

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

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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Supplement to Petition for a Declaratory Ruling

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Canal Partners Media, LLC (“CPM”) files this supplement to its petition for a declaratory ruling to apprise the Commission about relevant information that was published after CPM filed its petition.

On September 30, 2014, CPM filed its petition seeking 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. Two days later, the National Association of Broadcasters (“NAB”) published the 18th edition of its *Political Broadcast Catechism*. According to the NAB’s website, this *Catechism* helps broadcasters find solutions to the most common political-broadcasting questions. The NAB’s *Catechism* acknowledges that using the LIFO method to determine preemption priorities discriminates against political candidates:

FCC staff has also expressed concerns about station preemption policies such as “last in; first out” that may have the effect of preferring long-term commercial advertisers over candidates.¹

LIFO is being used by some stations to steer political candidates to purchase more expensive categories of airtime, a practice the Commission has

¹ National Association of Broadcasters, *Political Broadcast Catechism* at 42 (18th ed. 2014). A copy of the relevant portion of the *Political Broadcast Catechism* is attached as Exhibit A. To CPM’s knowledge, this is the first time LIFO and how it discriminates against political candidates has been mentioned in the *Catechism*.

held to be illegal. The FCC's staff has expressed concerns about this practice.² Those "concerns" are that using LIFO to preempt political candidates' advertisements in favor of commercial advertisers' spots within particular classes of time is an obvious violation of § 315(b) and the Commission's rules.

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 completely inform the voters."³ When stations use LIFO to preempt political candidates' advertisements, they force candidates to spend more money to convey their messages and inform voters. The result is a less robust debate and less informed voters. With less than 30 days until the general election, there is not enough time for the Commission to seek comments via public notice and issue a declaratory ruling before Election Day. But if the

² *Id.*

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 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. In other words, 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.

³ 1972 U.S.C.C.A.N. 1773, 1774.

Commission were to seek comments now, it would encourage stations to follow the law. Candidates would rather receive make-good spots now than money in the form of rebates after the election, and the public would benefit. Stations would fulfill their public-interest obligations, candidates would be able to get their messages out, and voters would be fully informed.

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. That is the law. Since the doctrinal manual of the NAB seems to hedge on stating that it is illegal to use LIFO to preempt political candidates' advertisements in favor of commercial advertisers' spots—stating only that FCC staff have expressed concerns—the Commission should issue a declaratory ruling to facilitate stations understanding and following the law.

Respectfully submitted this 13th day of October 2014.



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Exhibit A



18TH EDITION • 2014

 NAB

POLITICAL BROADCAST CATECHISM

18TH EDITION



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Additional copies of the Political Broadcast Catechism are available at nabstore.com

which some of the other spots running were sold at a higher rate than the spot for which the make good is being given, the make good will reduce the LUC for that period to the rate originally paid for it. Any political advertiser who paid a higher rate for time in the period in which that make good is aired must be given a rebate. *Political Programming Policies*, 7 FCC Rcd 678, 697 (1991).

A station must provide make goods to candidates before the election if it has provided time-sensitive make goods to any commercial advertiser purchasing the same class of time during the year preceding the applicable election period. *Political Programming Policies*, 7 FCC Rcd 678, 696-97 (1991); *Political Programming Recon.*, 7 FCC Rcd 4611, 4618 (1992).

If a make good is being furnished to meet contracted-for promises of audience size, demographics or ratings, that make good will not affect the LUC. *Political Programming Policies*, 7 FCC Rcd 678, 697 (1991). The benefits for such audience guarantee policies must be made available to candidate advertisers. The FCC requires that if a station will not know until after the election whether audience guaranty make goods might be due a candidate, this fact should be disclosed to the candidate, and an alternative, such as post-election cash rebate or a credit toward a future election should be negotiated. *Political Programming Recon.*, 7 FCC Rcd 4611, 4618 (1992); *see also Zell Miller and Guy Millner Against Station WALB-TV*, 12 FCC Rcd 10550 (1997).

The FCC staff has stated informally that a make good given due to technical problems when the spot was originally scheduled will not affect the LUC in the time period in which the make good runs.

Spot Separation Policies or "Pod Exclusivity"

The Commission has held that stations are not required to guarantee spot separation or "pod exclusivity" to candidates. Such guarantees are different from make good or preemption policies because they do not significantly affect the value of particular classes of time. *Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith Against Station WCIZ-TV 1 Miami, Florida*, 12 FCC Rcd 12248 (1997).

Preemption Policies

In general, stations must apply their normal preemption policies to political advertisers. FCC staff has raised concerns about stations which allow commercial advertisers to preempt other ads by offering a small amount over the price paid by the first advertiser, but require candidates to move to a higher "class" to preempt an existing spot. On the other hand, FCC staff has also expressed concerns about station preemption policies such as "last in; first out" that may have the effect of preferring long-term commercial advertisers over candidates. Stations facing preemption questions should seek advice of counsel.