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December 20, 2013

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12 St. SW
Washington, DC 20554

Re: Written Ex Parte Communication, MM Docket No. 00-168

Dear Ms. Dortch:

The Public Interest, Public Airwaves Coalition, whose members include Campaign Legal Center, Common Cause, Free Press, and the United Church of Christ, OC Inc., together with Sunlight Foundation and Center for Effective Government, would like to bring to the Commission's attention a recent Sunlight Foundation study examining station compliance with the online political file disclosure requirements enacted by the Commission.¹ This study further supports PIPAC's argument that the Commission must establish standards for online political file data, and should adopt the process we recommended in our comments.²

Overall, the study found that "[a]s a rule the[] disclosures are not very revealing." Sunlight chose 200 ad contracts at random from the current online political files, which represent only the top-50 DMAs and the top-4 station affiliates. Of those 200 ad contracts, the researcher found that 94 were ads targeting federal candidates. Yet, even though 47 U.S.C. § 315(e)(2)(E) requires that the political file provide the name of the candidate and the office to which the candidate is seeking election, only *eight* of those 94 included the name of the targeted candidate.³ Fifty-seven of the disclosure forms left the information out, and another 22 had no disclosure forms at all.

¹ Jacob Fenton, *Political Advertisers and TV Stations Ignore Disclosure Rules*, SUNLIGHT FOUND. (Dec. 18, 2013), <http://sunlightfoundation.com/blog/2013/12/18/political-advertisers-and-tv-stations-ignore-disclosure-rules> (the full study is attached in the Appendix).

² PIPAC et al. Comments, MM Docket No. 00-168, at 15-24, <http://apps.fcc.gov/ecfs/document/view?id=7520939828>.

³ Disclosure of the name of the candidate referred to is required by 47 U.S.C. § 315(e)(2)(E).

A review of the political file records regarding issue ads was similarly disappointing, Sunlight's review showed. The study only examined two issues of national importance—gun control and immigration, although, clearly, there are many more. The Communications Act requires that in the case of messages regarding “national legislative issues of public importance,” the issue to which the communication refers be included in public file.⁴ Of the 21 issue ads found, the disclosure forms for only *four* described the subject of the ad.

The report also includes a few of the most egregious examples of non-disclosure, including an ad by Crossroads GPS that targeted Joe Donnelly, Indiana's then-Democratic-candidate for Indiana's open Senate seat. The ad's disclosure files did not say that the ad referred to Joe Donnelly.

The report suggests that some of the non-compliance might be due to a lack of understanding of the disclosure rules. Even LUC Media, a supporter of disclosure and large media buyer, admitted it made some mistakes in disclosing the issues and candidates of the ads it ran. For example, an ad purchased by LUC Media on behalf of Independence USA failed to disclose when the ad supported Robin Kelly, or attacked her opponent, Deborah Halvorson. Bobby Kahn, the group's founder, said “we'll be more thorough in the future.”

Lastly, the report indicates that online disclosure from smaller stations (who must start uploading political files online in July 2014) will likely be less complete than for the larger stations. David Parker, a political science professor at Montana State University said that, in his vast experience with paper files in Montana, stations did not disclose nearly enough information to get a full picture of the ad spending.

Lack of disclosure is a universal problem, whether caused intentionally or by a misunderstanding of the law. The simplest way to ensure full disclosure is to adopt data standardization requirements, such as those PIPAC suggested in its comments.⁵ This would ensure that broadcasters provide the information required by law. Citizens should not have to rely on the good graces of broadcasters and ad buyers to ensure they receive the disclosure they are entitled to by law and which is necessary to have an informed electorate.

⁴ 47 U.S.C. § 315(e)(1)(B)(iii).

⁵ PIPAC et al. Comments, MM Docket No. 00-168, at 15-24, <http://apps.fcc.gov/ecfs/document/view?id=7520939828>.

Respectfully submitted,

/s/

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December 20, 2013

Appendix

Political advertisers and TV stations ignore disclosure rules

By Jacob Fenton

Dec. 18, 2013, 9:30 A.M.



Screenshot from an ad by the Kentucky Opportunity Coalition backing Republican Sen. Mitch McConnell scheduled to run May 10-16 on WLKY in Louisville. Disclosure filings at the station do not mention McConnell.

In a [2003 Supreme Court opinion](#) on the biggest campaign reforms in a generation, Justice Stephen Breyer reflected on a little-known provision that required outside groups to disclose additional details about their political ad spending at local TV stations. "Recordkeeping can help both the regulatory agencies and the public evaluate broadcasting fairness," Breyer wrote, "and determine the amount of money that individuals or groups, supporters or opponents, intend to spend to help elect a particular candidate."

But a decade after the Supreme Court ruling, an extensive review of these documents by the Sunlight Foundation reveals that TV stations often fail to report even the most basic information about the political ads that outside groups buy on their airwaves. As a result, the records that Breyer said would facilitate public watchdogging are spotty or don't exist. There's no way to total reliably how much is being spent for or against a candidate, or, in some cases, who is doing the spending. A systematic review of 200 randomly-selected ad buys made by outside groups found that fewer than 1 in 6 ads targeting federal candidates disclosed the name of the candidate or election mentioned.

Such omissions deprive the voting public of important information. TV ad files have become an increasingly important tool for tracking otherwise undisclosed political spending by groups that

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run the gamut from well-known trade associations and unions to lesser-known operations whose anodyne names offer little information about the financial or political interests behind them: "Americans for Job Security," for instance, or "Checks and Balances for Economic Growth." In the wake of court decisions making it easier to route big money through outside groups, broadcast political TV ads jumped to [an estimated \\$5.6 billion in 2012](#) — up 30% from 2008. Yet in spite of this massive payday, stations still find it hard to fill out paperwork about their benefactors.

They are required to do so by a relatively obscure section of the sweeping 2002 campaign finance law popularly known as "McCain-Feingold," named after the senators who authored its key components. It requires TV stations to make available detailed information about political ad buys, including the names of any elected officials mentioned in the ads and any national issues discussed in them. Only recently has it become clear how often that law is being flouted.

That's because, until last year, the ad files were available only at local television stations. To see them, members of the public had to arrange to visit the stations during business hours and review the files. Charges for making copies could be steep. In August 2012, however, the Federal Communications Commission (FCC) won [a court decision](#) that permitted the agency to require about one-tenth of the nation's more than 2,000 broadcast stations — those located in the 50 largest TV markets and affiliated with the top four broadcast networks — to post their ad files online.

Sunlight made those files searchable on its [Political Ad Sleuth](#) project. But in working with the files, we noticed so many omissions that we undertook a more comprehensive check. It suggests the McCain-Feingold requirements are more often ignored than obeyed. And our survey actually understates the extent of the problem. We only tallied the most flagrant violators: groups known to be targeting federal candidates that failed to disclose the names of those candidates in their paperwork. Our survey of ad filings doesn't include dark money groups we'd never heard of, and union groups active in both state and federal races. The most widely-used disclosure form allows advertisers to check a box saying whether the ads are national or local; additional disclosures are only required for advertisements that are national in scope. The most common response is to leave both boxes blank.

[National box ignored \(p. 1\)](#)

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NAB Form PB-17 Issues

**AGREEMENT FORM FOR
NON-CANDIDATE/ISSUE ADVERTISEMENTS**

Station and Location: WLKY Louisville	Date: 4-25-13
-------------------------------------------------	-------------------------

I, Emily Milhoan

do hereby request station time concerning the following issue:

Kentucky Opportunity Coalition P.O. Box 6067 Louisville, KY 40206 Treasurer: Caleb Crosby

Broadcast Length	Time of Day, Rotation or Package	Days	Class	Times per Week	Number of Weeks
	see attached Schedule				

Total Charges: \$20,825 NET

This broadcast time will be used by: Kentucky Opportunity Coalition

Does the programming (in whole or in part) communicate "a message relating to any political matter of national importance?" <input type="checkbox"/> Yes <input type="checkbox"/> No

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[As seen above, a]dvertisers commonly ignore a question that asks whether their ad is national. Some disclosure forms, like the one shown here, can be confusing because the text doesn't make clear that any ad targeting a legally qualified candidate for federal office is by definition nationally important.

What the survey found

The McCain-Feingold law requires TV stations to disclose: "The name of the candidate to which the communication refers and the office to which the candidate is seeking election, the election to which the communication refers, or the issue to which the communication refers." This only applies to ads relating to a "political matter of national importance" which the statute further defines in three categories: (i) a legally qualified candidate; (ii) any election to Federal office; or (iii) a national legislative issue of public importance."

What exactly a "national legislative issue of public importance" means is not defined. Nor is it totally clear what an ad must do to "refer" to a candidate.

For years, broadcasters and some sympathetic to the FCC have complained that the language of the statute is hard to understand, especially as concerns national legislative issues. But when candidates are involved, the disclosure should be relatively straightforward, according to Eric Null, a staff attorney at Georgetown Law's Institute for Public Representation. "If you mention, or refer to, or have a picture of, or put the name up of a candidate, then you have to disclose in your filing that this ad referred to that candidate and you also have to disclose which office that candidate is seeking election for," Null said. The law was "somewhat ambiguous" for ads that include both national issues and candidates, according to Null. But, he added, "If you're running an ad for Mitt Romney, and it talks about gun control then you should be disclosing that you talked about Mitt Romney in your ad and that you talked about gun control in your ad and that it's for the 2012 presidency."

Null researched these points for the Sunlight Foundation because few lawyers, even those intimately involved in campaign reform efforts, are familiar with them. Null and a variety of experts interviewed for this story all believe the rule requiring enhanced political ad disclosure has never been interpreted by a judge after the decision in *McConnell vs. FEC*, the 2003 Supreme Court ruling on the McCain-Feingold law.

Nor has the FCC written agency rules explaining how this information must be disclosed. For years, however, TV stations have used a disclosure form put out by the National Association of Broadcasters (NAB). Not all stations use this form — others have their own forms, and one media buying company, Target Enterprises, uses their own [disclosure form](#) that only leaves an empty box for "issue." It is typically left blank.

As a rule these disclosures are not very revealing. One disclosure form is often used for multiple ad buys, though it's generally unclear which document refers to which ad buy. The total ad cost is often omitted, with the note "see contract."

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To see whether ad targets were being disclosed, Sunlight examined 200 randomly chosen ad contracts from stations' "non-candidate issue advertiser" folders, and compared disclosure forms to what other information we could find about the advertiser in question. We used Political Ad Sleuth and another Sunlight tool, [Ad Hawk](#), which archives campaign ad videos. We also examined Federal Election Commission (FEC) records and news stories about the ads. The results, while not scientific, make clear that TV stations are failing to disclose who outside groups are targeting with their ads.

Of 200 randomly chosen ad contracts examined, 94 were for ads targeting federal candidates, though not all ads could be categorized. Of those ads, only eight listed the name of the candidate targeted. Another seven included the name of the candidate in the text of the ad contract — typically given as the "product" being sold by the ad. Fifty-seven ads simply left the information out; another 22 had no disclosure forms at all.

[The ad target is not disclosed \(p. 2\)](#)

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NAB Form PB-17 Issues

For programming that "communicates a message relating to any political matter of national importance," list the name of the legally qualified candidate(s) the programming refers to, the office(s) being sought and the date(s) of the election(s) (if applicable):

[Empty box for candidate information]

For programming that "communicates a message relating to any political matter of national importance," attach Agreed Upon Schedule (Page 3)

I represent that the payment for the above described broadcast time has been furnished by:

Crossroads GPS, 1404 New York Ave. NW, Washington DC 20005
Margee Clancey-Treasurer Steven Law- Board Chairman (703)989-6167

and you are authorized to announce the time as paid for by such person or entity. The entity furnishing the payment, if other than an individual person, is:

a corporation; a committee; an association; or other unincorporated group.

The names, offices, and addresses of the chief executive officers, directors, and/or authorized agents of the entity are named below (may be attached separately):

THIS STATION DOES NOT DISCRIMINATE OR PERMIT DISCRIMINATION ON THE BASIS OF RACE OR ETHNICITY IN THE PLACMENT OF ADVERTISING.

I agree to indemnify and hold harmless the station for any damages or liability, including reasonable attorney's fees, that may ensue from the broadcast of the above-requested advertisement(s). For the above-stated broadcast(s), I also agree to prepare a script, transcript, or tape, which will be delivered to the station at least 24 before the time of the scheduled broadcasts.

TO BE SIGNED BY ISSUE ADVERTISER

9/21/12 _____ 703-299-1760
Date Signature Contact Phone Number

TO BE SIGNED BY STATION REPRESENTATIVE

Accepted Accepted in Part Rejected

Signature Printed Name Title

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[The above] ad targeted Joe Donnelly, the Democratic candidate for Indiana senate. Although the form makes clear that his name should be listed, advertiser Crossroads GPS left it blank.

Ads airing messages about issues of national legislative importance also need to disclose their subjects, although this question is much harder to answer. Counting only ads known to have been aired about two blockbuster federal issues — immigration and gun control, or that described themselves as being nationally focused — the Sunlight survey found just 4 of 21 issue ads that described their subject. This leaves out ads on numerous subjects that most would consider national: Obamacare, energy policy and others.

Here's a small sampling of documents that failed to disclose the ad targets. There's a chicken-and-egg problem with describing inadequate disclosure, of course: We only include ads that are documented elsewhere, but many of the ad files have so little information it's hard to know what they are about. Click the links to see the original documents.

- [The Kentucky Opportunity Coalition](#) put up [this ad](#) targeting both Obamacare and Kentucky Senator Mitch McConnell's opposition to it. Under FEC rules, this isn't a campaign ad and need not be reported.
- [A Crossroads GPS](#) ad that [targeted Joe Donnelly](#), last year's Democratic candidate (and ultimate victor) for Indiana's open Senate seat.
- [An ad from the Democratic Congressional Campaign Committee](#) scheduled to air between Oct. 30 through Nov. 5 in 2012 on KHOU in Houston, Texas. The disclosure form says the ad is national in scope, but no candidate or issue is listed.
- [A National Republican Senatorial Committee](#) ad scheduled to run Nov. 1 through Nov. 6, 2012 on WLWT in Cincinnati. Documents filed with this \$74,000 buy said that the ad was national in scope, but didn't list the name of the candidate referred to. Presumably the ad was either attacking Sen. Sherrod Brown, D-Ohio., or backing his Republican rival, Josh Mandel.

Even those who've backed disclosure have trouble completing the paperwork. LUC Media handled at least \$1.5 million in political ad contracts for Independence USA, a super PAC that supported Democrat Robin Kelly's bid for Congress in an Illinois special election this year. All of the group's ad filings at Illinois TV stations reviewed by Sunlight failed to disclose the candidate targeted (some of the ads backed Kelly, while others bashed her opponent, Deborah Halvorson).

The filings "should have said it was an issue of national importance," said the group's founder, Bobby Kahn. "We'll be more thorough in the future," he said.

The group's omissions are all the more surprising in light of LUC's pedigree. They were one of the few political advertisers to back the change that put ad files online, and said they regularly consult these files. Kahn, an attorney and former executive director of Georgia's Democratic Party, was part of a group that's previously used station data to help show that some candidates [were getting ripped off](#) in violation of FCC rules.

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The violations are bipartisan

TV stations could be penalized for leaving out disclosure information, but the FCC has shown little appetite for doing so. Although occasional enforcement checks took place in the years after the reforms were adopted, more recently the FCC has fallen back on a "complaint driven" process. In other words, the agency won't act unless someone asks it to. But because the vast majority of the political ad filings are hidden away in file cabinets at broadcast stations, available only during business hours when most voters are working, few people ever see them, let alone complain.

Steve Waldman, an Internet entrepreneur and journalist who worked as a senior advisor to former FCC chairman Julius Genachowski, said the nation's communications watchdog was leery of getting stuck with the unenviable position of campaign cop. "When it comes to political stuff, there's extra sensitivity at the commission because it's the one area where Congress jumps up and down and says, 'If you do that we're going to come and slap you in the head,'" Waldman said.

Tom Wheeler, who just replaced Genachowski, saw his Senate confirmation vote held up by Sen. Ted Cruz, R-Texas, over the issue of political ad disclosure. In a [statement](#), Cruz said he lifted the hold after Wheeler said he'd make political ad funding disclosure "not a priority."

Further complicating the problem is the historically cozy relationship between the FCC and the NAB. The commission has avoided leaving a paper trail that might explain its thinking on thorny issues, like what exactly constitutes "a national legislative issue of public importance." Instead, TV broadcasters who need an opinion on whether an ad is political can call the FCC for an informal phone consultation. FCC officials declined to comment for this story.

A spokesman for the NAB said only that the group encouraged members to complete the disclosure forms as fully as possible. The group has previously said that the disclosure forms it publishes are always reviewed informally by FCC lawyers. Not that the NAB requires that expertise: The group's general counsel, Jane Mago, spent 26 years at the FCC, according to [her bio](#). Her roles included stints as general counsel, chief of the Office of Strategic Planning and Policy Analysis and deputy chief of the Enforcement Bureau.

While ads that mention candidates must be disclosed to the FEC if they run close to a voting day (30 days before a primary or 60 days before the general election), groups often begin laying the groundwork for a campaign much earlier. Trade groups regularly run ads supporting candidates months ahead of the election, and avoid reporting these spending by scheduling the ads just outside of the disclosure window. The American Chemistry Council spent hundreds of thousands of dollars running TV ads supporting Rep. Jim Matheson, D-Utah, in 2012, but reported none of it to the FEC. Their biggest campaign, [a three-week ad buy](#), went up Aug. 16 and ended just days before the electioneering window began. Matheson won re-election by one of the narrowest margins in the house: fewer than 3,000 votes. None of the ad documents from the council's buy list Matheson as the ads' target — the only way to figure out who the ads supported is by reading press accounts of race.

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Small station disclosure likely worse

Sunlight only examined filings made online from some of the country's biggest stations — the ones whose political ad files are online. If big stations that have faced at least a modicum of public scrutiny for more than a year are still failing to meet the disclosure laws' basic provisions, how well are smaller stations doing?

Not well, says David Parker, who has probably seen as many small-market political TV ad contracts from 2012 as anyone. An associate professor of political science at Montana State University, Parker drove thousands of miles to collect TV ad contract data from the 2012 Montana Senate race, driving to virtually every TV station in the state three times over as research for a forthcoming book.

The political files almost never said who the ads supported, said Parker, who estimated he's reviewed seven or eight thousand ad buy documents. "I would say in 95% of the cases I've witnessed you've got to know something about the organization" to tell who they are targeting, he said.

In some cases, when the same group was spending money on multiple races, it was impossible to tell how the ads were divvied up. "If AFSCME [the American Federation of State, County and Municipal Employees] spent money were they spending it on the governors' race or on the Senate race? You couldn't tell from the files," he said.

All told, discerning the candidates targeted might have been one of the easier parts of Parker's data collection. Figuring out spending totals from seemingly random documents was "like an exercise in forensics," said Parker. To research the book, Parker had to build relationships with broadcasters, who sometimes helped him connect ads to the ad buys by showing him footage. That wasn't always the case, though: One station employee "thought I was evil incarnate — that I would be bothering her to have the temerity to be in her office and hang out with these files."

Sometimes just getting the documents was the problem. "Here in town there's the Bozeman ABC/FOX affiliate. Their files aren't here though. You have to go to Missoula for the files." From Bozeman, that's a three and a half hour drive, he said.

Reforms expected to continue

While small station political files like the ones Parker criss-crossed Montana to collect have remained offline, that's set to change in 2014, when, according to an FCC order, all station files will go online.

And while the paper files remain a mess, the simple act of putting them online, and thus in a place where the public can access them — and complain if things are missing — should be seen as a move in the right direction, said Waldman, the former FCC advisor. "What they did with putting the political file online was a really important first step, but they said at the time it was very incomplete."

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The next step, Waldman said, was outlined in an [April 2012 FCC order](#) that aimed at creating a database of public TV data.

"We agree that certain information in the public file would be of much greater benefit to the public if made available in a structured or database-friendly format that can be aggregated, manipulated, and more easily analyzed; this continues to be our ultimate goal," FCC lawyers wrote.

Living up to this promise will depend greatly on whether FCC leadership deems it worthy. The FCC has "a huge portfolio, they have lots of different things to look at and therefore they sometimes tend to get buffeted around by the topics that get the most attention ... It's the job of the chairman to say 'We're not just going to be reactive we are going to set our own priorities,'" Waldman said.