



PUBLIC NOTICE

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FCC'S MEDIA BUREAU PROVIDES GUIDANCE ON POLITICAL EQUAL OPPORTUNITIES REQUIREMENT FOR BROADCAST TELEVISION STATIONS

Emphasizes that Broadcast TV Stations Airing Covered Programming Motivated by Partisan Purposes Must Comply with Equal Opportunities Requirement

The FCC's Media Bureau herein provides guidance on the application of the statutory equal opportunities requirement¹ and the *bona fide* news exemptions to broadcast television stations, including their airing of late night and daytime talk shows.

Background. Decades ago, Congress made the decision to prevent covered broadcast television programs from being used to advance certain partisan political purposes. Specifically, through section 315 of the Communications Act of 1934, as amended,² Congress put protections in place to ensure equal access to broadcast station facilities for legally qualified candidates for office, regardless of political affiliation.

A person is a legally qualified candidate for purposes of the FCC's equal opportunities or equal time rule if they meet certain requirements, including having publicly announced their intention to run for office and qualifying under applicable state or federal law to hold the office being sought.³

Under section 315, if a broadcast station permits any legally qualified candidate for public office to use its facilities, it shall provide an equal opportunity to all other legally qualified candidates for that office.⁴ This statutory requirement and the corresponding FCC rules⁵ seek to ensure that

¹ See 47 U.S.C. § 315(a). Although section 315(a) is also commonly referred to as the "equal time" rule, it requires the provision of comparable time and placement, rather than the provision of identical airtime to opposing candidates.

² *Id.*

³ The criteria for legally qualified candidates are specified in the FCC's rule at 47 CFR § 73.1940.

⁴ 47 U.S.C. § 315(a).

⁵ 47 CFR §§ 73.1212 (Sponsorship identification); 73.1940 (Legally qualified candidates for public office); 73.1941 (Equal opportunities); 73.1942 (Candidate rates); 73.1943 (Political file); 73.1944 (Reasonable access).

no legally qualified candidate for office is unfairly given less access to the public airwaves than their opponent. Furthermore, the Commission's political file rules state that, when "free time is provided for use by or on behalf of candidates, a record of the free time provided shall be placed in the political file."⁶ Any such free use of broadcast airtime by a legally qualified candidate would require the broadcaster to place a record in its online political file "as soon as possible."⁷ Other legally qualified candidates can then submit an equal opportunities request. As the FCC has determined, equal opportunities generally means that a broadcaster must provide comparable time and placement to opposing legally qualified candidates.⁸ Adherence to these requirements is central to a broadcast licensee's obligation to operate in the public interest.⁹

In 1959, in an effort to increase news coverage of political campaign activity, Congress adopted certain limited exceptions to the equal opportunities requirement.¹⁰ Specifically, section 315 was amended to exempt from the equal opportunities requirement appearances by a legally qualified candidate on any: (1) *bona fide* newscast; (2) *bona fide* news interview; (3) *bona fide* news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary); or (4) on-the-spot coverage of *bona fide* news events (including but not limited to political conventions and activities incidental thereto).¹¹

Congress provided the Commission the discretion to determine the scope of each exemption.¹² The inclusion of "*bona fide*" in each exemption category, however, reflects Congressional concern that broadcast stations would apply the exemptions too broadly in service of a political agenda and thereby frustrate the original purpose of the equal opportunities requirement to maximize broadcast coverage of political events.¹³ Accordingly, when considering the scope of an exemption related to a specific program, the Commission has long sought to ensure "that the

⁶ 47 CFR § 73.1943(c).

⁷ *Id.* § 73.1943(d).

⁸ See, e.g., *Equal Opportunities Complaint Filed by Nicole Parra Against Pappas Telecasting Companies*, 19 FCC Rcd 21994, para. 3 (MB 2004) ("The Commission has ruled that when a candidate is furnished time at no cost, competing candidates are entitled to receive the same amount of free time in comparable time periods."); *Carter/Mondale Reelection Committee*, Memorandum Opinion and Order, 81 FCC 2d 409, n.13 (1980) ("the time that is made available under 315(a) must have a comparable audience potential to that of the initial 'use.'"); see also *Primer on Political Broadcasting & Cablecasting*, Public Notice, 69 FCC 2d 2209, 2219 (1978) ("The station must, however, make periods that normally have comparable audiences available to competing candidates upon request.").

⁹ 47 USC 312(a)(7).

¹⁰ *Aspen Institute Program on Communications and Society*, Memorandum Opinion and Order, 55 FCC 2d 697, 704 (1975) (Congress exempted news programming "in order to foster public consideration of major candidates while assuring minor candidates access to reasonable opportunities for air time.").

¹¹ 47 U.S.C. § 315(a)(1)-(4).

¹² *Chisholm v. FCC*, 538 F.2d 349, 366 (D.C. Cir. 1976) ("Rather than enumerate specific exempt and non-exempt 'uses,' Congress opted in favor of legislative generality, preferring to assign that task to the Commission.").

¹³ See, e.g., *Henry Geller*, Report and Order, 95 FCC 2d 1236, 1243 (1983) (noting that the legislative history of the news exemptions demonstrates "Congress' intent that the programs be of genuine news value and not be used to advance the candidacy of a particular individual").

content, format and participants not be intended for the political advantage of candidates.”¹⁴ Indeed, the FCC has specifically noted that certain programs that might otherwise be exempt would be excluded from an exemption category if the program was “designed for the specific advantage of a candidate.”¹⁵

The federal equal opportunities regulations operate to prevent broadcast television stations, which have been given access to a valuable public resource (namely, spectrum), from unfairly putting their thumbs on the scale for one political candidate or set of candidates over another. These regulations, which do not apply to cable channels or other forms of distribution, represent, in codified form, the decision by Congress that broadcast television stations have an obligation to operate in the public interest— not in any narrow partisan, political interest.

Bona Fide News Interview Programs. Pursuant to this Congressional mandate, over time, the FCC has ruled—through its declaratory ruling process—that a wide variety of shows *can* be eligible for an exemption as a *bona fide* news interview.¹⁶ Consistent with the legislative history of section 315, the Commission considers the following factors in determining whether a program qualifies as a *bona fide* news interview program: (1) whether the program is regularly scheduled; (2) whether the broadcaster or an independent producer controls the program; and (3) whether decisions on the content, participants, and format are based on newsworthiness, rather than partisan purposes, such as an intention to advance or harm an individual’s candidacy.¹⁷ An FCC decision that a show qualifies for an exemption is fact specific and based on the show that was the subject of the request as it existed at the time of the request.

In 2006, the FCC’s Media Bureau determined that the interview portion of “The Tonight Show with Jay Leno” qualified for the equal opportunities exemption as a *bona fide* news interview.¹⁸ This was the first time that such a finding had been applied to a late night talk show, which is primarily an entertainment offering. This decision was also contrary to a 1960 Commission

¹⁴ *Request for Declaratory Ruling That Independently Produced Bona Fide News Interview Programs Qualify for the Equal Opportunities Exemption Provided in Section 315(a)(2) of the Communications Act*, 7 FCC Rcd 4681, 4685, para. 26 (1992); see also *Nebraska Broadcasters Association*, 21 FCC Rcd 10742, 10743, para. 5 (MB 2006) (“[T]he licensees of the stations on which the subject programs air remain ultimately responsible for a determination to air a particular program and should not do so for the political advantage of a candidate for public office.”).

¹⁵ *Aspen Institute*, 55 FCC 2d at 705.

¹⁶ See, e.g., *Fox Television Stations, Inc.*, Staff Ruling 6 FCC Rcd 7120 (MMB 1991) (seeking a declaratory ruling for “Not Just News” under the *bona fide* newscast exemption) (citing *Paramount Communications, Inc.*, Staff Ruling, 5 FCC Rcd 4627 (MMB 1990) (“Hardcopy”); *Paramount Pictures Corp.*, Staff Ruling, 3 FCC Rcd 245 (MMB 1988) (“Entertainment Tonight” and “Entertainment This Week”); *Rev. Donald L. Lanier*, 37 FCC 2d 952 (B/c Bur. 1972) (“The Church Today”)).

¹⁷ 105 Cong. Rec. 17777 (1959); see also, e.g., *Equal Opportunities Complaint Filed by Angelides for Governor Campaign Against 11 California Television Stations*, Order, 21 FCC Rcd 11919, 11923, para. 11 (MB 2006) (*Angelides*) (finding “that decisions as to format, content and participants are based on the producers’ independent news judgment as to the participant’s newsworthiness and not motivated by partisan purposes”); *ABC, Inc.*, Staff Ruling, 15 FCC Rcd 1355, 1358 (MMB 1999) (finding that ABC demonstrated “that Buena Vista’s decisions about format, content and selection of participants are based on newsworthiness and not motivated by any partisan purpose”).

¹⁸ *Angelides*, 21 FCC Rcd 11919.

decision that declined to make such a finding regarding the Jack Paar program, which was also referred to as “The Tonight Show.”¹⁹

Concerns have been raised that the industry has taken the Media Bureau’s 2006 staff-level decision to mean that the interview portion of *all* arguably similar entertainment programs—whether late night or daytime—are exempted from the section 315 equal opportunities requirement under a *bona fide* news exemption. This is not the case. As noted above, these decisions are fact specific and the exemptions are limited to the program that was the subject of the request.

Importantly, the FCC has not been presented with any evidence that the interview portion of any late night or daytime television talk show program on air presently would qualify for the *bona fide* news exemption.²⁰ Moreover, a program that is motivated by partisan purposes, for example, would not be entitled to an exemption under longstanding FCC precedent. Any program or station that wishes to obtain formal assurance that the equal opportunities requirement does not apply (in whole or in part) is encouraged to promptly file a petition for declaratory ruling that satisfies the statutory requirements for a *bona fide* news exemption.

In the meantime, the Media Bureau encourages all television broadcast stations to ensure that they are making all appropriate equal opportunity filings in accordance with section 73.1943 of the FCC’s rules and as required by agency precedent.²¹ It is important that both broadcasters and legally qualified candidates understand the FCC’s equal opportunities regulations and how they can result in broadcasters offering opposing legal qualified candidates comparable time and placement.

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¹⁹ *Angelides*, 21 FCC Rcd at 11924-25, para. 15 (finding that the Jack Paar decision applied a standard that was no longer relevant).

²⁰ Notably, “The Tonight Show with Jay Leno” is no longer airing, as Jay Leno left the show. As discussed in *Angelides*, Mr. Leno’s relationship to then-Governor of California Arnold Schwarzenegger was a significant factor in both the complaint and the Media Bureau analysis. *See id.*

²¹ 47 CFR § 17.1943.