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## Political Broadcasting 101

Jeffrey Gee  
703-812-0511  
gee@fhhlaw

As the country segues from primary season to general election season, now is a good time for broadcasters to check their policies and procedures on political advertising to ensure that their stations remain in compliance during the coming months. The broadcast of political messages is covered by a complex set of laws and regulations and *all* station personnel involved with programming, sales and traffic should be aware that decisions about what ads to run, when to run them and how much to charge for them may have serious consequences for the station.

A complete review of the federal political broadcasting rules is far beyond the scope of our humble Memo to Clients. Nevertheless, what follows is a crash course highlighting a few issues that broadcasters should be thinking about before the political broadcast season begins in earnest.

### *Who's who?*

One of the first things stations need to do is determine which elections are likely to generate requests for advertising time. On November 4, 2008, the general *federal* election will include races for the offices of the President, Vice President, all of the House of Representatives and one-third of the Senate. Several state and local offices also will be up for election on November 4. Your local board of elections should be able to give you a list.

Once you know which offices are up for election, you will need to decide which of those races will be permitted to buy time on your station. *All* candidates for *federal* offices are entitled to “reasonable access” to your station. That is, you *must* sell time (within certain limits) to the candidates for President, Vice President and the US Congress.

By contrast, candidates for *state* and *local* office have *no absolute right* to reasonable access – stations can refuse to sell time for such races. If, however, a station sells ads to one candidate for a particular office, the FCC’s “equal opportunities” rule requires that station to sell ads to all qualified candidates for that particular office. Stations may pick

and choose among the state and local races, however. For example, a station could choose to accept ads from state senate candidates but refuse them from county council candidates.

Non-candidate advertising – advertising from groups (including “public interest” groups) or individuals other than candidates or their committees – are never entitled to access as a matter of right. Stations are free to accept or reject “issue ads” as they see fit, although certain liabilities and record-keeping requirements may be attached to accepting such ads.

### ***What’s what?***

One of the most important things the station will do prior to the election season is prepare its political disclosure statement – a written statement that will be provided to candidates that describes the station’s political ad rates, time classes, and sales practices. The disclosure statement is not technically required by the FCC’s rules, but it is vitally important that every station is clear, upfront and consistent about the types of advertising time it will sell, which races will be allowed to buy time and the rates the station will be charging for the time. Obviously, a written statement will be infinitely helpful to station personnel in this regard and can also serve to avoid disputes about what information may or may not have been relayed by station personnel in less formal, oral interactions.

The disclosure statement should be kept up-to-date, and all personnel involved with the sale of advertising time should be familiar with the disclosure statement and adhere to the policies set forth in the disclosure statement at all times. Sophisticated political campaigns keep a close eye on how much time their opponents buy and how much they pay for the time. Any discrepancies between the rates or access given to different candidates will almost certainly subject a station to complaints. In addition to information on the classes of time that may be purchased and the rates that will be charged for each class, the disclosure statement should include information on how and when preemptions may be made, payment policies, and any other station policies that could reasonably affect political advertising buys.

### ***How much?***

As part of preparing the disclosure statement, each station will need to determine the “lowest unit charge” (LUC) to which qualified candidates are entitled. Calculating the LUC can be tricky. Simply stated, the LUC is “the lowest rate of the station for the same class and amount of time for the same period.” Put another way, it is the rate for any given class of time granted to the station’s most favored advertisers once all discounts, bonuses and other considerations have been taken into account. Keep in mind that most

stations will have several different LUCs because they sell several different classes of time (different day parts, preemptible/non-preemptible, etc.).

Not all political advertising is entitled to LUC rates. As a threshold matter, LUC rates apply only during the “LUC windows”. For the general election, the LUC window begins 60 day prior to the general election date (*i.e.*, September 5, 2008). During the LUC rate window, the LUC rates must be offered to all qualified federal candidates and their authorized committees and all qualified state and local candidates and their authorized committees (assuming the station has decided to run ads for that particular state or local office).

To qualify for the LUC rate, the advertising must include a “use” of the broadcast station by a qualified candidate (a “use” is defined as any “positive appearance of a candidate whose voice or likeness is either identified or is readily identifiable”). In addition, to qualify for LUC rates, federal candidates must meet the “stand by your ad” certification requirements described below.

Advertising that is not sponsored by a qualified candidate (*e.g.*, issue ads run by political action committees or so-called 527 groups) is **not** entitled to LUC rates. Prior to the LUC window (*i.e.*, between now and September 5<sup>th</sup>), stations are not required to offer LUC rates, but qualified candidates are entitled to rates that do not exceed “the charges made for comparable use of such station by other users thereof.” While not as burdensome as the LUC requirements, this “comparable rate” requirement means that stations must treat candidate ads at least as well as they treat other comparable advertisers with respect to rates, discounts, etc. Stations also must keep in mind that rates and discounts must be made available to each qualified candidate for the same office on an equal basis both before and during the LUC window.

***The job’s not over until the paperwork . . .***

Stations should also be preparing for the paperwork burden involved with political advertising. Stations must keep a political file (which is an essential component of the station’s public inspection file) that includes records of **all** requests for political time made by or on behalf of any candidate. The political file records must include: the name of the candidate and office involved; whether or not the request was accepted; the schedule of time provided; the spot length; the classes of time purchased; the rates charged; the date and time the spots actually aired; the name, address and telephone number of a contact person for the candidate/committee, along with the name of the authorized committee treasurer; and the rebates paid to the candidate (if any).

As the station is obligated to keep these records and make them available for public inspection, it must be certain that all relevant staff members are aware of the obligation to collect and keep this information starting when an inquiry for political advertising time is made (although mere rate inquiries do not need to be recorded). Moreover, these records must be continually updated as relevant information develops (*e.g.*, when the spots are run, etc.).

In addition, broadcaster must now keep records of all paid political advertising that “communicates a message relating to any political matter of national importance.” This requirement applies to *all* political advertising, not just candidate advertising. Thus, even though non-candidate advertisements are not subject to reasonable access, equal opportunities or LUC rate requirements, they *are* subject to this recordkeeping requirement. The records of such ads must include: a record of each request to purchase time; whether or not the request was accepted; the rate charged; the date and time the ads aired; the class of time purchased; the issue covered by the ad; the name of the candidate and office to which the ad refers (if applicable); and the name of the purchaser, the name, address and telephone number of a contact person and a list of chief executive officers/board of directors. Again, relevant station personnel must be made aware of their responsibility to collect the relevant information when requests for air time are made.

Finally, thanks to relatively recent changes in federal election law, candidates for *federal* office must provide to the station a particular written certification *at the time the advertising time is purchased*. In this “stand by your ad” certification, the federal candidate must certify whether or not the advertising will refer to another candidate for the same office. If the ad will refer to an opposing candidate, the certification must also state that at the end of the ad a statement will be included in which the candidate identifies himself or herself as well as the office being sought and affirmatively states that the candidate has approved the broadcast. Television ads also must include an image of the candidate and a printed statement that the candidate or the candidate’s committee paid for the broadcast, the name of candidate, and that the candidate approved the broadcast. The FCC has advised the stations may (but are not required to) deny LUC rates to federal candidates that do not meet the “stand by your ad” certification requirements.

*There’s more where that came from . . .*

As mentioned above, the political advertising rules are notoriously complex and a station’s compliance with the rules typically depends on the specific facts at hand. Many of the areas discussed above give rise to their own subsets of particular questions which can generally be answered only with specific reference to specific factual settings. This summary of the station’s requirements is, necessarily, brief and superficial. As you

prepare your station's political advertising policies, disclosure statements, LUC rates, and political files, you should consult early and often with local election officials, your state broadcasters association, the NAB and, of course, your friendly neighborhood communications lawyers.