

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

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In the matter of the petition of

Canal Partners Media, LLC

for a declaratory ruling stating that broadcast stations' use of the Last-In-First-Out method to preempt political candidates' advertisements in favor of commercial advertisers' spots violates § 315(b) of the Communications Act

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Petition for a Declaratory Ruling

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Canal Partners Media, LLC (“CPM”), one of the nation’s preeminent media-buying firms for political candidates and issue advertisers, petitions the Commission for a declaratory ruling stating that broadcast stations’ use of the Last-In-First-Out or “LIFO” method to preempt political candidates’ advertisements in favor of commercial advertisers’ spots violates § 315(b) of the Communications Act.

1. Background on § 315(b) of the Communications Act.

In exchange for obtaining a valuable license to operate a broadcast station using the public airwaves, each radio and television licensee is required by law to operate its station in the public interest, convenience, and necessity.¹ Recognizing the particular importance of the free flow of information to the public during elections, the Communications Act and the FCC’s rules impose specific obligations on broadcasters regarding political speech. One of those obligations is that a broadcast station must treat candidates as their most-favored commercial advertisers as far as the terms and conditions and charges for airtime are concerned.² The purpose of this

¹ 47 U.S.C. § 307.

² *Codification of the Commission’s Political Programming Policies*, 7 FCC Rcd. 678, 689–90 (1991) (holding that the most-favored advertiser standard applies to a station’s sales practices and other discount privileges that improve the value of the spot to the advertiser).

requirement is to give candidates “greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters.”³ The Commission has long held that the most-favored advertiser standard applies to station sales practices, including preemption priorities, not just to advertising rates.⁴

Wanting to blunt the effect of § 315(b), stations complain about the fact the benefits that must accrue to candidates are based on a composite picture of the most-favored commercial advertiser.⁵ No single advertiser, they say, would ever receive all the advantages that candidates must receive through the “cherry-picking” of benefits given to all commercial advertisers.⁶ The Commission, however, has rejected this complaint.⁷

³ 1972 U.S.C.C.A.N. 1773, 1774.

⁴ *Codification of the Commission’s Political Programming Policies*, 7 FCC Rcd. 678, 689–90 (1991) (holding that the most-favored advertiser standard applies to a station’s sales practices and other discount privileges that improve the value of the spot to the advertiser).

⁵ *Id.* at 689.

⁶ *Id.* at 689.

⁷ *Id.* at 690 (“Even if it were true that no single advertiser would ever receive all such benefits (a conclusion some commenters dispute), nonetheless we believe that, because all such factors enhance the value of a particular class of time and improve the value of individual spots (even though the price itself does not necessarily reflect such value), each such benefit must be made available to candidates. Any other approach would be inconsistent with the statute’s express directive that candidates be charged no more than the station’s most-favored advertiser for the ‘same class’ of time.” [parenthetical in original]).

2. Broadcast stations are violating § 315(b) of the Communications Act by using the LIFO method to preempt political candidates' advertisements.

Just like when an airline overbooks a flight, when a television or radio station oversells commercial airtime during a particular broadcast, the station must preempt some advertisers' spots from running. Stations are increasingly using the LIFO method to determine preemption priorities within particular classes of time and are using it to preempt political candidates' advertisements in favor of commercial advertisers spots. "LIFO" stands for Last-In, First-Out. Stations are preempting candidates' advertisements because they claim commercial advertisers booked their spots before the candidates booked theirs.

a. Using LIFO to preempt political candidates' advertisements in favor of commercial advertisers' spots is illegal.

Using LIFO to preempt political candidates' advertisements in favor of commercial advertisers' spots violates the lowest-unit-charge provision of the Communications Act, 47 U.S.C. § 315(b), which requires that broadcast stations treat candidates as their most-favored commercial advertisers as far as terms, conditions, and charges for airtime are concerned. Under the LIFO method of preemption, the "First-In" advertiser within a particular class of time is the last to be preempted. That makes the First-In advertiser the

station's most-favored commercial advertiser. Under § 315(b), a political candidate is thus entitled to the same priority against preemption that the station gives the First-In advertiser even if the political candidate was the last to book their spot.⁸ Put another way, if a station adopts the LIFO method of preemption, a political candidate's advertisements are required by law to be considered as if they were the First-In spots because that is the only way the candidate can be treated as the station's most-favored commercial advertiser as far as terms and conditions for airtime are concerned.⁹

LIFO may sound fair, and it is in many respects. But the rules of the playground are not the governing standard, the law is what governs. The purpose of § 315(b) is to give candidates "greater access to the media so that they may better explain their stand on the issues, and thereby more fully and

⁸ See *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd. 678, 690 (1991) (rejecting broadcaster's argument the benefits that must accrue to candidates should not be based on a composite picture of the most-favored commercial advertiser and holding that the most-favored advertiser standard applies to the privileges that improve the value of the spot to the advertiser, including make goods, *preemption priorities*, and any other factors that enhance the value of a spot).

⁹ Stations may argue, like they have before, that by considering a political candidate's advertisements as the First-In spots no matter when they were bought, they would be giving candidates greater benefits than those actually conferred upon the most-favored commercial advertiser. But this Commission has expressly rejected that argument. *See id.*

completely inform the voters.”¹⁰ Using LIFO to preempt political candidates’ advertisements in favor of spots purchased earlier by commercial advertisers is, by definition, treating political candidates as something less than the station’s most-favored commercial advertiser, it gives candidate less access to the media, and it violates the law.¹¹

b. Applying LIFO to preempt political candidates’ advertisements in favor of commercial advertisers’ spots discriminates against political candidates.

Political candidates, as an industry, buy airtime late when compared to commercial advertisers. Commercial advertisers have the benefit of time and an established budget and budgeting processes. In contrast, running a political campaign is like building an airplane while flying it. Campaigns often raise and spend money as they go. Candidates also make purchasing decisions based on targeting and the flow of the campaign, which are often subject to change and adjustment as the election approaches.

Even if candidates want to implement buying decisions early in the

¹⁰ 1972 U.S.C.C.A.N. 1773, 1774.

¹¹ See *Codification of the Commission’s Political Programming Policies*, 7 FCC Rcd. 678, 690 (F.C.C. 1991) (rejecting broadcaster’s argument the benefits that must accrue to candidates should not be based on a composite picture of the most-favored commercial advertiser and holding that the most-favored advertiser standard applies to the privileges that improve the value of the spot to the advertiser, including make goods, *preemption priorities*, and any other factors that enhance the value of a spot).

process, campaign-finance laws limit their ability to do so. Both federal and state campaign-finance laws limit candidates' ability to spend money raised for the general election until the candidate qualifies as a candidate for the general election by winning the party primary. (Money raised for the general election by a candidate that does not qualify for the general election must be returned to contributors.) Thus, because candidates cannot get in line to establish a position in the LIFO pecking order until they become a legally qualified candidate, applying LIFO to preempt political candidates' advertisements in favor of commercial advertisers' spots discriminates against political candidates.

Using Georgia's 2010 race for governor as an example, Roy Barnes became the legally qualified candidate of the Democratic Party on July 20, when he won his party primary. Nathan Deal became the legally qualified candidate for the Republican Party on August 10, after he won his party's primary runoff election. If the application of LIFO to preempt political candidates' spots were not illegal and Barnes and Deal wanted to get in line to establish a priority against preemption under LIFO, Barnes could not get into the LIFO line until July 21, while Deal had to wait until August 11. So not only does the application of LIFO discriminates against political candidates generally, it also discriminates between the political candidates

themselves because some candidates can get in the LIFO line and beat out commercial advertisers before others as the Barnes-Deal example from Georgia illustrates.

If there were some way to defy law and logic to somehow deem the use of LIFO to preempt political candidates' advertisements in favor of commercial advertisers' spots legal, it could only be legal if the station fully discloses it before all candidates become legally qualified as candidates in the election for which it is to be applied,¹² and if the station applies LIFO consistently to all

¹² See 47 C.F.R. § 73.1942(b)(2) (requiring stations to disclose "[a] description of the lowest unit charge and related privileges (such as priorities against preemption and make goods prior to specific deadlines) for each class of time offered to commercial advertisers" [parenthetical in original]); *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd. 678, 688-89 (1991) ("The Commission believes that broadcasters must disclose and make available to candidates all discount privileges available to commercial advertisers, including the lowest unit charges for the different classes of time sold by the station. This requirement serves to ensure that candidates are able to avail themselves of their statutory rights and are not steered to purchase more expensive categories of time. Candidates must have full information about the discount privileges made available with various classes of time in order to ensure parity of treatment with commercial Advertisers. ... It is thus incumbent upon the broadcaster to disclose to candidates all information concerning the lowest unit charges made available to commercial advertisers, together with the discount privileges associated by the broadcaster with those rates. The absence of such full disclosure hampers candidates' ability to evaluate what is being made available to them and is inconsistent with Congress' intent to place candidates on par with favored commercial advertisers. Indeed, the benefits of disclosure not only were underscored in the comments but were also made clear in the Commission's 1990 political audit. In a number of instances, the Commission noted that lowest unit charge issues arising from the audit stemmed in large measure from incomplete disclosure to candidates of individual stations' commercial sales practices. ... [A]t a minimum, this disclosure should include: (a) a description and definition of each class available to commercial advertisers which is

(continued...)

advertisers and *without exception*. If for any reason a station were to run a commercial advertiser's spot that would have otherwise been preempted by the strict application LIFO, the station would have given that commercial advertiser a priority against preemption. Under § 315(b), political candidates would then be entitled to the same priority against preemption, which would mean that stations could not apply LIFO to preempt a political candidate's advertisements.

As Judge Learned Hand so eloquently said, one must "remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."¹³ The purpose of § 315(b) is to give candidates "greater access to the media so that they may better explain their stand on the issues, and

¹²(...continued)

complete enough to allow candidates to identify and understand what specific attributes differentiate each class; (b) a complete description of the lowest unit charge and related privileges (such as priorities against preemption and make goods prior to specific deadlines) for each class of time offered to commercial advertisers ..." [parenthetical in original]; National Association of Broadcasters, Political Broadcast Catechism at 59 (16th ed. 2004) ("Disclosure is one of the most important aspects of the political broadcasting rules. Stations are required to inform all candidates - federal and non-federal - of their political rates, their time classes, their sales practices, *and any other information that may be relevant to the purchase of time on the station.*" [emphasis added])

Also, "once disclosure is made, stations must negotiate in good faith to actually sell time to candidates in accordance with this disclosure." *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd. at 689.

¹³ *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945).

thereby more fully and completely inform the voters.” 1972 U.S.C.C.A.N. 1773, 1774. The use of LIFO gives candidates less access to the media and violates the spirit if not the letter of the law.

Political advertising is unique. November 4, 2014, is Election Day. McDonald’s will be in business on November 5, 2014, so it usually doesn’t care if some of its spots are preempted. It will just run the preempted advertisement another day. For political candidates, there is no November 5; the campaign is over on November 4. And because political candidates cannot buy airtime for the general election until they become a legally qualified candidate for that election, they cannot buy time early to be first in the LIFO pecking order. Thus, as applied to political candidates, it appears LIFO, if permitted by this Commission, would just be a mechanism that stations can use to steer political candidates into buying more expensive classes of airtime.

Conclusion

Twenty-four years ago, the Commission conducted audits of broadcasters’ compliance with the lowest-unit-charge provision of the Communications Act. The Commission found that political candidates often paid more than commercial advertisers did for the same airtime. A rulemaking followed the audit, resulting in a Report and Order that codified the Commission’s political

programming policies.¹⁴ And things got better for political candidates buying airtime. But in their quest to make an ever-increasing amount of money, some stations view their public-interest obligations as an unwanted burden or, worse, something that they can avoid through clever artifices.

It is in this context that LIFO is being used by stations to preempt political candidates' advertisements in favor of spots purchased by commercial advertisers. LIFO is being used to steer political candidates to purchase more expensive categories of airtime, a practice the Commission has held to be illegal. If this is allowed to continue, stations will have accomplished an end-run around § 315(b) of the Communications Act and the Commission's 1991 Report and Order.

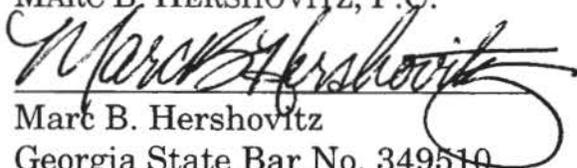
The Commission should issue a declaratory ruling stating that if broadcast stations are using LIFO as a method for determining preemption priorities, they must treat political candidates as being the First-In advertiser regardless of when the candidate purchased its airtime in order to be in compliance with § 315(b) of the Communications Act.

¹⁴ See *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd. 678 (1991).

Respectfully submitted this 29th day of September 2014.


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