

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

In the Matter of )  
 )  
National Association of Broadcasters, et al. ) MB Docket No. 19-363  
Petition for Reconsideration of )  
Political File Orders )

**JOINT COMMENTS OF THE  
ABC TELEVISION AFFILIATES ASSOCIATION,  
CBS TELEVISION NETWORK AFFILIATES ASSOCIATION,  
FBC TELEVISION AFFILIATES ASSOCIATION, AND  
NBC TELEVISION AFFILIATES**

The ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates (collectively, the “Affiliates Associations”)<sup>1</sup> submit these comments in support of the Petition for Reconsideration and Clarification of the National Association of Broadcasters, et al. (the “NAB Petition”) in this proceeding.<sup>2</sup>

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<sup>1</sup> Each of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates is a non-profit trade association whose members consist of local television broadcast stations throughout the country that are each affiliated with its respective broadcast television network. Collectively, the Affiliates Associations represent over 500 local television stations in markets of all sizes across the country. These local network-affiliated stations form the backbone of the American television broadcasting system, providing thousands of hours of local news and information programming every week. Together, these local television stations invest millions of dollars every year in their communities to support their broadcasting operations.

<sup>2</sup> See Petition for Reconsideration and Clarification of the National Association of Broadcasters, et al., File Nos. 140502J, et al., filed Nov. 15, 2019; see also Media Bureau Seeks Comment on National Association of Broadcasters, et al., Petition for Reconsideration of Political File Orders and Establishes “Permit-But-Disclose” Ex Parte Procedures, *Public Notice*, MB Docket No. 19-363, DA 19-1224 (rel. Nov. 29, 2019).

## I. INTRODUCTION

In 2020, the more than 500 stations represented by the Affiliates Associations will air hundreds of thousands of federal, state, and local political advertisements. As they have for decades, these advertisements will play a crucial role in setting the tone of countless campaigns for elective office and the direction of American democracy itself. The advertisements also will generate onerous, expensive record-keeping and reporting obligations for the Affiliates Associations' member stations – effectively, an unfunded mandate from the federal government that is part of the bargain broadcasters strike when they accept a license to broadcast in the public interest. The Affiliates Associations' member stations are more than willing to abide by political record-keeping requirements consistent with the Communications Act and the Commission's political advertising record-keeping rules (the "Rules"), which require broadcasters (among other things) to catalogue the numerous political advertisements they air.

Unfortunately, as the NAB Petition thoroughly demonstrates, the Commission's recent orders purporting to clarify television stations' political advertising record-keeping and reporting responsibilities will make complying with the Rules more uncertain, complicated, time-consuming, and costly.<sup>3</sup> Reporting obligations should be straightforward, and compliance should be measurable by objective standards. The Commission's recent reinterpretation of Section 315(e) fails on both counts: It is both overly complex and unfairly subjective. And broadcasters who strive to comply with the Commission's purported "clarification" essentially face strict

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<sup>3</sup> See 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) (the "*Omnibus 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) (the "*Acronym Order*") (collectively, the "*Clarification Orders*").

liability for getting it wrong, regardless of their good faith efforts to follow the Rules. This is no way to administer a statute.

Under the Commission's new standards set forth in the *Clarification Orders*, employees at local stations across the country will be expected to make independent determinations about what issues a particular advertisement addresses and whether the issue or issues a broadcaster identifies pertain to "political matter(s) of national importance." Those determinations are necessarily subjective, and if a station gets the answer wrong in the eyes of the Commission after the fact, the station will face liability for violating the reporting requirements.

Broadcasters' only rational response to the uncertainties generated by the Commission's recent "guidance" will be to over-report everything. If a state issue ad, on its face, has nothing to do with any federal election, what should a broadcaster hoping to avoid liability do? Report the ad. How about an issue ad related to a local county executive race that happens to mention health care? Report the ad. Or an ad in which a candidate running for state senator talks about gun rights? Report the ad. If a candidate for U.S. Congress airs a picture of herself with her entire party caucus on the steps of the Capitol? Report the ad as if it pertained to every person pictured who is running for re-election. The end result is both obvious and fundamentally contrary to the intended purpose of the political record-keeping requirements: Viewers and other interested parties will drown in (often useless) information about the political ads that run on each station. And broadcasters and their employees will spend untold amounts of time and money compiling reports that will benefit no one.

With the 2020 Presidential Election already heating up, the timing could not be worse for the kind of imprecision and perverse incentives that the *Clarification Orders* have injected into the political advertising ecosystem. The Commission should avoid, rather than create, an

outcome that saddles local television stations with additional regulatory burdens (that will lead to a less-informed citizenry), particularly at a time when broadcasters face increased competition from unregulated market actors.

On reconsideration, the Commission should adopt an order that clarifies and explains its political record-keeping Rules and makes compliance manageable, straightforward, and worthwhile, rather than a game of chance or an exercise in overkill. In particular, the Commission should adopt the following clarifications:

- Advertisements aired in state and local elections are not subject to federal reporting requirements, regardless of their subject matter;
- Candidate-sponsored advertisements are not subject to issue advertisement reporting requirements; and
- Stations' efforts to identify the issues and candidates addressed by an advertisement will be judged by a "good faith efforts" standard.

With these clarifications, the Commission can restore essential certainty and reasonableness to its political advertising reporting requirements. Without them, the Commission's Rules will remain overbroad and vague – and will likely be subject to challenge in the courts. The Affiliates Associations therefore urge the Commission to grant the NAB Petition in full and revise its Rules accordingly.

## **II. THE COMMISSION MUST ISSUE CLEAR RULES WITH OBJECTIVE COMPLIANCE STANDARDS.**

### **A. The Commission Should Issue a Bright-Line Rule Exempting State and Local Ads from Section 315(e) Reporting Requirements.**

As a fundamental matter, the Commission must ensure that its Rules actually comport with both the language and intent of Congress in Section 315(e). The Supreme Court has identified the statute's purpose: "to address Congress's concerns about the increasing use of soft

money and issue advertising to influence federal elections.”<sup>4</sup> Given that congressional intent, it makes no sense to require broadcasters to report advertisements directed at state or local political races, regardless of whether the ads might mention, or even highlight, issues that have a national profile.

For this reason, the Commission should clarify that issue advertisements directed at state and local races rather than federal elections create no Section 315(e) reporting obligation at all. As the NAB Petition rightly points out, the Commission’s interpretation of the phrase “political matter of national importance,” which would sweep in any advertisement that discusses an issue that is “the subject of controversy or discussion at the national level,” is overbroad. The Commission’s interpretation would require reporting of state and local advertisements that literally have nothing to do with any federal election merely because they mention an issue of state-level importance (say, government spending or gun control) that also happens to be a topic of national discussion.<sup>5</sup>

There is no evidence that Congress wanted or expected such advertisements to be reported or that reporting them would lead to greater transparency about those persons, entities, or parties trying to influence national political races. Indeed, because the Commission proceeded here by adjudication rather than rulemaking, the agency lacks any evidence to justify a finding that state and local issue ads have any impact on federal elections.<sup>6</sup> Absent such evidence, the

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<sup>4</sup> See *McConnell v. FEC*, 540 U.S. 93, 132 (2003), *overruled in part*, *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>5</sup> The Affiliates Associations agree with NAB’s view that only ads “directed or about *national political actors in a position to take national political action on the matter*” should satisfy the standard of ads addressing “political matter(s) of national importance” under Section 315(e). See NAB Petition at 6-7.

<sup>6</sup> As NAB correctly points out, the Commission’s determinations in the *Clarification Orders* lack the type of evidentiary foundation that could have been produced only through a

Commission's interpretation of Section 315(e) set forth in the *Omnibus Order* requiring reporting of such advertisements is arbitrary and capricious. Accordingly, the Commission should reverse course and clarify that the statutes does not require reporting of state and local issue advertisements.

**B. The Commission Should Exempt Federal Candidate Advertising from Issue Advertising Reporting.**

The Affiliates Associations also endorse the NAB Petition's request that the Commission clarify that candidate ads reported under Section 315(e)(1)(A) are not subject to additional issue advertising reporting under Section 315(e)(1)(B).<sup>7</sup> As NAB points out, since the *Clarification Orders* dealt only with third-party issue advertisements, it is unclear whether the Commission intended its sweeping statements about such third-party ads to apply to candidate ads as well.<sup>8</sup>

It appears that Commission Staff has sought to informally advise broadcasters that the issue advertising reporting requirements do not apply to ads that are already reported as candidate ads.<sup>9</sup> While that informal guidance is helpful, it is non-binding and therefore of limited value. The Commission should state clearly that candidate ads are not subject to Section 315(e)(1)(B) reporting requirements, dispelling any uncertainty.

**C. The Commission Should State That Stations' Good Faith Efforts to Identify Issues and Candidates in Political Advertisements Are Sufficient to Satisfy the Rules.**

The Affiliates Associations share NAB's concern that the *Clarification Orders* impose unfairly expansive and subjective burdens on broadcasters, who are now tasked with identifying

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notice and comment rulemaking proceeding, which was not conducted in this matter. *See id* at 5-6.

<sup>7</sup> *See* NAB Petition at 20-22.

<sup>8</sup> *See id.*

<sup>9</sup> *See, e.g., FCC Political Ad Clarification Appears to Apply Only to Issue Ads*, *Communications Daily* (Nov. 26, 2019).

every issue and every candidate mentioned in every political advertisement.<sup>10</sup> The Affiliates Associations agree that it would be far more reasonable to require broadcasters to identify only the issues and candidates that are actually the primary focus of a political advertisement.

As NAB explains at length, the Commission mandate that broadcasters report every issue in every third-party ad, while apparently a simple command, is, in practice, unfairly subjective.<sup>11</sup> Most topics of “national importance” implicate multiple policy issues. The policy issues a person identifies in an advertisement often will depend upon his or her individual stance on the issue(s). While one viewer might see an ad about carbon taxes as implicating tax policy and federal spending, another might view the same ad as addressing climate change or pollution. Which of these hypothetical viewers correctly identifies the relevant issues? Both. And neither. Given the inherent subjectivity of those determinations, the “good faith efforts” standard NAB advocates is the only yardstick by which to fairly evaluate stations’ efforts to identify and report the relevant issues.<sup>12</sup>

Likewise, an issue ad might include a picture of one or several persons who happen to be candidates for federal office, even though the ad does not in fact focus on the candidate(s). For example, an issue ad focused on clean water might feature a picture of a signing ceremony for clean water legislation. The picture might include not only the candidate the ad is directly addressing but also a dozen other congressional representatives who happen to be up for election. It would be a waste of resources to require stations to report such an ad as concerning every pictured representative. Instead, the reporting obligation should pertain only to the candidate

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<sup>10</sup> See NAB Petition at 12-20.

<sup>11</sup> See *id.* at 14-15.

<sup>12</sup> See *id.* at 18-20.

who is the focus of the advertisement. And a station whose political recordkeeping file includes such a report should be found in compliance.

As NAB points out, the more extraneous issues and incidental candidates included in a political file for a particular ad, the less likely it is that anyone reviewing the file will find the included information useful.<sup>13</sup> Section 315(e) was intended to give viewers and advertisers an accurate picture of political advertising aired on a station, not an exhaustive catalogue of minutiae regarding every advertisement. Taken literally, the Commission's new reporting requirements would render most reports entirely meaningless. Instead, the Commission should make clear that stations comply with the political advertising reporting Rules when they make a good faith effort to identify the candidates and issues that are the focus of each reportable advertisement.<sup>14</sup>

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<sup>13</sup> *See id.* at 19.

<sup>14</sup> This same "good-faith" standard should apply to stations' use of acronyms in their reports. *See* NAB Petition at 22-24. As NAB rightly points out, judgments about what acronyms the public does and does not understand are inherently subjective and community-specific. *See id.* All agree that an incomprehensible report does not comply with the Rules, but acronyms are at least as likely to lead to clear and concise reporting as they are to confuse or mislead. The Commission should withdraw its attempts to disfavor use of acronyms and should instead defer to the judgment of local stations about which acronyms are widely understood and which are not.



**III. CONCLUSION**

For the reasons stated herein, the Affiliates Associations urge the Commission to grant the NAB Petition in full and adopt the Rule clarifications described above.

Respectfully submitted,

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