 'equal opportunities,' particularly where there has been an accumulation of time." The Commission said "the licensee and the candidate should confer, and attempt to work out in good faith, reasonable solutions to the time problems presented in the case."<sup>205</sup>



<sup>204</sup>Gray Communications Systems, Inc., 14 FCC 2d 766, 767 (1968); reconsideration denied, 19 FCC 2d 532 (1969).

<sup>205</sup>Emerson Stone, Jr., 40 FCC 385, 387 (1964).



## Political Editorials; Personal Attacks

85. The rules on political editorials and personal attacks do not forbid the broadcast of either.<sup>206</sup> Instead, they require broadcasters who carry such editorials or attacks to offer the persons adversely affected by them a chance to state their side of the case in person or through a spokesman.

### Political Editorial Rule

86. The FCC receives many more complaints about political editorials than about personal attacks in connection with political campaigns. Therefore, most of this section deals with the editorializing part of the rule, which states:

73.1930. Where a licensee, in an editorial, (1) endorses or (2) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial, (a) notification of the date and the time of the editorial; (b) a script or tape of the editorial; and (c) an offer of a reasonable opportunity for candidate or spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

Note that a candidate is not necessarily entitled to respond in person. If he did respond personally, his opponent or opponents in the campaign would be entitled to "equal opportunities" under

Section 315(a) of the Act, and since they could not be censored, they could use their "equal time" in any way they chose. This is why the broadcaster is given the alternative of offering time for a spokesman of the candidate to respond, but in adopting this rule the Commission stated that "Barring extraordinary circumstances, the choice of the spokesman is, of course, a matter for the candidate involved."<sup>207</sup> Examples of the Commission's interpretation of other parts of the rule follows:

(a) *What is a station editorial?* Basically, a station editorial is a statement representing the view of the licensee of the station, such as its owner, a principal officer, the manager, or another employee if he is permitted by the licensee to speak for the station. Even if a statement is not labeled an editorial, it may be one. For example, on the day before the primary elections the president and controlling stockholder of a station endorsed several candidates during an interview with him broadcast by his station. The station president claimed later that his statements about the candidates represented only his personal feelings and were not an editorial endorsement of candidates by the station itself. The Commission stated that "when the president and controlling stockholder of a licensee . . . endorses candidates for public office, such endorsements are indistinguishable from a station editorial within the meaning of [the political editorializing rule]."<sup>208</sup> In another case, all three stations in a city broadcast an identical item in their newscasts on the day before an election. The item stated that the managers of all three stations had endorsed the same candidates in the next day's election. Two of the station managers had broadcast endorsements of these same candidates at an earlier date and at that

<sup>207</sup>In the Matter of Amendment of Part 73 of the Rules, 8 FCC 2d 721, 727 (1967).

<sup>208</sup>Richard A. Karr (WJOB), 32 FCC 2d 285 (1971); see also, *Port Jervis Broadcasting Co.* (forfeiture order) June 24, 1976; application in mitigation or remission denied, March 14, 1977.

<sup>206</sup>The personal attack rule is found in §73.1920. The political editorial rule is found in §73.1930.



time had complied with the requirements of the editorializing rule as to notifying other candidates, etc., but the endorsement by the third manager was not announced until the "news item" was broadcast just before the election day. The Commission ruled that the broadcast of the announcement of the endorsement by all three managers was in effect the broadcast of a new political editorial, and that the candidates not endorsed should have been notified in advance.<sup>209</sup> On the other hand, a statement of an employee or commentator of a station is not a station editorial unless it is represented to be one.<sup>210</sup>

(b) "*72-hour rule.*" In the cases cited above, the stations did not comply with the requirement that if a political editorial is broadcast within 7 hours of election day, notice must be given to the candidates opposed or not endorsed in the editorial sufficiently far in advance for them to "have a reasonable opportunity to prepare a response and to present it in a timely fashion." In still another case, the station broadcast an endorsement of one candidate on the day before the election and then telephoned the opposing candidates and offered them a chance to respond. This was a violation of the rule, since the notification was not given "in advance of the broadcast."<sup>211</sup> The same ruling was made in a case where the station broadcast an endorsement of one candidate twice on the same day before election and once on election day and wrote the other candidate a letter offering him a chance to respond, but the letter was not even mailed until election day.<sup>212</sup>

(c) "*Reasonable opportunity to respond.*" There can be no single definition of what is a reasonable offer of an opportunity to respond to a political editorial, because the reasonableness of

the opportunity may vary with the circumstances, as the Commission noted on p. 727 of its Order adopting the rule, cited above. The Commission stated that "In many instances a comparable opportunity in time and scheduling will be clearly appropriate; in others, such as where the endorsement of a candidate is one of many and involves just a few seconds, a 'reasonable opportunity' may require more than a few seconds if there is to be a meaningful response." Thus, if a station's editorial stated merely that it believed that the following candidates were best qualified for election to the city council and then listed 20 persons, the entire editorial might be less than a minute long, but a "reasonable opportunity" for a response by any of the candidates who were not endorsed certainly would require more than one-twentieth of the time occupied by the editorial. In a specific case, the Commission found that the station had not given a candidate a reasonable opportunity to respond when it devoted 25 lines of script to endorsing his two opponents and opposing him, and offered him the equivalent of six lines for his responses.<sup>213</sup> The Commission ruled that reasonable opportunity had been offered in another case, where the station had broadcast a one-minute editorial opposing a candidate's election at 6:25 and 10:25 p.m. on October 28 and then offered the candidate five minutes for a response to be broadcast at 10:25 p.m. on election eve, November 5. The Commission said it could not find the offer of five minutes on election eve compared to two earlier one-minute editorials to be unreasonable.<sup>214</sup>

(d) *When does an editorial endorse or oppose a candidate?* If an editorial simply urges the election of one candidate to a certain office or recommends that the public vote against another candidate, there is no question

<sup>209</sup>KSLY, KATY, KVEC (Notice of Apparent Liability for Forfeiture), May 31, 1973, FCC 73-594.

<sup>210</sup>Accuracy in Media, Inc., 45 FCC 2d 297 (1973); Letter to Edward L. Fanning, December 3, 1975.

<sup>211</sup>WKJK, 43 FCC 2d 593 (1973).

<sup>212</sup>Black River Radio, 28 FCC 2d 337 (1971).

<sup>213</sup>Dolph Pettey Broadcasting Co. (KUDE), 30 FCC 2d 675 (1971).

<sup>214</sup>William J. Dodd (KATC-TV), 32 FCC 2d 545 (1971).



as to whether the editorial falls within the scope of the rule. However, all cases have not been this clear, as illustrated by the following three:

- (i) Two of the five members of the Board of Town Commissioners were running for reelection. Without identifying any candidate by name, a station broadcast editorials criticizing the current Board and urging the public to vote for "a change." The Commission ruled that even though the two Board members seeking reelection were not named, the editorial was in effect a statement of the station licensee's opposition to their candidacies and therefore, was a political editorial under the rules.<sup>215</sup>
- (ii) During the second week before an election, station editorials referred to the fact that a State Senator announced that he would introduce legislation to create a commission to investigate corruption in government. Without referring to the election or the fact that the State Senator was a candidate for reelection, the editorial praised the idea of creating such a commission. The Senator's campaign workers distributed a campaign flier on which the editorial was printed, along with the station's logotype. The station broadcast a disclaimer of the flier three times, stating that use of its logo was unauthorized and that the station had a policy of not endorsing individual candidates. It also wrote to the Senator demanding that he stop using its trademark. The Senator's opponent claimed that the need for strengthened ethics legislation for state officials was a principal issue in his campaign, and that the station's editorial was interpreted by some persons as an endorsement of the Senator. The station denied that the editorial endorsed him or even inferentially advocated his election. The Commission ruled that although the favorable reference to the Senator's proposal "could arguably and with some logic be viewed as an endorsement. . . [t]o apply our political

editorializing rules in these situations—where no clear-cut endorsement of a candidacy is involved, would make little practical or legal sense. . . [i]nstead of encouraging 'uninhibited, robust and wide-open debate' . . . the effect of our ruling would be to inhibit it."<sup>216</sup>

- (iii) A county prosecuting attorney was a candidate for Democratic nomination for governor. The day before the primary, a station broadcast an editorial six times, strongly criticizing the candidate's record as a prosecutor but making no mention of the primary election for governor or the fact that he was a candidate in it. The licensee of the station denied that the editorial was one opposing the prosecutor's candidacy for governor. The station acknowledged, however, that the prosecutor's record was a controversial issue with "political implications" and that the broadcaster had been aware of the "political significance of the editorial." The Commission ruled that the editorial was a political one opposing the prosecutor's candidacy for governor, because the station took "a partisan position on a politically significant issue which is readily and clearly identified with a legally qualified candidate." The editorial "inferentially. . . challenged the qualifications of this official to obtain nomination as his party's gubernatorial candidate." Also, "The editorial was broadcast on election eve, even though. . . the issue was one of public concern long before. . ." <sup>217</sup> The Commission found a difference between this and the *Stephen M. Slavin* case above in that the editorial in this case dealt with the candidate's "capacity to function as a public official," whereas in the *Slavin* case "it was the need for legislation to control government corruption that the station sought to endorse, not the candidacy of Senator Berning *per se*." The Commission noted, as another distinction, the fact that in the *Slavin*

<sup>215</sup>*Bel Air Broadcasting Co., Inc.* 47 FCC 2d 985 (1974).

<sup>216</sup>*Stephen M. Slavin*, 45 FCC 2d 639, 641-42 (1973).

<sup>217</sup>*Taft Broadcasting Co.*, 53 FCC 2d 126, 132, 133 (1975).





case the station had broadcast denials that an endorsement had been intended.

### **Personal Attacks**

87. Since there are exceptions in the personal attack rule for attacks by candidates and their campaign associates against other candidates and their associates, as well as attacks on anyone that occur during "uses" of stations by candidates, complaints do not arise very often in political campaigns about violation of this rule. However, attacks sometimes take place which do not come within the exemptions, as will be discussed briefly below. The personal attack rule, is found in §73.1920. It is as follows:

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked:

- (1) Notification of the date, time and identification of the broadcast;
- (2) A script or tape (or an accurate summary if a script or tape is not available) of the attack; and
- (3) An offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this Section shall not apply to broadcast material which falls within one or more of the following categories;

- (1) Personal attacks on foreign groups or foreign public figures;
- (2) Personal attacks occurring during uses by legally qualified candidates;
- (3) Personal attacks made during broadcasts not included in (b)(2) and made by legally qualified candidates, their authorized spokespersons, or those associated with them in the campaign, on other such candidates, their authorized spokespersons or persons associated with the candidates in the campaign; and

(4) Bona fide newscasts, bona fide news interviews, and on-the-spot coverage of bona fide news events, including commentary or analysis contained in the foregoing programs.

(c) The provisions of paragraph (a) of this Section shall be applicable to editorials of the licensee, except in the case of non-commercial educational stations since they are precluded from editorializing (Section 399(a), Communications Act).

Note that the rule applies only to attacks on "the honesty, character, integrity or like personal qualities of an identified person or group." Criticism of a person's ability or intelligence is not a personal attack for purposes of the rule. The attack must be upon his honesty, character, integrity or similar qualities involving moral turpitude. Thus, saying that a legislator is ignorant and always votes the wrong way is not a personal attack under the rule, but saying that he has taken a bribe for his vote is a personal attack. In order for the rule to apply, the attack must be made during the discussion of a controversial issue of public importance. Finally, the rule not only exempts attacks by candidates and their associates on other candidates and their associates; it also exempts all attacks that occur during "uses" by candidates and all attacks made during newscasts, news interviews and on-the-spot coverage of news events. The news exemption includes commentary or analysis when it is broadcast in an exempt news program. However, station editorials and news documentaries are not exempt.



## Examples of Personal Attack Rulings

88. The personal attack rule is a part of the Fairness Doctrine. A few illustrations of the way the rule applies to political campaigns are given below:

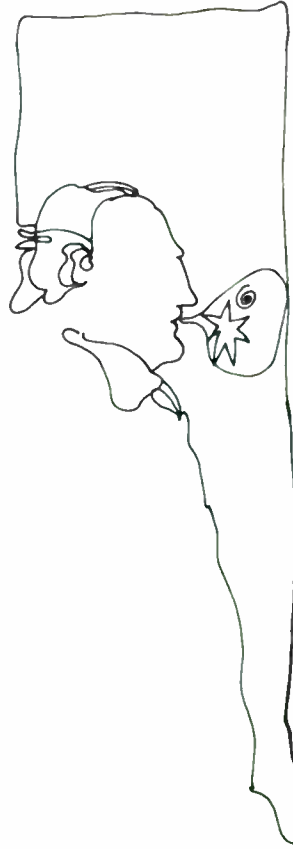
(a) *Candidate himself need not be given response time.* If a personal attack on a candidate is broadcast, the station can comply with the rule by providing time for response by a spokesman for the candidate rather than the candidate himself. If the candidate himself appeared, he would be making a "use" of the station and under Section 315(a) of the Act his opponents would be entitled to equal opportunities. Although the personal attack rule does not state specifically that time for a candidate's spokesman will be sufficient (as does the editorializing rule), the Commission made this clear when it adopted both rules.<sup>218</sup>

(b) *"Mental Gymnastics" charge is not an attack.* A station accused a candidate of "strange mental gymnastics" because he and other county supervisors had voted for a bond issue to enlarge the county government's office space on the grounds that more space was needed, but at about the same time gave free space in the county building for a U.S. Senator from that state. The Commission found that the station licensee had not been unreasonable in deciding that no personal attack had been made "because the editorial questioned the wisdom of the supervisors' positions and not their honesty, character or integrity."<sup>219</sup>

(c) *"Garrulous grand dame" reference not a personal attack.* A station referred to a local woman as "the garrulous grand dame of Billings radio talk shows" and "pistol packing momma." The object of these remarks alleged a personal attack that might have affected an election. The Commission refused to find the station wrong in denying that a

personal attack was made. It said, "The statements do not appear to allege either a deliberate falsehood or to question your character or integrity."<sup>220</sup>

(d) *Honesty and integrity.* A station broadcast charges that a candidate's "veracity leaves something to be desired" and that his "constituents had best assess his integrity or lack of it." This is the *Port Jervis Broadcasting Company* case cited in paragraph 86(a). The Commission imposed a forfeiture on the licensee for violation of the "72-hour rule" for political editorials. The broadcasts also were personal attacks on the candidate, since they questioned his veracity and his integrity.



<sup>218</sup>In the Matter of Amendment of Part 73 of the Rules, 8 FCC 2d 721 (1967).

<sup>219</sup>John B. Walsh (KOGO-TV), 31 FCC 2d 726, 727 (1971).

<sup>220</sup>Mrs. Frank Diesz (KOOK-TV), 27 FCC 2d 859 (1971).

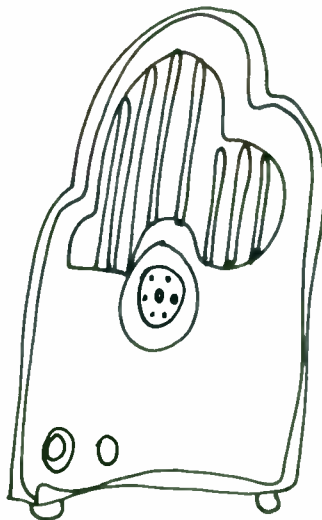
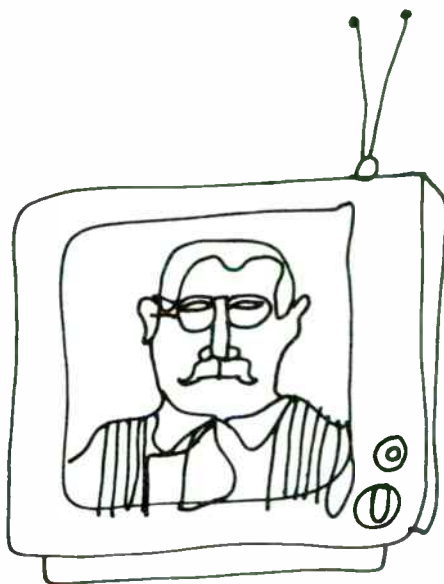


## The Fairness Doctrine in Political Broadcasting

89. Some people think that the Fairness Doctrine is the same as the so-called "equal time" law, which is explained above under the heading "What Are 'Equal Opportunities'?" Actually, the Fairness Doctrine is quite different. First, it deals with controversial public issues, whereas the equal opportunities law as set forth in Section 315(a) of the Communications Act refers to *persons* (that is, candidates). Second, the Fairness Doctrine does not require "equal time" for contrasting views on a controversial issue. All it requires is (i) that the broadcaster devote a reasonable amount of time to the discussion of the most important issues in his area and (ii) that if he presents one side of such an issue, he give reasonable opportunity for presenting contrasting views on that issue. He need not present contrasting views in a single broadcast, or even the same series of broadcasts, provided he presents them somewhere in his overall programming. Thus, if a station presents an editorial favoring one side of an issue or a person favoring that side, it need not present a specific "counter-editorial" or any particular person to give the opposing viewpoint, as long as it presents contrasting views elsewhere in its overall programming. The licensee of the station is given discretion to choose the issues to be discussed, the program formats to be used and the persons who will present the contrasting views. The Commission will review the licensee's decision only to decide if they were reasonable and made in good faith.<sup>221</sup>

90. There are two exceptions to the statement above that a station need not present any particular person to give "the other side" of an issue. These two exceptions are covered by Commission rules which deal with political editorializing and personal attacks.

91. Although most inquiries and complaints in political campaigns concern appearances by candidates themselves which are "uses" of stations, to which the Fairness Doctrine does not apply, there are some situations to which it does apply, as explained in the following paragraphs.



<sup>221</sup>Fairness Report, 48 FCC 2d 1 (1974).



## Fairness Doctrine Examples

92. The following are some specific examples of how the Fairness Doctrine does or does not apply to political campaigns:

(a) *It does not apply to "uses" by candidates.* The Fairness Doctrine does not apply to "uses" of broadcast stations by legally qualified candidates for public office. The Commission has stated:

In Section 315(a), Congress has specified that equal opportunities shall be applicable to legally qualified candidates and that *in other instances* "fairness" be applicable—that is, that there be afforded "... reasonable opportunity for the discussion of conflicting viewpoints on issues of public importance."<sup>222</sup> [Emphasis added.]

This policy was recently affirmed by the Commission in a rulemaking proceeding which also amended the personal attack rule so as to exempt attacks made during "uses" by legally qualified candidates.<sup>223</sup>

(b) *It does apply to news coverage of candidates.* The Fairness Doctrine applies to appearances by candidates on programs which are not "uses" of a station, as listed in Section 315(a) of the Act and in paragraphs 38 to 39 of this Primer. It also applies to news coverage of candidates in general. The controversial public issue in a political race is who among the competing candidates for nomination or election to an office should be chosen. The individual candidates represent "contrasting viewpoints" on the overall issue of which should be elected, rather than each candidate being a controversial issue himself. Therefore, under the Fairness Doctrine a broadcaster is called upon to make a reasonable, good faith judgment on the significance of a particular candidate on this basis to decide how much coverage should be given to his candidacy and campaign activities. The

broadcaster is not required to give as much coverage to "fringe" party candidates as major party candidates.<sup>224</sup>

In one case, a minor party candidate received 14 minutes in news coverage or in exempt personal appearances, compared to 40 minutes for each of the two major party candidates. The Commission found this reasonable in view of the small vote polled by the minor party's candidate in that district in the previous election.<sup>225</sup>

(c) *Praise or criticism of candidates by commentator.* When an employee of a station, such as a commentator, criticizes a candidate or praises his opponent, the Fairness Doctrine comes into play.<sup>226</sup>

(d) *Purchase of time by Independent Committee.* A Committee which registered with the Federal Election Commission as an "independent expenditure committee" sought to buy time on several stations to broadcast advertisements opposing the election of a senatorial candidate. Three stations refused to broadcast the spots citing a policy of rejecting paid ads that present one side of a controversial issue of public importance. The Commission ruled that the Committee was not entitled to reasonable access, equal opportunities, or quasi-equal opportunities.<sup>227</sup>

<sup>222</sup>First Fairness Report, 36 FCC 2d 40, 47 (1972); see also, *Gloria W. Sage (WHEN-TV)* 62 FCC 2d 136 (1976).

<sup>223</sup>Report and Order, 44 Fed Reg 45951 (1979).

<sup>224</sup>*Lawrence L.C. Smith*, 40 FCC 549 (1963); *Ms. Penny Manes*, 38 FCC 2d 308 (1972); reconsideration denied, 42 FCC 2d 878 (1973); *Robin Flicker*, 65 FCC 2d 657 (1977); *American Independent Party and Eugene McCarthy*, 62 FCC 2d 4 (1976); *U.S. Labor Party* 57 FCC 2d 1273 (1976).

<sup>225</sup>*Harvey Michelman (WNBC-TV)*, 38 FCC 2d 374 (1972).

<sup>226</sup>*Richard K. Kelly, Jr.*, 40 FCC 2d 415 (1973).

<sup>227</sup>*You Can't Afford Dodd Committee*, 78 FCC 2d 658 (1980), review denied, 81 FCC 2d 579 (1960).



### The “Zapple Doctrine”

93. The Commission applies the Fairness Doctrine in a special way to one kind of political situation—that is, where Candidate A or his supporters buy time in which to support A or criticize his opponent, but A does not appear on the broadcast in person. If supporters of Candidate B then seek to buy a comparable amount of time they will be entitled to do so although the Fairness Doctrine does not usually require comparable amounts of time for contrasting views on an issue. Similarly, if A’s supporters have obtained free time, B’s supporters must be given free time if they ask for it. Although in this situation the candidates themselves would not appear and the broadcasts would not be “uses,” the Commission recognizes that such broadcasts are in “the political arena” and that a “quasi-equal opportunities” situation arises to which the Fairness Doctrine should be applied in a way that has approximately the same result as the equal opportunities requirement for appearances by candidates themselves.<sup>228</sup> The Commission has stated that the so-called “Zapple Doctrine” is “a particularization of what the public interest calls for in certain political broadcast situations . . .” It also has explained that this policy applies only to major political parties.<sup>229</sup>

In a recent ruling the Commission emphasized that *Zapple* is limited to formal campaign periods. Thus, it only applies where there are legally qualified candidates, and reflects the intent of Congress to confine special treatment of political discussion to distinct, identifiable periods. Political discussion outside of campaign periods would be subject to general Fairness Doctrine principles. Any other interpretation would create the anomalous result of supporters having greater rights than the candidates themselves.<sup>230</sup>

94. The Commission has ruled that the *Zapple* Doctrine does *not* apply to appearances of candidate supporters on the categories of bona fide news programming which are exempt from Section 315 requirements. The determination of whether news programming is bona fide depends upon the broadcaster’s intent, not the intent of the candidate chosen for news coverage.<sup>231</sup>



<sup>228</sup>*Nicholas Zapple*, 23 FCC 2d 707 (1970).

<sup>229</sup>*First Fairness Report*, 36 FCC 2d 40, 47-50 (1972).

<sup>230</sup>*Gaylord Broadcasting Co.*, \_\_\_ FCC 2d \_\_\_, (FCC 83-528, November 17, 1983).

<sup>231</sup>*Democratic National Committee*, 91 FCC 2d 1170 (1982).



## Identifying Sponsor of Broadcast

95. Section 317 of the Communications Act states that when a station is paid to broadcast anything, the station must announce that the broadcast is paid for, and who paid for it. The announcement must be made at the time the program is broadcast. The law applies to paid political broadcasts as well as to other sponsored programs and spots. The sponsorship identification rules are in §73.1212. There have been many misunderstandings of what the Act and the rules require in sponsorship identification.

96. Examples of how the sponsorship identification requirements apply to political broadcasts follows:

(a) Merely stating that "The following is a paid political announcement" does not comply, because it doesn't say *who* paid for it.

(b) Merely adding a statement at the end of a spot or program that says, "Authority, Blank Campaign Committee, John Smith, Treasurer" does not comply because it doesn't say that *anyone* paid for it.

(c) Giving the sponsorship identification in such small type on television that the average viewer cannot read it, or leaving it on the screen too briefly to be read, does not comply because in neither case is the public informed that the program or spot is paid for and by whom.<sup>232</sup>

(d) *Advertising for or against a ballot proposition.* The Fairness Doctrine applies to ballot advertising, which ensures that the public will not be left uninformed as to such ballot issues. The Commission will not intervene in cases alleging false and misleading statements regarding controversial issues of public importance. Each licensee may exercise its own judgment on such issues. Intervention by the Commission, where false and misleading statements are alleged in

such cases, might create the impression that the Commission is advocating one viewpoint or attempting to judge the truth or falsity of material being broadcast on either side of a currently controversial issue—a position which would be inappropriate for the government licensing agency.<sup>233</sup>

(e) An announcement that was paid for by a candidate which said that the candidate was providing free taxi service to take anyone to the polls "to vote for the candidate of your choice" should have been announced as paid for, even though the licensee of the station considered the announcements "non-political."<sup>234</sup>

(f) A station broadcasts a list of candidates for various local public offices without revealing that the list was not complete or that the candidates named on the list had paid the station to include them. The Commission ruled that this was a violation of the sponsorship identification requirement.<sup>235</sup>

(g) Announcements for a candidate ended as follows: "Paid for by a Lot of People Who Want to See Sam Grossman Elected to the United States Senate." Although "A Lot of People", etc. was the actual name of the committee that paid for the spots, the Commission ruled that this language did not comply with the sponsorship identification statute and rule because it did not achieve the basic purpose behind the sponsorship identification requirements, which is that the public is entitled to know by whom it is being persuaded. The language used here "was so general that it did not convey to listeners and viewers the fact that the announcements were sponsored by a specific entity, i.e., a committee supporting Mr. Grossman's candidacy."<sup>236</sup>

(h) If a station customarily computes the time needed for sponsorship identification as part of the time purchased

<sup>233</sup>Honorable Ronald Reagan, 33 FCC 2d 314 (1972).

<sup>234</sup>Letter to Station WBFN, July 9, 1976.

<sup>235</sup>Starkville Broadcasting Co., 45 FCC 2d 201 (1974).

<sup>236</sup>Station KOOL-TV, 26 FCC 2d 42 (1970).

<sup>232</sup>Application of Sponsorship Identification Rules to Political Broadcasts, 66 FCC 2d 302 (1977).



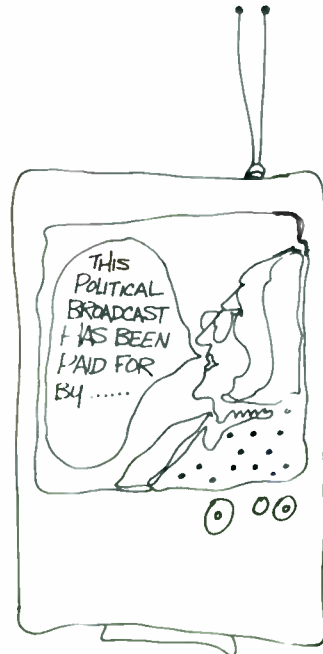
by a commercial advertiser, it is allowed to follow the same practice with paid political programs or announcements. Thus, stations which require that a one-minute commercial advertising spot include sponsorship identification within the one minute that was paid for may make the same requirements for paid political announcement or program.

(i) Although Section 317 of the Communications Act uses the phrase "paid for," the Commission's rules state that "sponsored" will be considered to have the same meaning. Section 73.1212(a)(1).

### Material Furnished Free

97. Section 73.1212(d) of the rules requires that when any "film, record, transcription, talent, script or other material or service of any kind is furnished . . . as an inducement to broadcasting . . . any political broadcast matter [or matter dealing with a controversial public issue] . . . an announcement shall be made both at the beginning and conclusion of such broadcast . . ." that the film record, etc. "has been furnished in connection with transmission of such . . . matter." (Only one announcement, either at the beginning or end of the broadcast, is required if the program is no more than five minutes long.) This rule means, of course, that even if someone doesn't pay for the *time* in which some kinds of material are broadcast, the station must announce that he furnished the material if he did so. This applies not only to political candidates furnishing recordings, film, videotapes, etc., but to anyone's furnishing them if they deal either with political subjects or controversial public issues. The Commission has ruled that an announcement is necessary that program materials has been furnished to a station not only when a party Congressional committee furnishes previously prepared film or audiotape of statements of Congressmen to stations, but when the committee only makes available to the station a camera or sound recording crew so that a representative of the sta-

tion himself can conduct an interview with a Congressional member of the party.<sup>237</sup> When members of Congress furnish stations with their weekly or monthly taped or filmed reports to their constituents, the same requirement exists that the station announce that the material was furnished to it by the Congressman. Instead of sending tape or film of their comments on political or controversial issues to stations, some public officials and other persons retain the taped messages in their offices, but set up telephone playback systems whereby a broadcaster dialing a certain number can receive by telephone the pre-recorded statement of the official or other persons for simultaneous or delayed broadcast. The same principle applies to this arrangement as to the *Sukow* case above, since the person is furnishing a "service" to a station as an inducement to broadcast his material. However, Congress has indicated that no announcement need be given when mere mimeographed or printed press releases are furnished to stations.



<sup>237</sup>Gary M. Sukow, 36 FCC 2d 668 (1972).



## FCC and FEC Regulations are Different

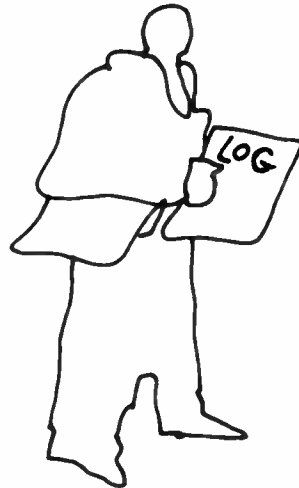
98. Different laws govern the Federal Communications Commission and the Federal Election Commission. The Communications Act applies to licensees of broadcast stations. Section 317 of that Act requires that *stations* broadcast sponsorship identification announcements of the kinds discussed above. On the other hand, the Federal Election Campaign Act and the FEC rules apply to *candidates*, their committees and other buying political broadcast time. The announcements required by the FECA are designed to reveal whether a paid message supporting a candidate or opposing another was authorized by a candidate. The FCC and the FEC released a joint Public Notice on June 19, 1978, 69 FCC 2d 1129, which gives examples of ways in which both the FCC's requirements and the FEC's requirements may be met in a single announcement. For example, if a program or announcement is both paid for and authorized by a candidate or his committee, an announcement that it was paid for or sponsored by the candidate or committee will be sufficient, since authorization by the candidate is assumed and need not be stated. However, when a third party pays for a program or announcement authorized by a candidate or his committee, an announcement like this is required:

Paid for (or sponsored) by (name of sponsor/payor) and ~~not~~ authorized by (name of candidate or committee).

If the program or announcement is paid for by a third party but *not* authorized by any candidate or any candidate's committee, an announcement with both FCC and FEC requirements:

Paid for (or sponsored) by (name of sponsor payor) and not authorized by any candidate.

The above announcements are merely examples of ways in which both statutes can be complied with in a single announcement. Broadcast licensees are responsible for making sure that an announcement is given revealing who paid for or sponsored an announcement or program, and candidates or their committee (or an outside party paying for the broadcast) are responsible for disclosing whether the program or announcement was authorized by a candidate or his committee.







## Miscellaneous Rules and Policies

### Logging Political Programs

99. The rules require that stations record many kinds of information in their program logs about the programs they broadcast.<sup>238</sup> This Primer will discuss only the parts of the logging rules that deal specifically with political broadcasts. They are:

- (a) The requirement in subsection (b)(1)(v) that a log entry be made for "each program presenting a political candidate, showing the name and political affiliation [party] of such candidate."<sup>239</sup> This requirement applies both to programs and spot announcements. It is in addition to the general requirement that for all sponsored programs and announcements, political or otherwise, the broadcaster must record in the log the name of the sponsor of the program or announcement.
- (b) The general logging rules require that an entry be made "classifying each program as to type." Political programs, one of the types, are defined in the NOTES at the end of the program logging rules as follows: Political programs (POL) include those which present candidates for public office or which give expressions (other than in station editorials) to views on such candidate or on issues subject to public ballot. (Political spot announcements need not be classified in the logs "as to type.")

With certain exceptions that are explained in the rules, program logs must be made available for public inspection, but not until 45 days after the date of the programs that they cover.<sup>240</sup>

### Computing Commercial Time

100. Computing total commercial time in political broadcasts depends on whether they are spot announcements or programs. If they are spot announcements they are treated in the program logs like any other commercial announcement, and the time used for paid political and commercial advertising spots is added together to arrive at the total time devoted to commercials in any clock hour. However, when a candidate or his supporters buy time for a program—perhaps a speech by the candidate or a panel discussion of the issues in the campaign—the station does not need to compute *any* commercial time for the program. The Commission decided years ago that since it is usually impossible to separate the so-called "commercial" and "non-commercial" parts of paid political and religious programs and since the Commission didn't want to discourage stations from carrying either kind of program by requiring them to be counted as entirely commercial, it would make an exception for them in computing commercial content of sponsored programs. (The exception does not include time actually devoted to selling a commercial product or service, such as a book or album of religious music.)<sup>241</sup>

<sup>238</sup>Section 73.1810 of the Commission's Rules.

<sup>239</sup>If the candidate is an independent, the log entry should indicate that fact.

<sup>240</sup>See Section 73.1850, "Availability of logs and records."

<sup>241</sup>See *Amendment of §§73.112, etc. 11 FCC 2d 992, 993 (1968).*



### **“Political File”**

101. Section 73.1940(d) of the rules requires broadcasting stations to:

... Keep and permit public inspection of a complete record (political file) of all requests for broadcast time made by or on behalf of candidates 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. When free time is provided for use by or on behalf of such candidates, a record of the free time provided shall be placed in the political file. All records required by this paragraph shall be placed in the political file as soon as possible and shall be retained for a period of two years.

(Section 76.205(d) of the cablecasting rules contained the same requirements.)

The language of the political file rule was recently revised by the Commission to make clear the fact that a broadcaster or cable operator must record in the file not only “requests” for time but gifts of time, whether or not the time is given as the result of a request. The language also was revised to state that all records of requests for time or gifts or sales of it must be entered in the political file as soon as possible throughout a political campaign. Otherwise, candidates might be denied their rights to equal opportunities because they might not learn within the seven-day period that their opponents had bought or been given time on stations or cable systems. In clarifying the rule, the Commission also explained that the rule applies not only to time used by candidates themselves but also to time in which others speak on their behalf.

### **No Indemnity Agreements Can be Required**

102. A station may not require a candidate to sign an agreement to indemnify it against possible liability resulting from the candidate’s proposed broadcast. The U.S. Supreme Court held in the *WDAY* case<sup>242</sup> that a station is not liable for libelous statements broadcast by a candidate. Therefore, an indemnification agreement is not needed to protect a station and requiring a candidate to sign such an agreement in advance “is likely to inhibit a candidate’s use of a broadcast facility and possibly affect his decision on whether to utilize a station to address the public.”<sup>243</sup>

### **Political Ads on UHF Translators**

103. UHF translator stations are allowed to originate visual slide announcements not exceeding 30 seconds per hour which contain commercial advertising. Although “the nature of translators and the limitations on local originations makes it extremely difficult for translator licensees to comply with Section 315. . . and the rules relating to political advertising. . . if UHF translator licensees originate political advertisements “they will be expected to comply strictly with the provisions of Section 315. . . .”<sup>244</sup>

<sup>242</sup>*Farmers Educational and Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959).

<sup>243</sup>*Senator Hubert H. Humphrey*, 37 FCC 2d 576, 577 (1972).

<sup>244</sup>*Public Notice, Acceptance of Political Advertising by UHF Translator Licensees*, 62 FCC 2d 896 (1976).

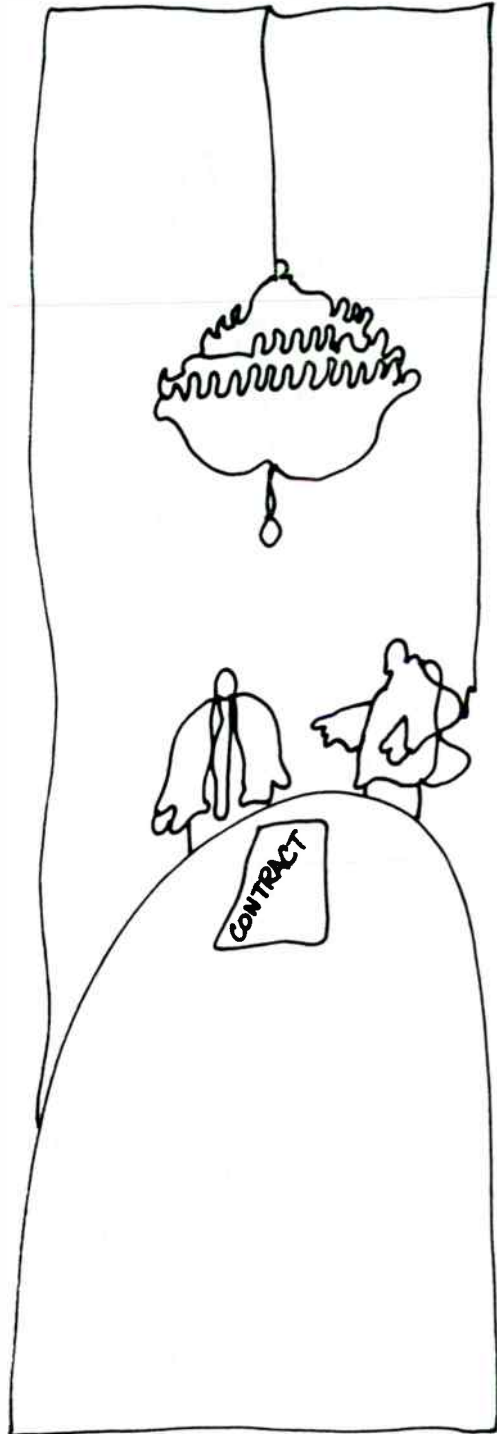


## Disputes over Terms or Performance of Contract

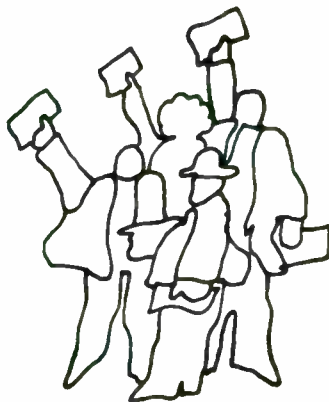
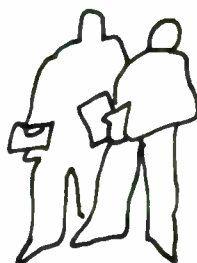
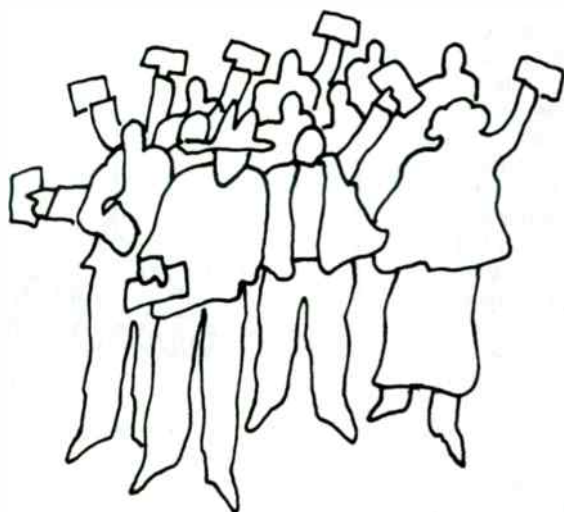
104. Disputes sometimes develop between broadcasting stations and sponsors over whether the station broadcast as many spots as it contracted to broadcast, whether the spots were broadcast in the time periods promised to the advertiser, whether the announcer read the continuity correctly, etc. The FCC has always taken the position that it cannot settle disputes over contracts between the more than 9,500 broadcasting stations in the United States and their advertisers. Such disputes can best be settled by negotiations between the two parties or in civil actions in the local courts. This principle applies to disputes between stations and candidates as well as other advertisers. If there is evidence of fraud on the part of the station licensee or of an effort to discriminate against a candidate, the Commission will investigate, but it will not become involved in the usual contract dispute.<sup>245</sup> (For a discussion of a station's furnishing "make-good" time when a program or announcement is omitted or its broadcast is seriously marred by technical problems, see paragraph 56.

Adopted: July 20, 1978

Federal Communications Commission,  
**William J. Tricarlico, Secretary**



<sup>245</sup>KAIT-TV, 62 FCC 2d 138 (1976); Letter to Mrs. Nancy Brown, February 25, 1977.





## Appendix.—The Commission's Rules and Regulations in 47 CFR Chapter I on Political Broadcasting and Cablecasting

105. Following are the rules for broadcasts by candidates for public office:

§73.1940 *Broadcasts by candidates for public office.*

(a) *Definitions.*(1) A legally qualified candidate for public office is any person who—

- (i) has publicly announced his or her intention to run for nomination or office;
- (ii) is qualified under the applicable local state or federal law to hold the office for which he or she is a candidate; and,
- (iii) has met the qualifications set forth in either subparagraphs (2), (3), or (4), below.

(2) A person seeking election to any public office including that of President or Vice President of the United States, or nomination for any public office except that of President or Vice President, by means of a primary, general or special election, shall be considered a legally qualified candidate if, in addition to meeting the criteria set forth in subparagraph (1) above, that person—

- (i) has qualified for a place on the ballot, or
- (ii) has publicly committed himself or herself to seeking election by the write-in method and is eligible under applicable law to be voted for by sticker, by writing in his or her name on the ballot or by other method, and makes a substantial showing that he or she is a bona fide candidate for nomination or office.

Persons seeking election to the Office of President or Vice President of the United States shall, for the purposes of the Communications Act and the rules thereunder, be considered legally

qualified candidates only in those states or territories (or the District of Columbia) in which they have met the requirements set forth in paragraph (a)(1) and (2) of this rule: *Except*, That any such person who has met the requirements set forth in paragraph (a)(1) and (2) in at least 10 states (or nine and the District of Columbia) shall be considered a legally qualified candidate for election in all states, territories and the District of Columbia for purposes of this Act.

(3) A person seeking nomination to any public office except that of President or Vice President of the United States, by means of a convention, caucus or similar procedure, shall be considered a legally qualified candidate if, in addition to meeting the requirements set forth in paragraph (a)(1) above, that person makes a substantial showing that he or she is a bona fide candidate for such nomination: *Except*, That no person shall be considered a legally qualified candidate for nomination by the means set forth in this paragraph prior to 90 days before the beginning of the convention, caucus or similar procedure in which he or she seeks nomination.

(4) A person seeking nomination for the office of President or Vice President of the United States shall, for the purposes of the Communications Act and the rules thereunder, be considered a legally qualified candidate only in those states or territories (or the District of Columbia) in which, in addition to meeting the requirements set forth in paragraph (a)(1) above—

- (i) he or she, or proposed delegates on his or her behalf, have qualified for the primary or Presidential preference ballot in that state, territory or the District of Columbia, or
- (ii) he or she has made a substantial showing of bona fide candidacy for such nomination in that state, territory or the District of Columbia; *Except*, That any such person meeting the requirements set forth in paragraph (a)(1) and (4) in at least ten states (or nine and the District of Columbia) shall be considered a legally qualified candidate



for nomination in all states, territories and the District of Columbia for purposes of this Act.

(5) The term "substantial showing" of bona fide candidacy as used in paragraphs (a)(2), (3) and (4) above means evidence that the person claiming to be a candidate has engaged to a substantial degree in activities commonly associated with political campaigning. Such activities normally would include making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign headquarters (even though the headquarters in some instances might be the residence of the candidate or his campaign manager). Not all of the listed activities are necessarily required in each case to demonstrate a substantial showing, and there may be activities not listed herein which would contribute to such a showing.

(b) *Charges for use of stations.* The charges, if any, made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed (1) during the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period, and

(2) at any other time, the charges made for comparable use of such station by other users thereof. The rates, if any, charged all such candidates for the same office shall be uniform and shall not be rebated by any means direct or indirect. A candidate shall be charged no more than the rate the station would charge if the candidate were a commercial advertiser whose advertising was directed to promoting its business within the same area as that encompassed by the particular office to which such person is a candidate. All discount privileges otherwise offered by a station to commercial advertisers shall be

available upon equal terms to all candidates for public office.

(3) This paragraph shall not apply to any station which is not licensed for commercial operation.

(c) *Discrimination between candidates.* In making time available to candidates for public office, no licensee shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; not shall any licensee make any contract or other agreement which shall have the effect of permitting any legally qualified candidate for any public office to broadcast to the exclusion of other legally qualified candidates for the same public office.

(d) *Records, inspection.* Every licensee shall keep and permit public inspection of a complete record (political file) of all requests for broadcast time made by or on behalf of candidates 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. When free time is provided for use by or on behalf of such candidates, a record of the free time provided shall be placed in the political file. All records required by this paragraph shall be placed in the political file as soon as possible and shall be retained for a period of two years. See Sections 1.526 and 1.527 of this chapter.

(e) *Time of request.* A request for equal opportunities must be submitted to the licensees within one week of the day on which the first prior use, giving rise to the right of equal opportunities, occurred: *Provided*, however, That where the person was not a candidate at the time of such first prior use, he shall submit his request within one week of the first subsequent use after he has become a legally qualified candidate for the office in question.

(f) *Burden of proof.* A candidate requesting equal opportunities of the



licensee, or complaining of non-compliance to the Commission shall have the burden of proving that he or his opponent are legally qualified candidates for the same public office.

## Political Cablecasting Rules

106. Following are the rules for origination cablecasts by candidates for public office:

### §76.5 Definitions.

Sections (a) thru (x) are omitted.

(y) *Legally qualified candidate.* (1) Any person who—

- (i) has publicly announced his or her intention to run for nomination or office;
- (ii) is qualified under the applicable local, state or federal law to hold the office for which he or she is a candidate; and,
- (iii) has met the qualifications set forth in either subparagraphs (2), (3), or (4), below.

(2) A person seeking election to any public office including that of President or Vice President of the United States, or nomination for any public office except that of President or Vice President, by means of a primary, general or special election, shall be considered a legally qualified candidate if, in addition to meeting the criteria set forth in subparagraph (1) above, that person:

- (i) has qualified for a place on the ballot, or
- (ii) has publicly committed himself or herself to seeking election by the written method and is eligible under applicable law to be voted for by sticker, by writing in his or her name on the ballot or by other method, and makes substantial showing that he or she is a bona fide candidate for nomination or office.

Persons seeking election to the office of President or Vice President of the United States shall, for the purposes of the Communications Act and the rules thereunder, be considered legally qualified candidates only in those states or territories (or the District of Columbia) in which they have met the requirements set forth in paragraphs (y)(1)

and (2) of this rule; *Except*, That any such person who has met the requirements set forth in paragraph (y)(1) and (2) in at least 10 states (or nine and the District of Columbia) shall be considered a legally qualified candidate for election in all states, territories and the District of Columbia for purposes of this Act.

(3) A person seeking nomination to any public office except that of President or Vice President of the United States, by means of a convention, caucus or similar procedure, shall be considered a legally qualified candidate if, in addition to meeting the requirements set forth in paragraph (y)(1) above, that person makes a substantial showing that he or she is a bona fide candidate for such nomination; *Except*, That no person shall be considered a legally qualified candidate for nomination by the means set forth in this paragraph prior to 90 days before the beginning of the convention, caucus or similar procedure in which he or she seeks nomination.

(4) A person seeking nomination for the office of President or Vice President of the United States shall, for the purposes of the Communications Act and the rules thereunder, be considered a legally qualified candidate only in those states or territories (or the District of Columbia) in which, in addition to meeting the requirements set forth in paragraph (y)(1), above (i) he or she, or proposed delegates on his or her behalf, have qualified for the primary or Presidential preference ballot in that state, territory or the District of Columbia, or

(ii) he or she has made a substantial showing of bona fide candidacy for such nomination in that state, territory or the District of Columbia; *Except*, That such person meeting the requirements set forth in paragraph (y)(1) and (4) in at least 10 states (or nine and the District of Columbia) shall be considered a legally qualified candidate for nomination in all states, territories and the District of Columbia for purposes of this Act.

(5) The term "substantial showing" of



bona fide candidacy as used in paragraphs (y)(2), (3), and (4) above means evidence that the person claiming to be a candidate has engaged to a substantial degree in activities commonly associated with political campaigning. Such activities normally would include campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee, and establishing campaign headquarters (even though the headquarters in some instances might be the residence of the candidate or his campaign manager). Not all of the listed activities are necessary required in each case to demonstrate a substantial showing, and there may be activities not listed herein which would contribute to such a showing.

§76.205 Origination cablecasts by candidates for public office.

(a) *General requirements.* If a cable television system operator shall permit any legally qualified candidate for public office to use the system's origination channel(s) and facilities therefor, the system operator shall afford equal opportunities to all other such candidates for that office: *Provided, however,* That such cable television system operator shall have no power of censorship over the material cablecast by any such candidate; *And provided, further,* That an appearance by a legally qualified candidate on any;

- (1) Bona fide newscast,
- (2) Bona fide interview,
- (3) Bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
- (4) On-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of the facilities of the system within the meaning of this paragraph.

NOTE: The Fairness Doctrine is applicable to these exempt categories. See §76.209.

(b) *Charges for use of cable systems*  
The charges, if any, made for the use

of any cable television system by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed;

(1) during the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the cable television system for the same class and amount of time for the same period, and

(2) at any other time the charges made for comparable use of such system by other users thereof. The rates, if any, charged all such candidates for the same office shall be uniform and shall not be rebated by any means direct or indirect. A candidate shall be charged no more than the rate the cable television system would charge if the candidate were a commercial advertiser whose advertising was directed to promoting its business within the same area as that encompassed by the particular office for which such person is a candidate. All discount privileges otherwise offered by a cable television system to commercial advertisers shall be available upon equal terms to candidates for public office.

(c) *Discrimination between candidates.* In making time available to candidates for public office, no cable television system operator shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any cable television system operator make any contract or other agreement which shall have the effect of permitting any legally qualified candidate for any public office to cablecast to the exclusion of other legally qualified candidates for the same public office.





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## V

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## **Z**

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