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

FCC Mail Room

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

File No. _____

Second Supplement to Petition for a Declaratory Ruling

Robert S. Kahn
CANAL PARTNERS MEDIA, LLC
25 Whitlock Place
Suite 100
Marietta, Georgia 30064
770-427-2145
770-427-7167 (fax)

Marc B. Hershovitz
MARC B. HERSHOVITZ, P.C.
One Alliance Center
4th Floor
3500 Lenox Road
Atlanta, Georgia 30326
404-262-1425
404-262-1474 (fax)

Attorneys for Petitioner

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Canal Partners Media, LLC (“CPM”) files this supplement to its petition for a declaratory ruling to bring to the Commission’s attention how runoff elections like the one between Mary Landrieu and Bill Cassidy for the U.S. Senate in Louisiana are affected by 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

Because no candidate received more than 50% of the vote in Louisiana’s U.S. Senate election, a runoff election will be held between the top-two vote getters on December 6, 2014. Those candidates—Mary Landrieu and Bill Cassidy—must now scramble to raise money, put together strategies, and buy broadcast airtime to communicate with voters. Landrieu and Cassidy did not become legally qualified candidates for the runoff election until November 5, after the general election resulted in no candidate receiving more than 50% of the vote. And until the vote totals dictated that there would be a runoff and that they would be the candidates in it, television and radio stations were under no obligation to sell them airtime and, indeed, could legally refuse to do so.

¹ In the interest of full disclosure, petitioner is the media buyer for U.S. Senator Mary Landrieu, but the problems discussed herein are faced by all candidates for office in all elections regardless of party affiliation. Petitioner was also the media buyer for Michelle Nunn, a candidate for U.S. Senator for Georgia in 2014.

If using the LIFO method to determine preemption priorities and using it to preempt political candidates' advertisements in favor of commercial advertisers' spots were legal, stations could effectively steer runoff candidates like Landrieu and Cassidy into buying airtime at the most-expensive, nonpreemptible rates. That is because the law does not guarantee their ability to get in line to establish a position in the LIFO pecking order in the less-expensive preemptible rate classes until they become a legally qualified candidate.² Because candidates cannot 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 in violation of § 315(b) of the Communications Act.

Commercial advertisers, however, can get in the LIFO line whenever they want, and they are encouraged to—and often do—buy early. There are things called upfronts, which usually take place in May, where television

² Stations may argue that a candidate expecting to be in a runoff could buy airtime before qualifying for that runoff, but there are many problems with that argument. We will address two of them. First, until the voting returns set up a runoff and the candidate looking to place a media buy is in it, stations are under no obligation to sell candidates airtime and, indeed, can legally refuse to do so. Second, both federal and state campaign-finance laws limit a candidate's ability to spend money raised for a runoff election until the candidate qualifies as a candidate for the runoff election by being one of the top-two vote getters (money raised for a runoff that does not take place or for which the candidate does not qualify must be returned to contributors).

networks unveil their schedule of shows for the upcoming television season, which begins in the fall. Upfronts are used to allow companies to buy commercial airtime "up front," or several months before the television season begins. In other words, commercial advertisers have the opportunity to—and regularly do—get in the LIFO line months before a general-election or a general-election-runoff media buy is even a glimmer in a candidate's eye, let alone the candidate becoming qualified to make the purchase.

The problem that the application of LIFO poses is made even more stark in a runoff election like Louisiana's, which will take place December 6. While the Christmas season seems to start earlier and earlier each year, holiday advertising tends to start just after Halloween and builds to a crescendo as Thanksgiving approaches (Black Friday Door-Buster Deals!!!). That advertising was planned and purchased well in advance. Stations applying LIFO to preempt political candidates' advertisements in favor of commercial advertisers' spots force candidates to buy airtime at the most-expensive, nonpreemptible rates in order to make sure their advertisements clear and are broadcast so that their message gets heard.

Stations that use the LIFO method to determine preemption priorities for political candidates' advertisements not only discriminate against political candidates generally, they also are discriminating between the political

candidates themselves when primary-runoff elections take place. Using Georgia's 2014 U.S. Senate election as an example, Michelle Nunn became the legally qualified candidate of the Democratic Party for the U.S. Senate on May 20, 2014, when she won her party primary. David Perdue, however, became the legally qualified candidate for the Republican Party for the U.S. Senate two months later, on July 22, 2014, after he won his party's primary-runoff election. If the application of LIFO to preempt political candidates' spots were not illegal and Nunn and Perdue wanted to get in line to establish a priority against preemption under LIFO, Nunn could get into the LIFO line on May 21, while Perdue had to wait until July 23. When one party has a runoff and the other does not, the application of LIFO discriminates between the political candidates because one candidate can get in the LIFO line and beat out commercial advertisers before the other as the Nunn-Perdue example from Georgia illustrates.

If using LIFO to preempt political candidates' advertisements were legal, a station could refuse to sell candidates time until they qualified for the runoff (or the primary or general election), then, once they become legally qualified candidates and place an order for airtime, preempt the candidates' spots in favor of commercial advertisers' spots because the candidates did not

buy airtime early enough—§ 315(b) would be rendered meaningless.³

Using LIFO to preempt political candidates' advertisements violates § 315(b) of the Communications Act, which requires that broadcast stations treat candidates as their most-favored commercial advertisers as far as terms, conditions, and charges for airtime are concerned. The Commission has long held that the most-favored-advertiser standard applies to stations'

³ The games stations can play do not stop there. Stations sell multiple classes of time. Imagine a station that sells three classes of time: preemptible, preemptible with two weeks' notice, and nonpreemptible or fixed. A runoff election is triggered that will occur a few weeks later. You are a candidate in the runoff and, on the morning after Election Day, after the runoff has been triggered, you contact the station about buying time.

"I would like to buy ads on your station during the next two weeks at the preemptible rate," you tell the station's sales rep. "I'm sorry," you're told, "those slots are essentially sold out, we use LIFO—Last-In, First-Out—to determine whose spots are going to run, and you'd be the last in, and thus the first out." "But I wasn't a legally qualified candidate in the runoff until today because there wasn't going to be a runoff until today," you retort. "Sorry," the sales rep says, "You want your ads to run because you have an election coming up, if you buy at the preemptible rate your spots will be preempted under our LIFO policy."

"OK," you reply, "I see you sell preemptible-with-two-weeks-notice spots. Put my spots in at that rate so they'll clear." "Nope, can't do that," says the sales rep, "I can't sell those spots now because you want those spots to air during the next two weeks. I can't sell you spots that are preemptible with two weeks' notice less than two weeks before your spots would be scheduled to air." "But you wouldn't sell me those spots earlier because there wasn't going to be a runoff election until today," you reply with a growing sense of exasperation. "Sorry," the sales rep says.

"So what you're telling me is this," you ask the sales rep, "to get my spots on the air, I'm going to have to pay your most expensive nonpreemptible, fixed rate?" "Yep," says the sales rep.

"Are all the car dealers you have advertising on this station paying that rate?" you ask. "Of course not," replies the sales rep, "They bought at the preemptible rate. You could have, too, if you placed your order earlier."

sales practices, including preemption priorities, not just to advertising rates.⁴ 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.⁵ 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.⁶

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 *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).

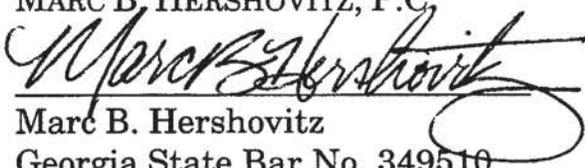
⁶ Stations may argue, like they have before, that by considering a political candidate’s advertisements as the First-In spots no matter when they were bought, they would be giving candidates greater benefits than those actually conferred upon the most-favored commercial advertiser. But this Commission expressly rejected that argument more than two decades ago. *See id.*

Using the LIFO method to determine preemption priorities for political candidates' advertisements is illegal. 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.

Respectfully submitted this 13th day of November 2014.


Robert S. Kahn *by MSA*
Georgia State Bar No. 406025

25 Whitlock Place
Suite 100
Marietta, Georgia 30064
770-427-2145
770-427-7167 (fax)

By: 
MARC B. HERSHOVITZ, P.C.
Marc B. Hershovitz
Georgia State Bar No. 349510

One Alliance Center
4th Floor
3500 Lenox Road
Atlanta, Georgia 30326
404-262-1425
404-262-1474 (fax)

Attorneys for Petitioner