NAB
NATIONAL ASSOCIATION OF BROADCASTERS

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Federal Communications Commission
Office of the Secretary

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Dear Ms. Dortch:

Attached please find the original and four copies of the Petition for Reconsideration and Clarification of the National Association of Broadcasters, et al.

Respectfully submitted,

Rick Kaplan
General Counsel and Executive Vice President
Legal and Regulatory Affairs
202-429-5420

**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matters of | ) | |
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| Complaints Involving the Political Files of | ) | |
| | ) | |
| WCNC-TV, Inc., licensee of Station WCNC-TV, Charlotte, NC | ) | File No. 140502J<br>Facility ID No. 32326 |
| | ) | |
| Scripps Broadcasting Holdings LLC, licensee of Station KMGH-TV, Denver, CO | ) | File No. 140502H<br>Facility ID No. 40875 |
| | ) | |
| Fox Television Stations, LLC., licensee of Station KMSP-TV, Minneapolis, MN | ) | File No. 140502K<br>Facility ID No. 68883 |
| | ) | |
| New World Communications of Tampa, Inc., licensee of Station WTVT(TV), Tampa, FL | ) | File No. 140502F<br>Facility ID No. 68569 |
| | ) | |
| Nexstar Broadcasting, Inc., licensee of Station WFLA-TV, Tampa, FL | ) | File No. 140502E<br>Facility ID No. 64592 |
| | ) | |
| NBC Telemundo License, LLC, licensee of Station WTVJ(TV), Miami, FL | ) | File No. 140502C<br>Facility ID No. 63154 |
| | ) | |
| WTVD Television, LLC, licensee of Station WTVD(TV), Durham, NC | ) | File No. 140502L<br>Facility ID No. 8617 |
| | ) | |
| CBS Broadcasting, Inc., licensee of Station WWJ-TV, Detroit, MI | ) | File No. 140502G<br>Facility ID No. 72123 |
| | ) | |
| Scripps Broadcasting Holdings LLC, licensee of Station KNXV-TV, Phoenix, AZ | ) | File No. 140502B<br>Facility ID No. 59440 |
| | ) | |
| Hearst Properties, Inc., licensee of Station WMUR-TV, Manchester, NH | ) | File No. 140502D<br>Facility ID No. 73292 |
| | ) | |
| Graham Media Group, Michigan, Inc., licensee of Station WDIV-TV, Detroit, MI | ) | File No. 140502A<br>Facility ID No. 53114 |
| | ) | |
| Complaint Involving the Political Files of Scripps Broadcasting Holdings, LLC, licensee of Station WCPO-TV, Cincinnati, OH | ) | File No. 160926a<br>Facility ID No. 59438 |

**PETITION FOR RECONSIDERATION AND CLARIFICATION OF THE NATIONAL ASSOCIATION OF BROADCASTERS, ET AL.**

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## PETITION FOR RECONSIDERATION AND CLARIFICATION OF THE NATIONAL ASSOCIATION OF BROADCASTERS, ET AL.

## I. INTRODUCTION AND BACKGROUND

On October 16, 2019, the Commission issued two Orders[1] significantly revising broadcasters' obligations to collect and disclose information about political advertisements under Section 315(e) of the Communications Act of 1934, as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA). Rather than making these prospective substantive changes through a notice-and-comment rulemaking, the Commission instead announced these new requirements through a consolidated adjudication of complaints[2] against 12 of the nation's 17,211 full-power radio and television stations.[3]

While the broadcast industry appreciates the FCC's attempt to clarify its complex and often confusing political rules, the Commission erred in creating new disclosure and recordkeeping requirements without the benefit of input from the vast majority of the industry required to maintain political advertising files. As a result of this failure, the Orders impose new industry-wide obligations that are in some cases unlawful, in others overbroad and difficult if not impossible to apply and in all cases counter-productive to the FCC's goal of increasing the public utility of stations' political files. Petitioners the National Association of Broadcasters (NAB) and Hearst Television, Inc., Graham Media Group, Nexstar Broadcasting, Inc., Fox Corporation, Tegna, Inc. and The E.W. Scripps Company (Station

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[1] *Complaints Involving the Political Files of WCNC-TV, Inc., licensee of Station WCNC-TV, Charlotte, NC, et al.*, Memorandum Opinion and Order, FCC 19-100 (rel. Oct. 16, 2019) (Order); *Complaints Involving the Political Files of Scripps Broadcasting Holding, LLC, licensee of Station WCPO-TV, Cincinnati, OH*, Order, FCC 19-101 (rel. Oct. 16, 2019) (Acronym Order) (collectively, Orders).

[2] *See* Complaints, Campaign Legal Center (CLC) and the Sunlight Foundation (Complainants) (filed May 1, 2014); Complaint of CLC, Common Cause, Sunlight Foundation and Benton Foundation (filed Sept. 26, 2016) (collectively, "Complaints").

[3] FCC News Release, *Broadcast Station Totals as of September 30, 2019* (Oct. 2, 2019).

Petitioners) (collectively, Petitioners) now respectfully seek reconsideration and clarification of the Orders under 47 C.F.R. § 1.106.[4]

## II. SUMMARY OF ARGUMENT

To begin, the FCC should not have altered its political broadcasting rules without the benefit of public comment. In this case, there was no realistic and meaningful opportunity for stakeholders beyond the 12 TV stations identified in the Complaints to comment, and the Commission did not even create a docket in which to review and file comments concerning the issues being adjudicated. While it was ostensibly resolving a handful of individual complaints alleging political file violations, the FCC in fact announced new, generally applicable substantive rules for prospectively implementing the disclosure and recordkeeping requirements of 47 U.S.C. § 315(e). Narrowly-focused complaint proceedings with limited parties and no call for public input are not the proper or lawful vehicles for promulgating industry-wide rules. The Commission should reconsider its Orders with the benefit of input from the broader industry directly affected by the FCC's new rules.

Petitioners request the FCC to reconsider and amend several aspects of its two Orders. First, the Order's definition of the phrase "political matter of national importance" in Section 315(e)(1)(B) goes far beyond Congress's aims in BCRA. The FCC's conception of "political matter of national importance" sweeps in advertisements that touch on issues merely "discussed" at water coolers nationwide and not subject to any federal action, as well as issues raised in local and state races where the eventual officeholders will have no input whatsoever in resolving those issues. The FCC should modify the Order to explain that a

[4] NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts. The Station Petitioners, licensees of broadcast TV stations in markets across the country, were parties to the Complaints giving rise to the Orders and are NAB members.

"political matter of national importance" means a *message directed to or about national political actors in a position to take national political action on the matter*, and therefore would exclude issue ad concerning elections for offices that do not affect such actors.

Second, the Commission has inadvertently and unnecessarily created a minefield for local stations by requiring that they identify and report *every* political matter of national importance noted in a political advertisement, not just the primary one(s). This places local radio and TV station personnel across the country in the position of picking out each and every arguably national issue in a political advertisement, with the threat of penalties for noncompliance hovering over them for even good faith mistakes. This approach is a recipe for disaster for local stations, interested third parties and the Commission. Local stations facing significant fines will now be effectively forced to over-disclose, third parties will have to sift through information they do not need or want, and the Commission will have to call balls and strikes on whether each and every issue referenced in the tens of thousands of advertisements aired during election cycles were appropriately captured.

Instead of this morass, the FCC should adopt a more rational, administrable and effective approach that requires stations to make *reasonable, good faith efforts* to disclose the topics that are the *focus* of political ads, rather than compile a laundry list of issues, however tangential, to the main points of those ads. In addition, Petitioners strongly urge the FCC to promptly clarify that the revised disclosure obligations attaching to third-party ads under Section 315(e)(1)(B) do not attach to any candidate-run ads (federal, state or local) under Section 315(e)(1)(A).

Third, the Commission should reconsider its revised and somewhat stilted policy concerning stations using acronyms to identify the sponsoring entities of political ads. The new standard is unnecessarily unforgiving, impractical and even fails to account for entities

whose legal names are acronyms. Petitioners request prompt reconsideration of these aspects of the Orders.

## III. PETITIONERS HAVE STANDING TO SEEK RECONSIDERATION OF THE ORDERS

Petitioners have standing to seek Commission reconsideration of the Orders. The Station Petitioners have standing because they were participants in the complaint proceedings giving rise to the Orders. Under 47 C.F.R. § 1.106(b)(1), "any part[ies] to the proceeding . . . may file a petition requesting reconsideration of the action taken." NAB independently has standing because its members' "interests are adversely affected" by the FCC actions, and NAB may represent and protect those interests through this petition.[5] The decisions in the Orders revising the political disclosure obligations will directly affect NAB's TV and radio station members that must implement the new obligations, under threat of FCC sanctions for any errors.[6] These decisions will have significant, far-reaching and imminent impacts on all broadcasters, especially during the 2020 election cycle. And as discussed in Section II, moreover, NAB and other broadcast entities had no realistic or meaningful opportunity to participate in the earlier individual station complaint adjudications.

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[5] 47 C.F. R. § 1.106(b)(1). *See also, e.g., In the Matter of Living Way Ministries, Inc. for a Construction Permit for a New Noncommercial Educational FM Translator Station on Channel 220 at Sun Valley, California*, 23 FCC Rcd 15070, at ¶ 8 & n.28 (2008) (rejecting challenge to NPR's standing to bring a petition for reconsideration because the broadcast licensee affected by the underlying decision was an NPR member station and "would have standing to protest in its own right"). As in *Living Way Ministries*, multiple stations that were parties to the Complaints are NAB members. *Accord U.S. Telecom Ass'n v. F.C.C.*, 295 F.3d 1326, 1330 (D.C. Cir. 2002) ("[A] trade association . . . has standing to sue on behalf of its members if its members would otherwise have standing to sue in their own right, [and] the interests it seeks to protect are germane to the organization's purpose . . . .") (quotation marks omitted).

[6] *See* Order ¶ 3 (placing all "entities subject to" political file recordkeeping requirements "on notice that, going forward, they will be subject to enforcement action" for failures to comply with their political file obligations, as clarified).

## IV. THE FCC SHOULD NOT HAVE ADOPTED THE DECISIONS IN THE ORDERS WITHOUT BENEFIT OF PUBLIC COMMENT

In the adjudications below, the Commission did not merely apply existing policies and regulations to specific sets of facts. Rather, the FCC announced new, generally applicable substantive rules of purely prospective effect for implementing the recordkeeping and disclosure requirements of Section 315(e). While the Commission correctly rescinded the Media Bureau's original determination in early 2017,[7] it should then have sought public comment to inform its determinations about interpreting and applying BCRA to the entire broadcast industry.

Under the Administrative Procedure Act (APA), promulgation of a rule generally requires notice and comment,[8] and "when an agency chooses to issue a rule," it must follow Section 553's procedures and may not escape them "by labeling its rule an 'adjudication'"[9] or "by labeling a major substantive legal addition to a rule a mere interpretation."[10] Notably, the rules announced in the Order are *entirely* prospective,[11] clearly indicating that the FCC promulgated new rules rather than merely interpreting existing requirements and applying them to the Complaints before it.[12] In this circumstance, a notice-and-comment rulemaking

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[7] *See* Order, DA 17-126 (Feb. 3, 2017).
[8] *See* 5 U.S.C. § 553(b).
[9] *Safari Club Int'l v. Zinke*, 878 F.3d 316, 331–32 (D.C. Cir. 2017). *Accord NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) ("The rule-making provisions of [the APA] . . . may not be avoided by the process of making rules in the course of adjudicatory proceedings.").
[10] *Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1024 (D.C. Cir. 2000).
[11] The FCC expressly determined not to take enforcement actions against the various licensees with respect to the "clarifications" it provided in the Order. *See id.* at ¶ 3. Thus, the FCC's revised rules were not given retroactive effect, but will apply only in the future.
[12] *See, e.g.*, *Wyman-Gordon*, 394 U.S. at 765 (where NLRB "did not even apply the rule it made to the parties in the adjudicatory proceeding" it "ma[d]e a rule" and "exercise[d] its quasi-legislative power"); *Catholic Health Initiatives Iowa Corp. v. Sebelius*, 718 F.3d 914, 922 (D.C. Cir. 2013) (stating that an "adjudication must have retroactive effect, or else it would be considered a rulemaking" and that "retroactive effect" "typically refer[s] to an order or penalty with economic consequences"); *Williams Nat. Gas Co. v. F.E.R.C.*, 3 F.3d 1544,

would have been more appropriate.[13] Fortunately, the Commission has another opportunity with this petition to receive broader input and insight. Petitioners have no doubt that such input can assist the FCC in formulating more legally sound, clear and readily administrable rules than those developed behind closed doors and delineated in the Orders.

## V. THE FCC'S INTERPRETATION OF "POLITICAL MATTER OF NATIONAL IMPORTANCE" IS OVERBROAD, INCONSISTENT WITH CONGRESSIONAL INTENT AND UNADMINISTRABLE

Petitioners urge the Commission to amend its determinations in the adjudications below in several respects. Perhaps most notably, the FCC adopted an unduly broad and vague interpretation of the statutory phrase "political matter of national importance," 47 U.S.C. § 315(e)(1)(B), that is virtually impossible for broadcasters to administer coherently. To resolve the myriad problems detailed below with the FCC's novel interpretation, the Commission should hold that an advertisement does not "communicate[] a message relating to any political matter of national importance," *id.*, unless the message is directed to or about *national political actors in a position to take national political action on the matter*. Advertisements concerning political issues merely discussed around water coolers nationally should not be included, and neither should political advertisements about elections in which the successful candidate/officeholder would lack the ability to make national political decisions or take national political actions (*i.e.*, issue ads about state and local elections), even if those ads also refer to an issue(s) that may be discussed nationally.

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1554 (D.C. Cir. 1993) (stating that retroactivity is the normal and necessary "corollary of an agency's authority to develop policy through case-by-case adjudication" and should therefore accompany any order the agency claims to be a mere "clarification[] [or] addition[]"); *Safari Club*, 878 F.3d at 333 (stating that the Supreme Court has explained that "prospective application only" is the mark of APA rulemaking) (citations omitted).

[13] Contrary to the Paperwork Reduction Act, the FCC also failed to obtain approval of the Office of Management and Budget for the new information collections required by the Order. *See* 44 U.S.C. § 3506(c).

The "national political actors taking national political action" paradigm is far more faithful to Section 315(e)(1)(B), in which Congress specifically enumerated categories of political matters of national importance as including legally qualified federal candidates; elections to federal office; or national legislative issues of public importance. These statutory categories delineate matters relating to national political actors and matters subject to national political action. Interpreting political matters of national importance as encompassing ads relating to and seeking to influence national political actors capable of taking national political action also is more consistent with Congress's intent in BCRA. As the Supreme Court explained, BCRA was "designed to address Congress' concerns about the increasing use of soft money and issue advertising to *influence federal elections*."[14]

### A. The FCC Must Reconsider And Narrow Its Definition Of "Political Matter Of National Importance"

Section 315(e)(1) of the Communications Act, as enacted in BCRA, requires broadcasters to maintain and make available for public inspection

> a complete record of a request to purchase broadcast time that—
> (A) is made by or on behalf of a legally qualified candidate for public office; or
> (B) communicates a message relating to any *political matter of national importance*, including—
> (i) a legally qualified candidate;
> (ii) any election to Federal office; or
> (iii) a national legislative issue of public importance.[15]

In the Order (at ¶¶ 2, 38) the FCC imposed the additional disclosures required under Section 315(e)(2) on a shockingly wide range of advertisements by defining "political matter of national importance" as political issues that are merely "the subject of controversy or discussion at the national level."

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[14] *McConnell v. FEC*, 540 U.S. 93, 132 (2003), *overruled in part*, *Citizens United v. FEC*, 558 U.S. 310 (2010) (emphasis added).
[15] 47 U.S.C. § 315(e)(1) (emphasis added).

At the outset, Petitioners urge the FCC to revisit this extremely broad and still ill-defined determination. Almost any issue could fall into the vast bucket of those "considered or debated at the national level."[16] It will be almost impossible for station personnel to rule out any political advertisement addressing almost any issue, unless it is hyper-local (*e.g.*, a school board referendum about building a new high school football stadium). The new regime encourages station personnel to be exceedingly over-inclusive in their disclosures to ensure they are not subject to FCC penalties. Even apart from inconsistency with BCRA, the FCC's approach virtually mandating over-disclosure will not materially aid interested third parties. It will merely bog them down in weighty political files listing every possible advertisement and identifying innumerable issues, whether or not their disclosure was envisioned by BCRA.

### B. Ads About State Or Local Candidates Should Not Be Subject To Section 315(e)(1)(B) Just Because They Mention An Issue That Could Be National

Given the focus of Section 315(e)(1)(B) specifically and BCRA generally on federal elections and legislative issues, the Order (at ¶ 33) erred in its conclusion that an advertisement referencing a non-federal candidate would be covered by that section and trigger additional disclosure and recordkeeping obligations "if the ad also communicates a message that is political in nature and has national importance." This decision is inconsistent with the Order's determination (at ¶ 31) that the term "legally qualified candidate" in Section 315(e)(1)(B)(i) meant "only candidates running for federal office." In light of its correct interpretation that Congress's use of the term "national importance" implies a limit to federal candidates,[17] the FCC should not have simultaneously stretched

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[16] Order at ¶ 33.

[17] *See id.* at ¶ 32 ("Given that the language in section 315(e)(1)(B) references 'political matter[s] of national importance,' inclusion of the word 'Federal' in section 315(e)(1)(B)(i) was unnecessary to limit application of that provision to federal candidates.").

Section 315(e)(1)(B) to encompass certain advertisements about local and state candidates and races. In light of Congress's language and purpose in Section 315(e)(1)(B) and BCRA overall, the FCC should reverse its determination that the additional disclosure requirements of Section 315(e)(2) can apply to advertisements about local and state candidates and races. If Congress had intended the provisions of Section 315(e)(1)(B) to potentially apply to ads referencing thousands of state and local elections and candidates in all 50 states, it surely would have said so explicitly, as Congress does not "hide elephants in mouseholes."[18]

There is, moreover, no sound reason to require broadcasters to make additional disclosures about the range of political issues discussed at the national level that may be referred to in advertisements about state and local candidates and elections. Clearly, such advertisements may reference a whole host of issues of concern at the state and local level (*e.g.*, education, crime, pollution, infrastructure, transportation, health care, opioid addiction, *etc.*) that also happen to be discussed at the national level. Many issues of political significance have both a national and a local dimension, and the FCC's approach does not distinguish between the two. For example, education funding or reform is both a political matter and an issue of national significance. But the FCC must recognize that under BCRA, an advertisement's reference to a state legislative candidate's position on funding for education does not trigger disclosures that Congress intended to apply at the federal level merely because education generally is an issue discussed at the national level. Indeed, such disclosure requirements border on the nonsensical, given that a state legislator has no

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[18] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Congress, moreover, clearly knows how to apply political broadcasting provisions to all federal, state and local candidates and elections, and in fact did so elsewhere in Section 315. *See* 47 U.S.C. § 315(a) (providing "equal opportunities" to candidates "for any public office"). Since Congress choose not to apply Section 315(e)(1)(B) to ad pertaining to candidates or elections "for any public office," the FCC should not now expand this section's terms to do so.

ability to increase or decrease education spending by the federal Department of Education or by Congress, but could only possibly influence education spending at the state level.

Interpreting political matters of national importance as meaning messages directed to or about national political actors in a position to take national political action on the matter, as Petitioners support, would be more consistent with Congress's concerns in BCRA. This approach also would avoid pointless disclosures about ads relating to local and state political activities or those referring to (arguably) national issues but concerning state or local officeholders who have no say whatsoever in their ultimate outcome. Advertisements focusing on local and state candidates and elections by definition do not concern matters subject to national political action or relate to the election of officials with the ability to make or take national political decisions and actions. The Commission therefore should not treat such locally or state-focused ads – even if they also mention political issues discussed nationally – as addressing "political matters of national importance" under Section 315(e)(1)(B) and subject to Section 315(e)(2)'s additional disclosure requirements.[19]

### C. The FCC's Definition Of "Political Matter Of National Importance" Raises Constitutional Concerns

The overbreadth of the FCC's conception of political matters of national importance not only is inconsistent with congressional purpose, but also has constitutional implications. Because, as discussed above, broadcasters will have difficulty determining – at risk of adverse government action – which advertisements will necessitate additional disclosures,

[19] Similarly, political advertisements for and against state or local ballot issues and referendums should not be treated as political matters of national importance because they can only result in political action at the state or local level.

the vagueness of the FCC's approach here raises questions under the First Amendment and the due process clause of the Fifth Amendment.[20]

Notably, the extensive recordkeeping requirements imposed by Section 504 of BCRA (which added Section 315(e) to the Communications Act) were unanimously struck down under the First Amendment by the three-judge district court panel that initially reviewed BCRA, due to the absence of evidence that they served any of the asserted governmental interests.[21] The Supreme Court reversed this decision by a 5-4 vote, finding, *inter alia*, that BCRA's issue ad disclosure and recordkeeping requirements survived a facial First Amendment challenge, but expressly leaving open a future "as applied" challenge, depending on how the Commission interpreted and applied the statutory language. The majority observed that the FCC has "adequate legal authority to write regulations that may limit, and make more specific, the provision's potential linguistic reach," adding that the FCC has "often ameliorated regulatory burdens by interpretation in the past, and there is no reason to believe it will not do so here."[22] In the Order, however, the FCC's overly broad conception of political matters of national importance was not limited or specific and only increased regulatory burdens.[23] The FCC's interpretation of Section 315(e)(1) therefore is vulnerable to an as applied First Amendment challenge, especially given the lack of a

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[20] *See, e.g., FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-54 (2012) (finding that FCC's indecency standards were vague as applied to the broadcasts in question due to the FCC's failure to give the affected broadcasters fair notice of its changed policies, contrary to the due process clause of the Fifth Amendment, and further stating that the "void for vagueness doctrine" is particularly important when speech is involved); *Reno v. ACLU*, 521 U.S. 844, 870-72 (1997) (stating that the vagueness of speech regulations raises special First Amendment concerns); *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 629, 631 (D.C. Cir. 2000) (vacating denial of broadcast license because regulation was "confus[ing]," "unclear" and failed to provide "fair notice" to broadcaster).
[21] *See McConnell v. FEC*, 251 F. Supp. 2d 176, 186-87 (D.D.C.), *aff'd in part and rev'd in part*, 540 U.S. 93 (2003).
[22] *McConnell*, 540 U.S. at 242.
[23] *See* Section VI.A., *infra*, further describing the Order's increased regulatory burdens.

substantial, let alone compelling, government interest in requiring the disclosure of myriad potential issues that could be mentioned in ads about local and state candidates and races. For all these reasons, the Commission should reconsider its interpretation of political matters of national importance and its decisions flowing from that definition.

## VI. ASPECTS OF THE ORDER ARE NOT FACTUALLY WELL GROUNDED AND CONSEQUENTLY, UNWISE AS A MATTER OF POLICY

In the Order, the Commission determined that, for each request to purchase political advertising time that communicates a message relating to any political matter of national importance, Section 315(e)(2) of the Act requires broadcasters to disclose certain information including, but not limited to, the names of *all* legally qualified candidates for federal office (and the offices to which they are seeking election), *all* elections to federal office and *all* national legislative issues of public importance, to which the advertisement refers.[24] The FCC should reconsider and rescind this new obligation that broadcasters identify and report *every* political matter of national importance referred to in such advertisements, especially those that refer to both an issue and candidate, or multiple issues or multiple candidates. Instead, the FCC should adopt a more rational, yet entirely effective approach that requires broadcasters to make reasonable, good faith efforts to disclose the topics that are the focus or the "gist" of a federal political ad.

### A. The FCC's Decision To Require Licensees To Disclose Every Federal Candidate And Issue Is Burdensome And Could Result In Reducing Political Speech

The FCC's determination that its newly-announced recordkeeping obligations would not be unduly burdensome is not only wrong, but also highlights another reason why the Commission should not attempt to create new rules in an adjudication. When assessing whether requiring stations to provide more information regarding the issues raised in

[24] Order at ¶¶ 2, 20.

political advertisements was overly burdensome, the Order concluded that it was not, as the Commission found that the licensees had not provided record evidence as to the burden associated with disclosing more information.[25] However, given that the stations involved were responding to complaints (and not participating in a rulemaking), some simply raised the reasonable defense that, under the FCC's rules, they and others justifiably believed they were under no obligation to identify both the candidate and issue mentioned in an ad, or multiple issues.[26] Thus, those parties had no reason to list or discuss the burdens with which they would be saddled if the Commission employed a new rule going forward. In the context of a formal complaint, it would have been highly unusual for the affected stations to argue they did not or could not comply with a statutory disclosure requirement because doing so would be unduly burdensome.[27] While it is not surprising the FCC concluded based on the adjudicatory record that the additional recordkeeping obligations included in the Order would impose only "marginal burdens" on stations,[28] this conclusion is erroneous. The FCC must now consider the costs and burdens of its revised rules.[29]

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[25] *See, e.g., id.* at fn. 52 (observing that licensees did not offer record evidence as to the burden associated with providing more information).
[26] *See, e.g.*, Order at ¶¶ 64-66.
[27] Due to the constraints of the complaint context, and the previous lack of an opportunity to present facts relating to the costs and burdens of revised political ad rules, the FCC should now consider such facts in this petition. *See* 47 C.F.R. § 1.106(c). Not only have circumstances "changed since the last opportunity to present such matters to the Commission," the public interest requires the FCC to fully consider the impact its altered rules will have on the broadcast industry. *Id.* at §§ 1.106(b)(2)(i) & 1.106(c)(1) & (2).
[28] Order at ¶ 19.
[29] "Agencies have long treated cost as a centrally relevant factor when deciding whether" and how "to regulate." *Michigan v. EPA*, 135 S.Ct. 2699, 2707 (2015) ("Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.") (emphasis in original). The FCC also has an affirmative duty under the Regulatory Flexibility Act to "minimize the significant economic impact" of regulations on "small entities." 5 U.S.C. § 604(a)(6).

The unduly burdensome nature of the FCC's new requirement to identify and disclose all issues and candidates referred to in advertisements can be illustrated by comparing the FCC's sponsorship identification rules with the new "national issues" reporting regime. Stations today review each political advertisement before it airs to confirm compliance with the sponsorship identification requirements.[30] This review is simple and efficient and can be done by most station staff because the sponsorship ID rules are clear and easy to understand. There is no gray area, as an ad either complies or it does not.

Reviewing a political ad or program to prepare a listing or summary of all federal candidates, federal elections and national issues, however, is an entirely different matter. Political ads influence viewer and listener emotions and many ads, especially those run by third-party issue groups, are very careful about the content of their messages. Accordingly, different persons may notice different issues when reviewing the same political ad and, even if they identify the same issues, they may describe them differently. For example, perhaps an ad urges viewers not to vote for a particular federal candidate due to her position on coal mining. Should the station list energy policy, climate change, jobs, a particular candidate and that candidate's opponent in its listing for the public file? If so, might issues such as pollution, job safety or healthcare be missing? Or, perhaps an ad mentions balanced budgets, a strong economy, creating a business-friendly financial and regulatory climate and/or tax cuts. Would it be sufficient for a station to identify this ad in its political file as addressing "fiscal policy?" Or would the FCC later deem each of those topics a discrete issue necessitating separate identification? Or perhaps the FCC would find that the first three points overlap enough that a single description suffices but the fourth required separate

[30] Order at ¶ 19 & fn. 51.

mention. The Order provides scant guidance, and stations will be forced to guess under the threat of complaints and significant sanctions for getting it wrong.

These nuanced judgment calls cannot be made by junior staff typically responsible for processing a station's advertisements and may not even be appropriate for advertising sales personnel. This effort also requires continuous review, revision and updates of issue and candidate lists that may be provided by an ad agency, often in advance of ad copy (*e.g.*, through a signed NAB PB-18 or similar political broadcasting form). As a result, stations attempting to avoid FCC enforcement actions may unreasonably need to employ senior managers or legal staff (or outside counsel) to review each political ad to ensure compliance with the Order's vastly expanded and more difficult to apply requirements.

Even senior or legal staff with training will find it difficult to spot and identify every issue referenced, however tangentially, in an ad referring to several issues and candidates, especially given that reasonable minds can differ on the content of an ad. And it borders on the absurd to think that station personnel will be able to identify all national issues and spot all "national legislative issues of public importance."[31] No one, including broadcast station employees, has knowledge about the subjects of all federal legislation that has been introduced and is pending in Congress. Pending legislation is voluminous and ranges from the controversial and consequential to the modest and minor.[32] Moreover, as described above, the Order further complicates matters by finding that an ad referencing a political

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[31] Order at ¶ 37 (defining national legislative issues as legislation introduced in the current Congress and bearing a current House of Representatives or Senate number).
[32] There are currently 7,998 pieces of legislation pending in Congress, *see* https://congress.gov/advanced-search/legislation (last visited Nov. 11, 2019), including S.1, *Strengthening America's Security in the Middle East Act of 2019*, and H.R. 5023, *Rename the Department of Veterans Affairs Community-Based Outpatient Clinic in Youngstown, Ohio, as the "Carl Nunziato VA Clinic."*

issue that is the subject of controversy or discussion at the national level may trigger Section 315(e)(1)(B), even if it does not qualify as a "national legislative issue of public importance."[33] Given these opaque directives, stations now must determine how to manage these new obligations, attempt to train their staffs to identify all such issues on a "know it when they see it" basis, and then hope for the best.

Not only are station employees ill-equipped to make these challenging determinations, the Commission demands they do so very quickly under the time pressure of an active political environment. Under 47 U.S.C. § 315(e)(3), stations must place materials in the political file "as soon as possible," a requirement defined in FCC rules to mean "immediately absent unusual circumstances."[34] Reviewing and uploading information about all political ads within this short time frame will put huge burdens on station staff. This is the case because, while candidates and issue groups often purchase airtime well in advance, the actual creative of each ad is determined in real time as campaigns unfold. To accommodate requests from candidates and issue groups to update creative quickly, stations allow political advertisers to supply their ads very close to airdate, sometimes even same day, and at times, copy can change within the same day. It is not at all uncommon for a station to receive an ad at noon that is supposed to start airing during the 5:00 p.m. news.

Previously, stations could quickly review advertisements for the presence of the sponsorship ID and, with issue ads, to screen for any potential defamatory or libelous language that would require additional review prior to airing. Now, stations must carefully review each ad, summarize their creative or otherwise create a list of *all* federal candidates,

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[33] Order at ¶¶ 2, 38.

[34] 47 C.F.R. § 73.1943(c). "[T]his may mean multiple updates each day during peak periods of the election season." *Standardized and Enhanced Disclosure Requirements for Television Broad. Lic. Pub. Interest Obligations*, Report and Order, 23 FCC Rcd 1274, 1282 (2008).

elections, issues and legislation referenced in the ads (and compare that to the list provided by the ad agency), and upload those lists to the FCC's online public file. Multiplying that effort *for each and every political advertisement* results in a daunting task for stations during a busy political season,[35] and a potentially unmanageable one in the frenetic weeks just before an election.[36] The sheer number of issue and candidate ad records that many stations face during election cycles makes it impracticable and inequitable to expect every record to be letter perfect in identifying all issues, as well as all candidates, elections and federal legislation. The Order did not consider these questions of administrability or burden, and the FCC must do so now.[37]

Clearly, station personnel are in no position to review and make accurate, consistent determinations about the issues that may be included in a large volume of ads under severe time constraints. While stations will make good faith effort to comply, they will do so under the watchful "Monday morning quarterbacking eye" of groups like the Complainants who can

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[35] Further increasing burdens on stations, many political advertisers run several different ads during one weekly schedule, and non-candidate advertisers often run multiple versions of a similar ad about a candidate that reference different issues.

[36] NAB members report that some stations run dozens or even hundreds of different ads during the weeks before an election, some of which are frequently updated in response to current events. They estimate that thoughtfully reviewing an ad for content, noting all the federal candidates, issues, elections and legislation referenced, and then uploading that information to their online public files will take 5-10 minutes per ad. In contrast, viewing an ad for sponsorship ID purposes takes 30 seconds or less. These time and personnel burden estimates could escalate quickly, given that many stations, including some of those cited in the Order, have voluminous political files. For example, WDIV-TV (Detroit) had 357 BCRA issue ad political file records in 2018 and KMSP-TV (Minneapolis) had 372 such records. (This data was derived from the FCC's online public inspection file system, https://publicfiles.fcc.gov, last visited Nov. 6, 2019.) And stations will experience a significant increase in political advertising in the 2020 presidential election cycle.

[37] *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (stating that an agency rule would be arbitrary and capricious if it "fail[s] to consider an important aspect of the problem").

cherry-pick instances where an issue or two may be overlooked, and more importantly, *see* Order at ¶ 3, the threat of FCC sanctions for any errors.

These new obligations also could result in less political speech. Mistakes can yield significant penalties, as the FCC's revised regulatory regime is, for all intents and purposes, effectively strict liability. Some stations may consider limiting the number of political ads, such as issue advertisements or certain state and local candidate races that they now accept, given this new high likelihood and cost of making a mistake.[38] This will not only harm station revenues, but more significantly, cause even greater damage to political advertisers who will not be able to broadcast their messages as broadly as they might wish. The FCC's decision is therefore likely to cause a decrease in constitutionally protected political speech, which surely was not Congress's intent.

### B. Rather Than Imposing A Strict Liability Standard, A Station's Good-Faith Efforts To Disclose Topics That Are The Focus Of Political Ads Should Be Sufficient

The FCC's approach of raising the burdens on broadcasters while continuing to enforce an effectively strict liability regime is unfair, inconsistent with BCRA and at odds with the First Amendment. Petitioners have already detailed above the increased burdens and the high likelihood of inadvertent errors, given the amount of information now required for disclosure and the intense pace of political campaign seasons. To avoid unnecessary and unjust enforcement actions or, worse yet, *de facto* restrictions on political speech, Petitioners strongly urge the Commission to adopt on reconsideration an approach that requires stations to use *reasonable best efforts* to list the topics that are the focus of a political ad. So long as a station's decision is reasonable and made in good faith, a station

[38] Stations are under no obligation to accept any political ads from third-party groups. Nor are they required to accept ads from state and local candidates, as only federal candidates have a right of reasonable access to broadcast stations. *See* 47 U.S.C. § 312(a)(7).

should not be at risk of complaints and enforcement actions. At the very least, the scope of the requirements imposed on broadcasters should be clarified to ensure that stations are not sanctioned for isolated or occasional oversights that do not indicate a pattern or trend of disregard for the recordkeeping expectation.

As noted earlier, by requiring stations to list all federal candidates, elections, issues and legislation mentioned in an ad, the Order established a muddled regime that will be bad for broadcasters, various interested third parties and the FCC. The rules as drafted through these adjudications create strong incentives for local radio and TV stations to be over-inclusive in their disclosures. And while to some that may seem like a positive outcome, the reality is that over-disclosing simply means heavier burdens on broadcasters, a less understandable and discernable political file for third parties and a difficult system to police and administer for the Commission. Advertisements referencing multiple issues and candidates will create incentives for stations to place a laundry list of possible issues into their public files to avoid possible sanctions, thereby likely confusing or misleading the public by burying the topic that was the ad's actual focus. For example, an issue ad might focus on immigration policy, but at its conclusion might display a graphic of a series of other issues related to a legally qualified candidate's candidacy. If the FCC's focus is on informing the public – and even academics and researchers[39] – how does that assist anyone in understanding the true aim of the advertisement?

This example illustrates just one reason why the FCC should revisit its decision and develop a system that would result in more useful public disclosures. Against the backdrop

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[39] With all due respect to the Order's expressed concerns about "research groups," *id.* at ¶ 10, stations' actual viewers and listeners should be seen as the main beneficiaries of stations' public files. Benefitting local viewers and listeners was the purpose, after all, of requiring stations to maintain *local* public inspection files. And local viewers and listeners (and voters) likely would benefit most from clear and concise public files.

of looming penalties, any broadcast station employee under the FCC's new regime would be prudent to over-disclose and identify any issue referenced however tangentially in any ad, whether or not that issue truly is nationally important. Some station groups may create extensive checklists showing that many ads mention a long list of issues. Other station groups may prepare summaries of each ad that may vary greatly in detail and length. Still others may place scripts or other advertiser-provided documentation directly in their files for the public to review and make their own assessment about an ad's contents.

The Commission can avoid this trek into the disclosure abyss by adopting two minor, but important changes to its Order. First, a station should not have to disclose every issue identified in an advertisement, but only those topics that are the focus of a federal political advertisement. While that still involves a judgment call, it is far easier to identify the issue or issues on which an advertisement centers, than every single one in a multi-issue spot. Second, the FCC should presume that a station has used their reasonable best efforts to discern the issue or issues that were the focus of an advertisement. Since by its very nature this process involves judgment calls, and because there is no manual identifying each and every conceivable issue, it is important for the Commission to recognize the challenges of the task assigned to local station personnel.

## VII. THE FCC SHOULD CLARIFY THAT ITS REVISED REQUIREMENTS APPLY ONLY TO NON-CANDIDATE POLITICAL ADVERTISEMENTS

The new requirements set forth in the Order spring from the resolution of 11 complaints concerning the purchase of advertising time by non-candidate issue groups and political party PACs filed jointly by the Complainants against certain TV stations in top-50 markets.[40] None of the complaints involved candidate ads.[41] Accordingly, the Order focuses

[40] Order at ¶¶ 1, 7.
[41] *See, e.g., id.* at ¶ 11 n. 24.

on the public file disclosure requirements triggered by Section 315(e)(1)(B) and not on the public file disclosure requirements for candidate ads triggered by Section 315(e)(1)(A).

While Petitioners believe that the new requirements in the Order apply to only non-candidate ads, the Order is unclear and invites confusion. As the Order notes, Section 315(e)(1)(B) can be triggered by an ad's reference to a political matter of national importance, including but not limited to: (1) a legally qualified federal candidate; (2) any election to federal office; or (3) a national legislative issue of public importance.[42] And the Order (at ¶ 33) further states that "references [to] a non-federal candidate would be covered by section 315(e)(1)(B) and consequently trigger record-keeping obligations if the ad also communicates a message that is political in nature and has national importance," thus sweeping in ads about state and local candidates as well. What the Order leaves open is whether a candidate ad (which is governed by Section 315(e)(1)(A)) that also references any one of the triggers of Section 315(e)(1)(B) would be obligated to follow the significant disclosure obligations of *both* 315(e)(1)(A) and 315(e)(1)(B), such that the information disclosure requirements in the Order would apply.

Petitioners are confident the FCC did not intend to overlook the fact that Congress expressly established two different sets of disclosure obligations – one set applying to political ads run by candidates and the second set applying to political ads run by anyone else. Eschewing the distinction would effectively make Section 315(e)(1)(A) a nullity since all ads run by federal candidates inevitably reference a federal candidate (*i.e.*, themselves and/or their opponents), which would trigger Section 315(e)(1)(B)(i). Consistent with the statute, and short of reconsideration of the Order as Petitioners urge, the FCC should clarify that the disclosure obligations attaching to third-party ads under Section 315(e)(1)(B) do not

[42] *See, e.g., id.* at ¶¶ 27–38.

attach to any candidate-run ads (federal, state or local), even if a candidate ad mentions a federal candidate, election or national issue. Given that the 2020 political cycle is already well-underway, Petitioners urge the Commission to issue this clarification as quickly as possible so that stations have appropriate guidance.

## VIII. THE ACRONYM ORDER SHOULD BE RECONSIDERED TO DEFER TO BROADCASTERS' GOOD FAITH JUDGMENT AND TO ALLOW THE USE OF LEGALLY ACCURATE ACRONYMS

In the Acronym Order, the Commission purports to clarify the policy that Section 315(e) prohibits identification of the sponsoring entity in a station's political file by using an acronym – at least where the acronym is not "commonly recognized" or in "widespread usage," such that "the general public is likely to be aware of what organization that acronym represents."[43] This new policy is unnecessary and will be unworkable in practice, for the reasons delineated below. Instead, the Commission should rely on broadcasters' good faith judgment as to whether the viewers and listeners in their local communities will recognize what a particular acronym represents.

First, according to the Acronym Order's standard, broadcasters must forecast whether "the general public" is "likely" to understand to which entity the acronym refers. With that exceedingly vague benchmark, stations will inevitably differ in their judgments, and no station can know whether the FCC will ultimately agree with its assessment about the recognizability of any acronym. Indeed, the Commission itself is commonly referred to in Washington, DC as the "FCC" (including in this petition), yet would a viewer or listener in Wyoming understand that? Broadcasters in local communities are in the best position to make that determination, and their good faith efforts to determine whether their local viewers or listeners understand the sponsoring entity's identity should be credited.

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[43] Acronym Order at ¶ 9.

Second, it is no answer to direct licensees to default to the "spelled-out" version of an acronym. This leads to absurd results, most notably in the instance where an organization has legally adopted an acronym as its name. Some advocacy organizations, such as AARP, have formally changed their names from the fully spelled-out version to an acronym.[44] At the very least, broadcasters should not be sanctioned for using an acronym that is an organization's legal name, even if that acronym is unfamiliar to some members of the public.

Third, the notion that the Communications Act is violated by stations when an average consumer may not immediately recognize the entity identified by an acronym in political file records is inconsistent with the FCC's recognition of the Internet as a viable – indeed, preferable – research and regulatory compliance tool.[45] Given that stations' political files today may only be accessed via the internet – which enables almost instantaneous checking of the fully spelled-out name of any entity's acronym – it is unclear to Petitioners why the use of an acronym in online files should rise to the level of an FCC enforcement action, which appears to be unnecessary overkill.[46]

Finally, the Acronym Order creates unnecessary uncertainty around the sponsorship identification rules: If an acronym is now insufficient for use in a licensee's online political file for recordkeeping purposes, the next question that arises is whether the same acronym

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[44] "AARP" is the organization's official, legal name; it is no longer known as the American Association of Retired Persons. *See* AARP FOUNDATION, DC.gov Department of Consumer and Regulatory Affairs, File No. 610186. Stations that spell out the full, former name of the organization would run the risk of noncompliance because "American Association of Retired Persons" is not the actual name of the sponsoring entity.

[45] *See, e.g., Petition for Rulemaking Seeking to Allow the Sole Use of Internet Sources for FCC EEO Recruitment Requirements*, Declaratory Ruling, 32 FCC Rcd 3685, ¶ 1 (2017); *Amendment of Section 73.1216 of the Commission's Rules Related to Broadcast Licensee-Conducted Contests*, Report & Order, 30 FCC Rcd 10468, ¶¶ 7-8 (2015).

[46] For example, a single search of the acronyms "DSCC" or "NRSC" in any internet browser would immediately inform an interested person of the fully spelled-out names represented by those acronyms.

will satisfy the sponsorship ID rule. This question was not examined as part of the narrow complaint proceeding below and raises myriad unresolved issues.[47]

The Commission should reconsider the Acronym Order to rely in the first instance on broadcasters' good faith judgments as to their viewers' and listeners' understanding, rather than forcing station personnel to predict whether FCC officials will find an acronym to be commonly recognized or widely used.[48] This approach would reduce unnecessary and unreasonable penalties for good faith judgments made by local broadcasters. Moreover, the FCC should not penalize a broadcaster for utilizing an acronym that is the legal name of the entity sponsoring an ad.

## IX. CONCLUSION

The Commission should reconsider and clarify the matters discussed above as requested in this petition.

Respectfully submitted,

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[47] What if, for example, a political advertiser or agency insists upon use of an acronym for sponsorship ID purposes? Is the station then at risk of possible sanctions if the FCC later disagrees that the acronym is used or recognized widely enough?

[48] In an analogous political advertising context, the FCC has long deferred to a licensee's reasonable good faith judgment as to whether a candidate's voice is in fact so well known that it is identifiable to the general public. See Letter to A.W. Davis, 17 FCC 2d 613 (1969). It should take the same approach with acronyms.

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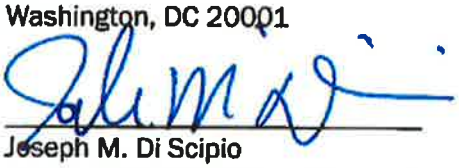

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## CERTIFICATE OF SERVICE

I, Jerianne Timmerman, hereby certify that copies of this Petition for Reconsideration have been served via U.S. Mail and electronic mail, this 15th of November, 2019, on the following persons at the addresses shown below.

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