April 28, 2015

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notice of Ex Parte Communication, MB Docket No. 15-24

Dear Ms. Dortch:

On April 24, 2015, Rick Kaplan and the undersigned of the National Association of Broadcasters (NAB), along with Jack Goodman of the Law offices of Jack N. Goodman met with William Lake, Mary Beth Murphy, Kalpak Gude, Robert Baker, Hope Cooper and Gary Schonman of the Media Bureau. Robert Kahn of Canal Media Partners, LLC (Petitioner) also participated in the meeting. The purpose of the meetings was to discuss Canal's Petition seeking a Declaratory Ruling concerning how broadcasters sell political time.[1] NAB reiterated the arguments set forth in our written comments that a broadcast station's use of Last-In-First-Out (LIFO) preemption is both consistent with Section 315(b)(1) of the Communications Act and the Commission's rules.[2]

The primary question raised during the meeting was whether a broadcaster could, consistent with the Communications Act and Commission precedent, employ last-in-first-out (LIFO) preemption to legally qualified candidates, as well as to its most-favored commercial advertisers. Petitioner's theory is that LIFO violates the statute and Commission rules because, despite being applied equally, it disadvantages candidates

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[1]Petition for a Declaratory Ruling, Canal Media Partners, LLC (Petitioner), MB Docket No. 15-24 (Sept. 29, 2014) (Petition).

[2] Opposition of the National Association of Broadcasters, MB Docket No. 15-24 at 2, 5-9 (Mar.2, 2015) *(citing* 47 U.S.C. § 315(b)(1)(A)). The lowest unit charge provision was adopted as part of the Federal Election Campaign Act of 1971, Pub. L. No. 92-225. During the debates, Senator Pastore, the floor leader on the legislation, explained that the lowest unit charge rule requires broadcasters to "render to that individual who is running for office the same rate as they do for commercial advertiser. That is all it amounts to." 92 Cong. Rec. S13290 (daily ed. Aug. 5, 1971 (statement of Sen. Pastore); *see also* 92 Cong. Rec. H11258 (daily ed. Nov. 18, 1971 (statement of Rep. MacDonald.).

1771 N Street NW
Washington DC 20036 2800
Phone 202 429 5300

who may purchase time later than commercial advertisers. Petitioner claims that, as long as LIFO is a preemption practice, legally qualified candidates must be treated *better than* the most-favored advertiser *within any class of time*, putting it to the head of the line no matter when the candidate buys his or her ad time.

As NAB discussed in its filings, the Petitioner's theory is contrary to law, undermines the Commission's policies and has absolutely no basis in the record. If the Commission were to grant the relief sought by the Petitioner, the Commission would be reversing its prior decisions that establish that stations may employ preemption to legally qualified candidates and commercial advertisers, so long as it is applied evenly and objectively. Moreover, the Petitioner provides no meaningful evidence that there is any problem to be remedied, as he continues to stand alone in a quest to force broadcasters into putting his clients ahead of all commercial advertisers. During the discussion, however, NAB stated that if the Commission believed that transparency was an issue in some stations' use of LIFO preemption, broadcasters would be happy to work in concert with the Commission and the Petitioner to ensure compliance with all of the Commission's rules and regulations.

With respect to the Communications Act, NAB explained that the Commission's seminal 1991 Order interpreting Section 315 of the Communications Act specifically stated that stations may "establish and define their own reasonable classes" of preemptible time, so long as those classes were based on some "demonstrable benefit, such as varying levels or assurances of preemption protection, scheduling flexibility or special make-good benefits. [3] The Commission also held that Congress did not intend candidates to be "essentially afforded 'fixed' status" at a cheaper "preemptible rate."[4]

One year later, the Commission further clarified its rules governing station preemption. Under the heading "Lowest Unit Charge," the Commission unequivocally stated that candidates and commercial advertisers are to be treated on an equal footing, explaining that since the enactment of the 1963 comparable use provisions, its rates policy "has evolved to require stations to make advertising time available to candidates *subject to the same rates terms and conditions applied to commercial advertisers*."[5] The Commission further clarified that, with respect to sold-out situations in preemptible classes of time, "the station is not unlawfully discriminating against candidates by advising them that is

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[3] *Codification of the Commission's Political Programming Policies*, Report and Order, 7 FCC Rcd 678, 690-91 (1991 Order).

[4] *Id*.

[5] *Codification of the Commission's Political Programming Policies*, Memorandum Opinion and Order, 7 FCC Rcd 4611, 4614 (1992 Order) (emphasis added).

necessary to pay the non-preemptible rate … because the station would not allow *any* advertiser to preempt a 'preemptible' spot at some intermediate rate."[6] The Commission left no doubt that a station's preemption policies should apply to candidates in the same manner as they apply to commercial advertisers by asserting that, "if a commercial advertiser pays a lower price for a class of time for assuming a specific prospective risk of nonclearance, a candidate should get the benefit of the same low price so long as the candidate assumes the same specific prospective risk of preemption."[7]

Thus, the 1991 and 1992 Orders both flatly rule out Petitioner's view that legally qualified candidates should never be preempted. To the contrary, the Commission specifically allows stations to offer different classes of preemptible time, and a permissible distinction among those classes would be levels of protection against preemption. The fact that the Commission also required stations to disclose their preemption policies shows that it knew that candidate ads would be treated the same as equivalent commercial ads when it came to preemption; if Petitioner's interpretation were correct, there would be no need to disclose preemption policies since candidates would always be the last to be preempted.

The Petitioner's argument rests entirely on one passage in the 1991 Order, in which the Commission states that its most-favored advertiser policy standard applies both to rates *and* sales practices.[8] This statement was offered in response to arguments that the "most-favored advertiser standard applies only to rates."[9] While affirming that its standard goes beyond just the charge itself, the Commission, however, went into great detail further in the same document and in its 1992 Reconsideration Order to explain exactly the rights to which candidates are entitled. That explanation did not suggest that candidates' status encompassed a right to never be preempted within a class of time.

Beyond the statute and Commission's rules themselves, NAB again noted that Petitioner offered absolutely no factual support for its claims that LIFO preemption has precluded any candidate from purchasing time on any station. NAB also again referenced the fact that numerous broadcasters and affiliated associations supported NAB's opposition,[10] and

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[6] *Id*. at 4616.

[7] *Id.* at 4611.

[8] 1991 Order at 690.

[9] *Id.* at 689.

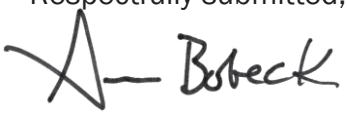
[10] *See*, *e.g.*, Reply Comments of Oregon Association of Broadcasters; Reply Comments of Media General, Inc., Reply Comments of the ABC Television Network Affiliates Association; Reply Comments of the CBS Television Network Affiliates Association; Reply Comments of the FBS Television Network Affiliates Association; Reply Comments of the NBC Television

not a single media buyer or other entity supported any of Petitioner's claims. Rather, Media Buyer Jan Crawford Communications (JCC) points out that in practice, the arguments set forth by Petitioner do not bear any resemblance to actual political advertising practices.[11] We agree with JCC that LIFO by its very nature establishes an equitable and legal rate structure for all buyers.

Finally, NAB explained that, by granting the Petition, the Media Bureau would effectively be eliminating the use of LIFO to establish preemption priorities, with the likely effect of eliminating low-priced classes of preemptible time altogether. Those classes provide a very inexpensive option for political candidates (and all other advertisers). NAB believes that this consequence therefore would not even provide the Petitioner with his desired relief and certainly would not serve the public interest. Thus, NAB strongly urges the Commission to deny the requested Declaratory Ruling.

Please direct any questions regarding these matters to the undersigned.

Respectfully submitted,



Ann West Bobeck
Senior VP and Deputy General Counsel
Legal and Regulatory Affairs

cc Robert Baker
Hope Cooper
Kalpak Gude
William Lake
Mary Beth Murphy
Gary Schonman

Affiliates; Reply Comments of Sinclair Broadcast Group, Inc.; Reply Comments of Gray Television, Inc., MB Docket No. 15-24 (filed March 17, 2015).

[11] *See* Reply Comments of Jan Crawford Communications, MB Docket No. 15-24, at 1-2 (Mar. 16, 2015).