



April 5, 2012

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

RE: Notice of Ex Parte Communication
MM Docket Nos. 00-168 and 00-44

Dear Ms. Dortch:

On April 3, 2012, Gordon Smith, Christopher Ornelas and the undersigned of the National Association of Broadcasters met with Sherrese Smith, William Lake and Lyle Elder of the FCC to discuss NAB's position in the above-captioned dockets. The NAB parties presented their arguments consistent with the attached points. In addition, the group discussed whether there were simple, practical ways to address broadcasters' concern about the market-distorting effects of creating anonymous accessibility to the commercially sensitive information included in the political file.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jane E. Mago", written in a cursive style.

Jane E. Mago
Executive Vice President &
General Counsel

Attachments

cc: Sherrese Smith
William Lake
Lyle Elder

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SUMMARY POINTS RE: ONLINE PUBLIC/POLITICAL FILES

I. Statutory Authority Questionable

- NAB's supplemental comments raised serious questions about the FCC's authority to require broadcasters to make their political files available online.
- In BCRA, Congress expressly required the FEC to place extensive election-related information online. In contrast, Congress referred to making the political records maintained by broadcasters only "available for public inspection." FCC must presume that Congress acted intentionally in excluding an online requirement for broadcasters.
- BCRA does not provide the FCC with authority to enact online political file requirements; DC Circuit decisions suggest that BCRA *bars* the FCC from mandating that broadcasters place political files online. See *MPAA*; *Railway Labor Exec.*, etc.
- A broadcaster online disclosure requirement would result in needless duplication with information already online at FEC. See Chart showing overlaps (attached). The extent of this duplication helps explain why Congress declined to require broadcasters to place their political records online.

II. Lack of Requirement for FCC to Act

- At the very least, there is no *requirement* that broadcaster public or political files or sensitive rate information be put online.
- FCC is not required by statute to have a public file rule at all (rule adopted in 1965, with FCC finding it was appropriate for carrying out the congressional purposes in Sections 309 and 311 of the Act).
- FCC has authority to decide, as it did in 2007, that the political file should not be put online. In this proceeding, the FCC has proposed to exempt other parts of the public file from an online requirement (e.g., letters/emails from public).
- Exempting all or some portion of the political file from an online requirement would be consistent with purpose of the political file -- "[t]o ensure that competing candidates will be able to ascertain what equal opportunities they are entitled to." 13 FCC Rcd 23254 ¶45 (1998) (adopting DBS political file requirement).

III. Burden of Online Public/Political File

- NAB has shown in (i) initial comments, with attached declarations, (ii) reply comments, and (iii) initial PRA comments, that the burden of the proposed public/political file rule is very real.

- This burden is especially great for stations in small markets and for smaller stations in larger markets.
- Several NAB member stations took photos of their political and public files—their size shows that transitioning to and maintaining online files will be a substantial burden. [Copies of photos attached]
- WGAL (NBC) in Lancaster, PA: total public file 79 inches, political file 30 inches
- KSNV (NBC) in Las Vegas, NV: total public file 61 inches, political file 35 inches
- WTAE (ABC) in Pittsburgh, PA: total public file 48 inches, political file 24 inches
- An online political file requirement is particularly problematic under the Paperwork Reduction Act, given the “duplicati[on] of information otherwise reasonably available” on the FEC’s website. 44 U.S.C. § 3506(c)(3)(A), (B).

IV. Online Sponsorship Identification

- Current rules require sponsor ID information to be aired at the time the sponsored material is broadcast, consistent with the relevant statutory language. Forcing broadcasters to put that information in their public files or online goes beyond the language of Section 317, raising statutory authority questions.
- The proposed requirement covers all sponsored programming -- network, syndicated and local. This overbroad proposal is needlessly burdensome and would result in identical, duplicative disclosures by hundreds of stations.
- Even the Information Needs of Communities report only suggested online disclosure of sponsors in news programming. But that more limited recommendation also is unwarranted, as the sponsorship rules cover newscasts already. Any cases of non-compliance with existing rules are best handled through the FCC’s enforcement process.
- Local stations do not receive a list of sponsors from network and syndicated content providers before broadcast and would presumably need to watch each show to identify and list the sponsors.
- NAB (and others) noted this in their initial comments. In reply, PIPAC claimed that this amounted to an admission of wrong-doing by our members, as they are purportedly required by 47 U.S.C. § 508’s payola provisions, to know in advance of broadcast if any money or services were provided in exchange for the inclusion of certain content into the program.
- PIPAC is incorrect. Section 508(e) states that the “inclusion in the program of the announcement required by section 317 of this title shall constitute the disclosure required by this section.” In other words, when networks and syndicators include sponsor information as required “at the time of broadcast” in their programming, that satisfies the requirements of Section 508. There is no obligation for those program suppliers to provide a separate list of program sponsors to the broadcaster before the program is aired.

Overlaps in FCC political file/FEC online information

<u>Data</u>	<u>FCC Political File</u>	<u>Available through FEC?</u>
<p>Who authorized a spot about a federal election/candidate or a political matter of national importance?</p>	<p>the name of the candidate and the name of candidate-authorized committee (for requests made by, or on behalf of, a candidate) (47 U.S.C. § 315(e)(2)(F)); the name of the person purchasing the time, and the name, address, and phone number of a contact person for the buyer (for spots that communicate a message relating to any political matter of national importance) (§ 315(e)(2)(G))</p>	<ul style="list-style-type: none"> ✓ all political committees must file reports of receipts and disbursements, which identify the filing committees (2 U.S.C. § 434(a)(1)) ✓ all authorized committees must identify in these reports the recipient of each expenditure to persons who received more than \$200 total in a calendar year or election cycle (2 U.S.C. § 434(b)(5)(A), (b)(6)(A)) ✓ all other political committees or other persons must identify the recipient of any independent expenditure if the person received more than \$200 total in a calendar year or election cycle; the reports show the name and contact information for the person or committee that purchased the spot (2 U.S.C. § 434(b)(6)(B)(iii), (c)(2); FEC Form 3X Schedule E and Form 5) ✓ electioneering communications reports identify the person making the disbursement (2 U.S.C. § 434(f)(2)(A))
<p>Who controls the buyer and its finances?</p>	<p>for sponsored broadcast matter that is political or involves the discussion of a controversial issue of public importance, public files must include a list of the sponsor’s chief executive officers or the members of the executive committee or of the board of directors; BCRA requires the same for spots that communicate a message relating to any political matter of national importance, and the identification of the committee’s treasurer for candidate spots (47 C.F.R. § 73.1212 and 47 U.S.C. § 315(e)(2)(F), (G))</p>	<ul style="list-style-type: none"> ✓ electioneering communications reports must identify “any person sharing or exercising direction or control over the activities of” the buyer, meaning “officers, directors, executive directors or their equivalent, partners, and in the case of unincorporated organizations, owners” (2 U.S.C. § 434(f)(2)(A); 11 C.F.R. § 104.20(a)(2)(3)) ✓ each political committee must report on all receipts and disbursements, with these reports signed by the committee’s treasurer (2 U.S.C. § 434(a)(1))

Overlaps in FCC political file/FEC online information

<u>Data</u>	<u>FCC Political File</u>	<u>Available through FEC?</u>
Who sold the spot?	each station maintains a file of the political spots it sold (47 U.S.C. § 315(e); 47 C.F.R. § 73.1212 and § 73.1943)	<ul style="list-style-type: none"> ✓ all authorized committees must report the recipient of each expenditure to persons who received more than \$200 total in a calendar year or election cycle (2 U.S.C. § 434(b)(5)(A), (b)(6)(A)) ✓ all other committees or persons must report each independent expenditure to persons who received more than \$200 in a calendar year or election cycle (§ 434(b)(6)(B)(iii), (c)(2))
Which candidate(s) and election(s) are referred to in an electioneering communications spot?	the name of the candidate to which the communication refers and the election to which the communication refers (47 U.S.C. § 315(e)(2)(E))	<ul style="list-style-type: none"> ✓ electioneering communications reports identify the elections to which the communications pertain and the candidates identified or to be identified (2 U.S.C. § 434(f)(2)(D)) ✓ all independent-expenditure reports must indicate whether the expenditure supported or opposed a candidate, along with the candidate's name and office sought (2 U.S.C. § 434(b)(6)(B)(iii); FEC Form 3X Schedule E and Form 5)

Overlaps in FCC political file/FEC online information

<u>Data</u>	<u>FCC Political File</u>	<u>Available through FEC?</u>
<p>What was the charge for the advertising flight?</p>	<p>amount of the expenditure is clear because file must include rates charged (and net price if any rebates were made) (47 U.S.C. § 315(e)(2)(B)); NAB's PB-17 Form (widely used by stations) calls for "total charge" information</p>	<ul style="list-style-type: none"> ✓ electioneering communications reports identify the amount of disbursements made over \$200 (2 U.S.C. § 434(f)(2)(C)) ✓ authorized political committees must report the recipient, date and amount for all disbursements to persons who receive more than \$200 during a calendar year or election cycle (§ 434(b)(6)(A)) ✓ non-authorized committees and all other persons must report the recipient, date, amount and purpose of independent expenditures to persons who receive more than \$200 in a calendar year or election cycle (§ 434(b)(6)(B)(iii), (c)(2))
<p>Did the buyer receive any rebates on the amount charged?</p>	<p>file must include information on rebates to candidates, including the date and amount of the rebate (47 U.S.C. § 315(e)(2)(B); 47 C.F.R. § 73.1942(a)(1)(ix)) (as interpreted by the Commission; <i>see Codification of the Commission's Political Programming Policies</i>, Memorandum Opinion and Order, 7 FCC Rcd 4611, para. 89 (1992): "If a rebate is subsequently issued, we would expect to find an appropriate notation on the contract or in another document in the political file, identifying at a minimum the amount and date of the rebate and the order to which it relates")</p>	<ul style="list-style-type: none"> ✓ all political committees must identify persons who provided "a rebate, refund, or other offset to operating expenditures," as well as the date and amount of the rebate, if the person provided rebates worth more than \$200 in a calendar year or election cycle (§ 434(b)(3)(F))



KSNV 3
HD 
LAS VEGAS, NV
2010 POLITICAL FILE

KSNV 3
HD 
LAS VEGAS, NV
2011 PUBLIC FILE



KSNV 3
HD 

LAS VEGAS, NV
2010 POLITICAL FILE



WGAL

**General
File**

**Political
File**



30"



49"

AUTHORIZATIONS

Public File

79"



WGAL




WTAE
**POLITICAL
FILE**




WTAE
**PUBLIC
FILE**