Political Broadcast
Primer, Political B/cing
Primer, Political Cablecasting

Statutes, rules and policies on political broadcasting and cablecasting, and their application in particular situations, is explained in new and revised edition of the political 'primer'.

FCC 78-523

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

PUBLIC NOTICE:

THE LAW OF POLITICAL BROADCASTING AND CABLECASTING

(Adopted: July 20, 1978; Released: August 16, 1978)
(43 FR 36342)

BY THE COMMISSION:

Following is the Federal Communications Commission's primer on broadcasts and cablecasts by and about candidates for public office.

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PART I.—INTRODUCTION

A.—Purpose of Primer

The FCC has prepared this booklet to inform you of the law on broadcasts and cablecasts by candidates for public office. The booklet, which we call the Primer, also includes the Commission's most important rulings and statements of policy on political broadcasting. In most cases, specific examples are given of how the law and the rules apply—sometimes in question and answer form—so as to make the Primer as understandable as possible. In the discussion of most questions in Part III, you will see citations to FCC rulings or court decisions so that you can review the full text of the ruling or decision if you wish to do so.[1]

The Primer is organized according to subject matter so that the questions and answers about each aspect of political broadcasting are together. When necessary, cross references are made to other parts of the Primer. Unlike former editions, the Primer has an index.

The Primer cites only current interpretations of the law. Unlike former Primers, it omits old decisions that have been overruled, because citing them would tend to confuse the reader. On the other hand, this Primer includes many new rulings issued by the Commission since the last edition was published.

1.—All Political Laws and Rules Covered

This is the first Primer that tries to deal with all laws, rules and policies about political broadcasting. This includes not only "equal time" and "censorship," but "reasonable access" for candidates for Federal office, the rates that may be charged candidates for time, the fairness doctrine as it applies to political campaigns, the personal attack and political editorializing rules, and the rules on sponsorship identification, logging of broadcasts and keeping a public file as they apply to broadcasts and cablecasts by or about political candidates.

Some Federal laws on political elections are not administered by this Commission, but rather by the Federal Election Commission. Even though our agency does not administer these laws, we have included short discussions of two of them in this Primer for your information.

2.—How the Primer Is Organized

Part I of the Primer is titled "Introduction." It includes the preceding introductory passages as well as an explanation of the importance of political broadcasting, instructions on where and how to file complaints and inquiries, and the text of the sections of the

[1] This Primer serves as an accurate restatement of existing rules and precedent. The Commission's decisions summarized in this document were reached in specific factual contexts, and may contain concurring and dissenting views. Any reader having questions about the interpretations set forth in this Primer should examine the text of the specific case(s) cited.

Communications Act of 1934 that govern political broadcasting and cablecasting.

Part II is a general summary of political broadcasting and cablecasting law. In it, we cover the main points of the laws and rules on this subject in language that we hope the non-lawyer can readily understand.

Part III is in 13 parts, each of which takes up a different aspect of political broadcasting and cablecasting law. It gives the law in much greater detail than does Section II, and it gives examples of how the law has been applied to specific situations. It also gives citations to the FCC rulings and court decisions that are the authority for the statements of law made in that Section.

The Appendix contains the Commission Rules and Regulations interpreting and administering the sections of the Communications Act that apply to political broadcasting and cablecasting.

Finally, there is an Index which we hope will enable you to find the answers to your questions quickly.

B.—The Importance of Political Broadcasting

Congress has recognized the great importance of political broadcasting by passing laws which establish stricter standards for this type of broadcast and cablecast than for any other. Most of these are in Section 315 of the Communications Act, which requires "equal opportunities" for candidates, forbids censorship of what they say, and puts a ceiling on the amounts that stations and cable systems may charge them for time. Another section of the Communications Act dealing with political broadcasts, 312(a)(7), requires stations to give or sell "reasonable access" to candidates for Federal elective office.

The U.S. Supreme Court also has recognized the great importance to the public of political broadcasts in more than one decision. For example, it held that since Section 315 forbids a station to censor a candidate's broadcasts and since stations should not be discouraged from carrying these broadcasts, a station was not subject to libel suits for anything that a candidate might broadcast. *Farmers Educational and Cooperative Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959).

The FCC itself has stressed the importance of political broadcasting many times. In one statement, it said:

> In short, the presentation of political broadcasting, while only one of the many elements of service to the public * * * is an important facet, deserving the licensee's closest attention, because of the contribution broadcasting can thus make to an informed electorate—in turn so vital to the proper functioning of our Republic. *Licensee Responsibility as to Political Broadcasts*, 15 F.C.C. 2d 94 (1968).

Because of the importance of political broadcasts, the Broadcast Bureau and the Office of General Counsel have been given joint responsibility to issue rulings in the broadcasting field under authority delegated to them by the Commission, and to make recommendations to the Commission itself on the major cases which go to it for decisions

rather than to the staff. Complaints and inquiries about political broadcasting and cablecasting are given special priority by the Commission so that rulings can be made on all complaints in time to put the rulings into effect before election day.

C.—Where to Send Complaints and Inquiries

Although we have tried to cover the most important, difficult and frequently asked questions about the laws on political broadcasts in this Primer, each day usually brings at least one new question of interpretation. If you have a question about the law on political broadcasts and cannot find the answer in this Primer, or if you have a complaint on this subject, write to:

Complaints and Compliance Division
Broadcast Bureau
Federal Communications Commission
1919 M Street NW.,
Washington, D.C. 20554

If you have a question or complaint in connection with cable systems, write to:

Policy Review and Development Division
Cable Television Bureau
Federal Communications Commission
1919 M Street NW.,
Washington, D.C. 20554

If time is short and does not permit use of the mails, you can obtain an oral staff opinion or ruling by placing a telephone call to (202) 632-7586, the Fairness/Political Broadcasting Branch of the Complaints and Compliance Division. If your complaint or question is about a cable origination, call (202) 632-6468.

D.—How To File a Complaint

No special form is needed for filing complaints about political broadcasting or cablecasting. However, in order to speed up our handling of complaints, we recommend that you follow these steps:

(1) Before complaining to the Commission, complain to the station or cable operator that you believe has denied you your legal rights. We encourage negotiation between candidates and stations or cable operators and have found that many disputes can be settled in that way, without our intervening.

(2) When you do file a complaint with the Commission, send a copy to the station or cable operator at the same time.

(3) The complainant and the station or cable operator should continue to send copies to each other of all correspondence between them and the Commission, thus saving time in settling the complaint.

(4) Unless it is within the last few days before an election so that a written complaint might arrive too late to be acted upon,

send your complaint in writing. It should contain (i) the name, address and telephone number of the complainant; (ii) the call letters (or name) and location (city and State) of the station or cable operator; (iii) a detailed statement of the facts of the case, including the public office involved, the date and kind of election to be held (primary or general election), and whether the complainant and his opponent or opponents are legally qualified candidates for public office under the laws of their State. When the complainant is seeking "equal opportunity," he or she should give the dates of prior broadcasts or cable originations, if any, by his or her opponents, the date on which a request for equal opportunities was made to the station or cable operator, and the reasons the station or cable operator gave for refusing the request. Where the complainant alleges denial of "lowest unit rate" or, if a candidate for federal office, denial of "reasonable access," the complainant should furnish all essential facts on which the complaint is based.

E.—Sections 315 and 312(a)(7) of the Communications Act

Section 315 of the Communications Act of 1934, as amended, follows:

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance 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 events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed—

(1) during the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of general or special election in

which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) at any other time, the charges made for comparable use of such station by other users thereof.

(c) For purposes of this section—

(1) the term "broadcasting station" includes a community antenna television system; and

(2) the terms "licensee" and "station licensee" when used with respect to a community antenna television system mean the operator of such system.

(d) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

Section 312 of the Communications Act states in part:

(a) The Commission may revoke any station license or construction permit—* * *

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

PART II.—GENERAL SUMMARY OF POLITICAL BROADCASTING AND CABLECASTING LAW

This part of the Primer is a general statement of the law of political broadcasting and cablecasting. It covers the most important parts of the law, but it does not give a detailed explanation of how it applies to every situation and it does not deal with some of the exceptions that must be made in applying the law. Therefore, it must not be taken as a definitive statement for legal reference purposes. For that, see Part III, which discusses the law in detail, explains how it applies to specific situations, and cites the statutes, rules, court decisions and Commission rulings which give it legal authority.

A.—Equal Time? Equal Opportunities? Fairness Doctrine?

Many people confuse the "fairness doctrine" with the law on political broadcasting, or think that the phrase "equal time" covers both of them. Although the fairness doctrine applies in some ways to political broadcasting, the law on broadcasts by political candidates requires "equal opportunities," which is different from the fairness doctrine. It also is not exactly the same as "equal time," although that is the phrase many people use. Here are short definitions of these three terms:

Fairness Doctrine.—It applies to *issues* rather than *persons*, and it does not require either "equal time" or "equal opportunities." It does require a broadcaster to provide "reasonable opportunity" for the presentation of conflicting views on the important controversial public issues in his area. "Reasonable opportunity" does not necessarily mean "equal time."

Equal time.—The law never uses this phrase. It uses the broader term, "equal opportunities."

Equal opportunities.—If a candidate obtains time on a station, other candidates for the same office may obtain "equal opportunities" on the station. Equal opportunities usually include equal time, but the term means more than equal time. For example, it means the right to obtain time in a period likely to attract approximately the same size audience as the period in which the opposing candidate appeared.

B.—The Purpose of the Law

Congress adopted the law on political broadcasting and cablecasting to achieve these basic purposes:

1. Prevent discrimination between competing candidates by broadcasting stations and cable systems operators;
2. Make sure that candidates are allowed to speak freely on the air without censorship by broadcasters or cable operators;
3. Guarantee time rates to political candidates as favorable as those offered by broadcasters and cable operators to their most favored advertisers;
4. Make sure that candidates for Federal elective office are given or sold reasonable amounts of time for their campaigns.

Sections 312 and 315 of the Communications Act contain the laws which Congress passed in order to achieve these purposes. These two sections are reproduced in Part I of the Primer. Section 315 deals with equal opportunities, freedom of candidates from censorship, the maximum rates that may be charged candidates for time, and news programs that are exempt from the equal opportunities requirement. Section 312(a)(7) requires that candidates for Federal elective office be given "reasonable access" on an unpaid basis or be allowed to buy "reasonable amounts of time" in which to promote their candidacies. All of these requirements apply only to programs or announcements in which legally qualified candidates appear in person or by tape or film. Therefore, before further discussion of other parts of Sections 312 and 315, we must explain what a "legally qualified candidate for public office" is, and to what kinds of broadcasts by candidates the law refers. We also must explain which candidates are considered to be opposing candidates so as to be entitled to equal opportunities.

C.—Legally Qualified Candidates

The first requirement for becoming a legally qualified candidate for nomination or election to an office is to be eligible under the law to hold the office if elected to it. Local, state or federal law will apply here, depending on what office the person is seeking. For example, the Commission once ruled that a minor party's candidate for President who was 31 years old was not a legally qualified candidate for President because the United States Constitution states that no one may become President unless he or she is at least 35 years old.

The second requirement is to announce that one is a candidate for nomination or for election.

The third requirement is more complicated, and it depends on whether (a) a person is seeking final election to an office or nomination to run for election, and (b) if he or she is seeking nomination, whether the nomination will be decided by a primary election or by a party convention or caucus.

To be a legally qualified candidate for *election* to office, a person must either quality for a place on the ballot under State laws or must publicly commit him or herself to seeking election as a write-in candidate and be eligible under State law to be voted for by this method. Write-in candidates also must make a "substantial showing" that they are serious ("bona fide") candidates for election. A "substantial showing" will depend on the facts of each case. In one case, the Commission decided that a write-in candidate had made a substantial showing by making campaign speeches, distributing campaign literature, issuing press releases and maintaining a campaign committee.

Another complication arises when we consider persons who claim to be legally qualified candidates for election to the Presidency or Vice Presidency of the United States. The same rules apply to them in individual States as to candidates for other offices about becoming eligible by getting a place on the ballot, qualifying as write-in candidates, etc. However, they are running for election nationally and a question arises as to which States they will be considered legally qualified candidates in, and thus be entitled to equal opportunities, low political time rates, "reasonable access," etc. The Commission has interpreted the law as meaning that if a person is a legally qualified candidate under its rules for President or Vice President in 10 or more States, he or she will be considered a legally qualified candidate in all States. If he or she is a legally qualified candidate in fewer than 10 States, then he or she will be treated as a legally qualified candidate only in those States in which he or she is qualified.

Next, let's consider candidates for *nomination* to office. If the nominees are selected in a primary election, the same rules apply as for candidates for *election* to office. If the nominees are named by a party convention or caucus, the person claiming to be a legally qualified candidate for nomination must make a substantial showing that he or she is a serious candidate for the nomination.

Persons seeking nomination for the Presidency or Vice Presidency are considered legally qualified candidates for nomination in (1) those States in which they (or their proposed delegates) have qualified for the primary or Presidential preference ballot or (2) those States in which they have made a substantial showing of being serious candidates for nomination. They will be considered legally qualified candidates for nomination in all States if they have qualified in 10 or more States. Otherwise, they will be considered legally qualified

candidates for nomination only in those States in which they have met the standards for qualification.

D.—Who are "Opposing Candidates?"

Section 315 says that if one legally qualified candidate uses a station, the station must allow all other legally qualified candidates for "that office" to have equal opportunities. The FCC and the Federal courts have interpreted this requirement to apply only to candidates who are directly opposing each other for nomination or for election. During the pre-nomination period, only the candidates seeking nomination for the same office by the same party are opposing candidates. For example, candidates seeking the nomination of the "Good Government Party" for sheriff are *not* opposing candidates to those seeking nomination for sheriff by the "Square Deal Party." After each party has nominated its candidate, their two nominees will then become opposing candidates in the campaign for election to the office.

Confusion also sometimes arises over whether candidates for election to one office are entitled to opportunities equal to those given to candidates for election to a different office. For example, candidates for the State legislature in one district may think they are entitled to as much time on stations in that district as the candidates for Governor of the State. A station must give all candidates for State legislature the same opportunities but it affords any one candidate for State legislature in that district, but the licensee of the station may make his own decision on whether the candidates for Governor should be afforded more time than the candidates for State legislature, based on his judgment of the importance of the races and the amount of public interest in them. There is one exception to this. Section 312(a)(7) of the Communications Act requires that all candidates for Federal elective office, such as for President, Senator or Congressman, be allowed "reasonable access" to the air or be allowed to buy "reasonable amounts of time."

E.—Laws Apply Only to Appearances by Candidates

The political broadcasting laws that we are discussing here apply only to programs or announcements in which candidates take part personally, either by voice or picture. The laws apply regardless of what the candidates talk about. The FCC and the courts have held that any kind of an appearance counts as a "use" of a station under Section 315. If an actor or comedian is a legally qualified candidate for public office in a State, his appearance in a motion picture drama or comedy on a TV station in that State will entitle his political opponents to equal opportunities on that station, even if no mention of his candidacy is made in the motion picture.

In order for a political program or announcement to qualify for political time rates, equal opportunities, etc., the candidate must take part in it in such a way that the audience will recognize his voice or

picture. Even if his voice merely states who is the sponsor of a paid political announcement, this will be sufficient, provided that he identifies himself by name or his voice is so well known that the audience will recognize it. However, in order for Sections 312 and 315 to apply to a whole program, the candidate must play a greater role. His appearance must be "substantial in length" and be an essential part of the program, and the program must be under his control and direction.

There is a major exception to the above statements which should be mentioned at this point. The "equal opportunities" law does not apply to four kinds of news programs. A personal appearance by a candidate on any of the following kinds of programs does not require that equal opportunities be given to his opponents:

newscast;
news interview;
news documentary—"if the appearance of the candidate is incidental to the presentation of the subject covered by the news documentary";
on-the-spot coverage of news event.

Thus, if a station interviews a candidate or uses an excerpt from his speech on any of these kinds of programs, Section 315 in itself will not require the station to do anything for opposing candidates for that office. However, the fairness doctrine may require that the station devote some time to the campaigns of other candidates, as will be explained in that part of the Primer.

F.—What Are "Equal Opportunities"?

Section 315 of the Communications Act requires that candidates for the same office be given equal opportunities in using a station or cable system. As explained above, "equal opportunities" does not always mean the same as "equal time." It usually means more. For example, if Candidate Smith buys 30 minutes of prime time on a TV station for $500, but the station charges his opponent Jones $600 for the same time period, Jones has not received an equal opportunity. Or, if the station refuses to sell Jones any prime time but offers him only such periods as 1:00-1:30 a.m. or 6:00-6:30 a.m. it will not be giving him an equal opportunity in the use of the station because late-night and early-morning programs are likely to have smaller audiences on television than those in prime time periods.

The Commission's rules forbid any discrimination between candidates in rates or in any other way. They also forbid a selling one candidate so much time that there is none left for his opponents. The rules do not require a station to sell or give a candidate any particular time period, or even to make available exactly the same time period that was sold or given to his opponent. The station must, however, make periods that normally have comparable audiences available to competing candidates upon request. As will be noted further along in this part of the Primer, a candidate must request his "equal

opportunities" within seven days of his opponent's use of a station, and the station need not notify a candidate of his opponent's broadcasts. The opponent can learn this by looking at the station's "political file," which must be made available at the station for public inspection.

G.—Censorship of Candidates Not Permitted

Section 315 says that the licensee of a station "shall have no power of censorship over the material broadcast" by legally qualified candidates for public office. This applies to "uses" of stations by candidates themselves. It does not apply to appearances by candidates on any of the exempt news programs. A station's news editor who chooses to use an excerpt from a candidate's speech on a newscast may edit the excerpt as is usual in preparing a news program, but if the candidate appears on any program except an exempt news program, the station cannot edit his material in any way or limit what he talks about. It cannot refuse to carry his broadcast even if it contains libelous material or is vulgar or in "bad taste." It cannot require the candidate to appear either live or on tape, or even ask to preview his script or pre-audition his tape or film, except to learn (1) whether it contains the required sponsorship identification (if it is paid for); (2) whether it is the agreed-upon length for the period reserved for it, or (3) whether the candidate himself will appear on the program so that it becomes a "use" and is subject to equal opportunities, the political time rate, etc. Since a station may not censor what a candidate says, the station itself cannot be held liable in a civil suit for any libelous statements the candidate makes.

It should be noted that the non-censorship part of Section 315 applies *only* to announcements or programs in which a candidate himself takes part and which are not exempt news programs. If the broadcast is by someone else, the non-censorship provision does not apply and the station is not protected against libel suits by the Supreme Court decision. Therefore, the station may refuse to broadcast an announcement or program if its licensee believes it contains libelous or false statements, provided that the station is acting in good faith and is complying with the Fairness Doctrine.

H.—Rates To Be Charged for Time

A station or cable system is never allowed to charge a candidate more for time than it would charge a regular commercial advertiser, and during some periods it must give candidates the benefit of volume discounts that a commercial advertiser might not get. These limitations on rates apply to programs or announcements on which a candidate appears in person, not to appearances by others speaking in his behalf, with one exception that will be explained when we take up the Fairness Doctrine.

Specifically, a station may never charge candidates more than it would charge anyone else for "comparable use" of the station. For example, if a station sells a single spot announcement for $10 but

reduces the rate to $7.50 if an advertiser buys 10 spots, a candidate will pay $10 for a single spot but will receive the discounted rate of $7.50 if he or she buys 10. However, during the 45 days preceding a primary election and the 60 days preceding a general election, the station may not charge a candidate more than its "lowest unit charge" for "the same class and amount of time for the same period." This means that if a radio station charges $10 for a one-minute spot at 8 a.m. on week days but only $7.50 if the advertiser buys 10 of these spots, it must sell *one* spot to a political candidate at its lowest unit rate, which in this case is $7.50. Even if a station gives a special low rate to only one advertiser, it must base its rate to candidates on this special low rate, not its average rate. If a station has a special "package" plan which offers advertisers a discount if they buy, say, 12 spots a day, of which three are in morning "drive time", three are mid-day, three are in afternoon "drive time" and three in the evening, it must make the same package rate available to candidates on a proportionate basis. That is, if a candidate wants to buy four spots a day, one in each time period, he may buy them for one-third of the cost of the 12-spot package. However, he cannot get the discount package rate if he wants all of his spots broadcast in the more desirable morning or afternoon "drive time."

I.—How Much Time Must a Station Provide?

Congress, the United States Supreme Court and the FCC all have made clear the fact that a broadcasting station must "afford reasonable opportunity for the discussion of conflicting views on issues of public importance", and that this obligation applies especially to political broadcasting. The language in quotation marks in the previous sentence is from Section 315 of the Communications Act. The U.S. Supreme Court has recognized the importance of political broadcasts in major decisions. The FCC has stated that political broadcasting is one of the major elements of a station's service to the public "because of the contribution broadcasting can make to an informed electorate—in turn so vital to the proper functioning of our Republic."

Thus, the Commission expects broadcasters to devote substantial amounts of time to broadcasts by and about candidates for public office. Some programs and announcements that are regularly sponsored by commercial advertisers may have to be canceled to make room for political broadcasts during a campaign. Also, it is no excuse to claim that a station's program format prevents it from carrying anything longer than spot announcements by candidates.

The law on this subject applies to all candidates for public office, but it applies in a different way to candidates for Federal elective office. In 1972 Congress amended the Communications Act to state that the Commission may revoke a station's license for

> * * * willful or repeated failure to allow reasonable access to or to permit

> purchase of reasonable amounts of time for the use of the broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

This law applies to "uses" (appearances by candidates themselves on programs). It does not apply to appearances by supporters or spokesmen of candidates. It does not require a station to provide free time—only that it either *give* "reasonable access" or *sell* "reasonable amounts of time."

What "reasonable access" is will depend on the circumstances of each case. For example, a station with a signal that covers many jurisdictions in which many candidates are running for office may not be expected to make as much time available to each Federal candidate as a station with fewer candidates to cover. The Commission relies first of all on the reasonable, good faith judgment of broadcasters in deciding what reasonable access is in any particular situation. However, broadcasters should be guided by certain principles in making this judgment, and the Commission will use these principles in deciding whether a broadcaster's judgment has been reasonable.

Among these principles are the following:

1. Unless there are unusual circumstances, such as the presence during a campaign of a great many candidates, stations must make available "prime-time" program time. "Prime time" means the evening hours on TV when the audience is usually greatest. It normally means time on radio when most people are driving to and from work.
2. Commercial stations must *always* make prime-time spot announcements available.
3. Stations may not adopt a policy of rejecting requests by Federal candidates for types, lengths and classes of time that they normally sell to commercial advertisers.
4. Stations must provide reasonable access at least during the 45 days before a primary election and the 60 days before a general election. The Commission will decide on a case-by-case basis whether they need to provide access before these periods. It will also decide when access must begin before a convention if candidates are to be chosen in that way.
5. Non-commercial educational stations have the same obligations as commercial stations. However, they need not make available lengths of program time that are not consistent with their normal program schedules, and even if they usually broadcast spot promotional or public service announcements, they generally do not need to make spot announcements available to political candidates. However, a non-commercial station may not reject anything submitted by a candidate just because it was originally prepared for broadcast on a commercial station.
6. A federal candidate need not be given or sold any particular position on a station's schedule. For example, he or she need not be given a spot immediately next to the most popular program

on a station. If he or she could, it might become impossible to give "equal opportunities" to other candidates for the same office if they demanded spots next to this program.

The law does not require a station to make time available to candidates in every state, county and local race. However, since political broadcasting is considered so important and since many state and local races are of great importance and interest to the people in those areas, the Commission expects broadcasters to make time available for candidates in these races on the basis of the importance of the races and the public interest in them.

A station does not need to make time available to candidates in every race, however. If it gives time to candidates in a certain race, it need not sell them time, and it does not need either to give or sell time in a particular position on the station's schedule.

J.—The "Seven-Day Rule"

The so-called "seven-day rule" requires a candidate who wants equal opportunities to make his request within one week of the day on which his opponent made his broadcast or cablecast. Thus, if Candidate A has been making broadcasts on a station for five weeks and his opponent B does not request equal opportunities until the end of the fifth week, B is entitled only to the amount of time that A has used during the fifth week. The Commission adopted this rule so that broadcasters and cable system operators could make orderly plans in advance for allocating time to candidates. It also wanted to make sure that one candidate did not "lie in the bushes" until a day or two before election and then gain an unfair advantage over his opponent by demanding and getting a block of more valuable last-minute time, equal to all of the time his opponent used during the whole campaign.

The rule applies only to persons who are legally qualified candidates at the time one of them makes a broadcast or cablecast. If A is a legally qualified candidate and makes a broadcast on August 1, and B does not become a legally qualified candidate under the laws of that state until August 2, B is not entitled to equal opportunities, no matter how quickly he files his request. However, if A makes a second broadcast on August 3, B is entitled to equal opportunities if he files his request by August 10.

If A makes a broadcast on August 1 but does not become a legally qualified candidate until August 2 and if B *is* a legally qualified candidate on August 1, B is not entitled to equal opportunities on the basis of A's August 1 broadcast, because A was not a legally qualified candidate on that date.

There is one further complication to the rule. It says that the request must be submitted within one week of the "first prior use" which created the right of equal opportunities. Notice that word "first." Here is an example:

On August 1, A, B and C all are legally qualified candidates for the

same office. A makes a broadcast on August 1. On August 5, B requests equal opportunities on the basis of A's broadcast. The station agrees, but B does not use his time until August 15. On August 10, C makes a request for equal opportunities, claiming that his request should be granted because it was made within seven days of B's request. The rule does not require the station to grant C's request because the seven-day rule is not based on the time a request is made by another candidate. It is based on the date the time is used. Even if C had made another request on August 16, based on B's broadcast of August 15, C still would not be entitled to equal opportunities because he was a candidate on August 1, the date of "the first prior use," and he did not submit his request by August 8. The seven-day rule would have little meaning if each broadcast base on an earlier broadcast by some one else were allowed to trigger still another grant of equal opportunities so that these requests could go on and on. Here C was a legally qualified candidate on August 1 and could have made his request within the following week. On the other hand, if C had not been a legally qualified candidate on August 1 but became one between that date and B's broadcast on August 15, then C could have made a valid request at any time within one week after August 15.

When a station or cable system sells or gives time to a candidate, it need not notify his opponent. It is up to the candidates themselves to keep track of what their opponents are doing. They can do this by having their campaign workers make frequent inspections of the public files of stations within their campaign area. Stations and cable systems must keep a record of all requests by candidates for free or paid time and what results from the request, including the rates charged for the time if it is sold. This is the so-called "political file," which stations and cable systems must keep available for public inspection during regular business hours.

K.—Political Editorials

A political editorial is a statement by or on behalf of the licensee of a broadcasting station or the operator of a cable system which endorses or opposes a candidate. It is not a statement by a commentator or another employee of a station, unless it is represented to be the statement of the licensee or cable operator. However, if the president of a station broadcasts a statement or interview in which he endorses or opposes a candidate, it will be considered to fall within the Commission's political editorializing rule, even though it is not labeled an editorial.

The rule does not forbid broadcasting or cablecasting political editorials. It requires only that a broadcaster or cable operator who broadcasts an editorial endorsing or opposing a candidate send to candidates for the same office who are opposed or not endorsed in the editorial the following within 24 hours after the editorial is broadcast:

(a) notification of the date and time of the editorial;

(b) a script or tape of the editorial;
(c) an offer of an opportunity for the candidate or his spokesman to respond over the station or cable system.

If a political editorial is broadcast within 72 hours of election day, the broadcaster or cable operator must comply with these requirements far enough in advance of the broadcast or cablecast to give the other candidates a "reasonable opportunity to prepare a response and present it in a timely fashion"—that is, before election day.

Note that the candidate need not be given a chance to deliver his response to the editorial in person. If he did, his opponent or opponents could demand "equal time" under Section 315 of the Communications Act, and since the licensee or cable operator could not censor their material they could use the time as they saw fit in order to promote their campaigns.

An editorial may fall within the political editorializing rule even if it does not endorse or oppose a candidate directly. If the statement, in effect, endorses or opposes a candidate, it will be considered a political editorial. For example, when two members of a Board of Town Commissioners were running for reelection and a station broadcast an editorial criticizing the present board and urging the public to vote for "a change," the Commission ruled that even though the two present Board members were not named, the editorial was in effect a statement of the licensee's opposition to their reelection and therefore was a political editorial. In another case, on the day before a primary election for nomination for governor, a station broadcast an editorial strongly criticizing one candidate's record as county prosecuting attorney. Although the editorial did not mention the fact that he was now a candidate for nomination for governor, the Commission ruled that the editorial was a political one.

L.—Personal Attacks

The Commission's personal attack rule does not apply to attacks made by candidates or their campaign associates on other candidates or their associates. However, attacks that do not come within this exemption sometimes are broadcast during political campaigns, so we will explore the subject briefly. Under the Commission's rules a personal attack is an attack on the "honesty, character, integrity or like personal qualities of an identified person or group," when the attack is made during discussion of a controversial public issue.

The rules do not prohibit the broadcast of personal attacks. They do require a station that broadcasts an attack to do the following within one week after the attack is broadcast:

(a) Notify the person or group attacked of the date, time and title of the program on which the attack was made;
(b) Send the person attacked a script or tape of the attack, or an accurate summary if neither of these is available;

(c) Offer the person attacked a "reasonable opportunity" to answer the attack over the station.

If someone broadcasts an attack against a candidate, the station need not invite the candidate to appear personally to answer the attack. If he did, all other candidates for the same office would be entitled to equal opportunities under Section 315 of the Communications Act. Therefore, a station can comply with the rule by allowing a spokesman for the candidate to respond.

One more point: the personal attack rule does not apply to attacks made during newscasts, news interviews, and on-the-spot coverage of news events. This exemption includes news commentary or analysis when it is broadcast within an exempt news program. The exemption does not include station editorials.

M.—The Fairness Doctrine

As explained at the beginning of this part of the Primer, the fairness doctrine does not require equal time. It requires that a broadcaster devote a substantial amount of time to discussion of the most important controversial issues in his or her area, and that a station which presents one side of an issue give reasonable opportunity for presenting contrasting views on that issue. The station need not give equal time to opposing views or present opposing views in the same program if it presents them in its overall programming. The licensee of a station is allowed to choose the controversial issues to be discussed, the program formats to be used in discussing them, and the persons who will present the various views on them. The Commission merely reviews the licensees' decisions to decide if they have been reasonable and made in good faith.

The fairness doctrine does not apply to personal appearances of candidates unless they appear on the news-type programs listed in Section 315 of the Communications Act, which are exempt from the equal opportunities requirement of that section. Otherwise, candidates are entitled to "equal opportunities," which is in some ways a stricter requirement than the fairness doctrine. In applying the fairness doctrine to news coverage of candidates, stations may use their judgment as to which candidates are most newsworthy and significant. Therefore, they do not need to give all candidates the same amount of coverage.

There is one political situation to which the Commission applies the fairness doctrine in a special way so that it becomes much the same as "equal opportunities." There is where Candidate A or his supporters buy time in which to urge the election of A or to criticize his opponent B, but A does not appear on the broadcast in person. If B or his supporters then ask to buy time, they must be allowed to buy the same amount. Similarly, if A's supporters have received free time, B's supporters must be given an equal amount in a comparable time period. The Commission has recognized that, although the candidates

themselves do not appear in this situation, it is in "the political arena" and should fall within the equal opportunities requirement.

N.—Identifying Sponsors of Broadcasts and Cablecasts

When a station or cable system is paid to broadcast anything, the station or system must announce that the broadcast is paid for and who paid for it. This law applies to paid political broadcasts as well as to other sponsored programs and spots. Here are some examples of how the sponsorship identification requirement applies to political broadcasts and cablecasts:

(a) Merely stating that "The following is a paid political announcement" does not comply with the law because it doesn't say *who* paid for it.

(b) Merely adding a statement at end of a spot of program that says, "Authority, Blank Campaign Committee, John Smith, Treasurer" does not comply because it doesn't say that *anyone* paid for it.

(c) Giving the sponsorship identification in such small type on television that the average viewer cannot read it, or leaving it on the screen too briefly to be read, does not comply, because in neither case is the public informed that the program or spot is paid for and by whom.

The Communications Act requires that stations and cable systems make the above sponsorship identification. The Federal Election Campaign Act (FECA), which is administered by the Federal Election Commission, has different requirements which apply to candidates and persons who buy time for them. The announcements required by the FECA require that persons buying time state whether a paid message supporting one candidate or opposing another has been authorized by the candidate. The FCC and the FEC have issued a joint Public Notice which gives examples of the ways in which the requirements of both acts may be met in a single announcement.

If a program is both paid for and authorized by a candidate or his committee, an announcement that it is paid for or sponsored by him or the committee will be sufficient since it will be assumed that the candidate or committee that paid for it also authorized it. However, when a third party pays for a program or announcement that is authorized by a candidate or his committee, an announcement like this is required:

> Paid for (or sponsored) by (name of third party) and authorized by (name of candidate or committee).

If the program is paid for by a third party but not authorized by any candidate or any candidate's committee, an announcement like this would comply with both the FCC and the FEC requirements:

> Paid for (or sponsored) by (name of sponsor/payor) and not authorized by any candidate.

These are merely examples of ways in which both laws may be complied with in a single announcement. Broadcast stations and cable operators are responsible for making sure that an announcement is given that identifies who paid for a program or announcement. Candidates or their committees—or an outside party paying for the broadcast—are responsible for revealing whether the program or announcement was authorized by the candidate or his committee.

O.—Miscellaneous Rules and Policies

Broadcasting stations and cable systems must keep public political files that reveal all requests for time made by or on behalf of political candidates and what the outcome of the request was; that is, what was broadcast, if anything, and when it was broadcast, and what charges, if any, were made by the station or cable system. Gifts of time to candidates, whether requested or not, also must be recorded in this file. All of this information must be entered in the file as soon as possible.

Broadcasting stations also must make a record in their program logs of all programs on which political candidates appear, together with the name and political affiliation (party) of the candidate. If the candidate is an independent the log should list him or her as one.

Broadcasting stations do not need to log the length of the "commercial time" in a political *program*, but they must log the commercial time of political *announcements*. The Commission does not require broadcasters to compute the commercial time in either political or religious programs because it is sometimes impossible to determine what is "commercial" and what is not in these programs.

PART III.—DETAILED EXPLANATION OF POLITICAL BROADCASTING AND CABLECASTING LAW

A.—Who is a "Legally Qualified Candidate for Public Office"?

Since Sections 315 and 312(a)(7) of the Communications Act apply only to legally qualified candidates for public office, it is important to understand how the Commission and the courts have defined this term. The Commission's rule states, in substance, that a legally qualified candidate is a person:

> * * * who has publicly announced that he is a candidate * * * *and* who meets the qualifications prescribed by the applicable laws to hold the office for which he is a candidate * * * *and* who:
>
> (1) Has qualified for a place on the ballot *or*
>
> (2) Has publicly committed himself to seeking election by the write-in method *and* is eligible under the applicable law to be voted for by sticker, by writing in his name on the ballot, or other method, *and* makes a substantial showing that he is a bona fide candidate for nomination or office * * *

Note the "ands" and "ors" in the above language. For example, a mere announcement that he is a candidate does not make a person legally qualified for the purposes of our rules. He must also be eligible to hold

the office he is seeking and either have qualified for a place on the ballot or have qualified, as explained in (2) above, as a write-in candidate. The Commission will look to the laws of the State in which the election is to be held to determine whether a person has qualified as a candidate, regardless of whether the election is for national, State, county or municipal office. Below are answers to the most frequently asked questions on this subject.

"Public Announcement" of Candidacy

1. A candidate may meet the "public announcement" requirement of the rules by simply stating publicly that he is a candidate for nomination or election to a certain office. Filing the necessary papers or obtaining the required certification under his State's laws in order to qualify for a place on the ballot is considered to be the equivalent of a public announcement of candidacy. However, a public announcement of candidacy will not be presumed to have been made merely because a person is "expected to run" or because some of his friends and associates are seeking support for him in the expectation that he will run. Problems in this area are most likely to arise when a nomination is by convention or caucus instead of by primary election, since a person may be nominated by a convention even if he has made no prior announcement of his candidacy. In its principal ruling on such a situation, the Commission found that President Lyndon B. Johnson was not a "legally qualified candidate for public office" for purposes of Section 315 at the time the TV networks broadcast an interview with him on December 7, 1967, because he had not publicly announced his intention to seek reelection. During the TV interview he refused to speculate about running for reelection and stated that he had not made his decision on the subject. The complainant in the case, who had publicly announced his intention to seek the Democratic Presidential nomination, requested "equal time", contending that he and President Johnson were opposing candidates for the nomination of their party. The Commission ruled that a person was not a legally qualified candidate within the meaning of the statute unless he had publicly announced his intention to be a candidate. The Commission stated that "In this area, there cannot simply be reference to applicable State law, which is the Commission's customary approach in local primary and general elections * * *." It said that unless it held to its long-standing requirement of public announcement of candidacy, a chaotic situation would result. "For example, incumbents often are eligible to run again, and, prior to a determination to seek another term, they may take many preliminary steps of varying nature (e.g., frequent trips to the election State, with speeches, conferences with financial sources and potential delegates) * * * ." The Commission concluded that for it "to attempt to make findings on whether or when the incumbent has become a candidate during this usual, oft-repeated and varying preliminary period would render the statute unworkable. There would

be a continual series of complex factual hearings, whose resolution * * * would be most difficult and indeed might remain stubbornly speculative."[1]

In a contrasting case, a person had announced his intention to seek the Democratic party nomination for Governor of New York, but claimed that section 315 did not apply to him, even though his name could be placed on the primary ballot by any one of three different methods. The Commission ruled that since under one of the three methods the persons could become the party's nominee if he received the majority of votes cast at a nominating session of the New York State Democratic Committee since he had no opponents under the other method, it was not unreasonable for the licensee of a station to decide that this person was now a legally qualified candidate for public office, since the Commission's rules state, among other things, that "a legally qualified candidate means any person who has publicly announced that he is a candidate for nomination by a convention of a political party * * * ."[2]

Who Is Eligible To Hold Office?

2. A party's candidate for President was 31 years old and her Vice Presidential running mate was 21 years old. They had publicly announced their candidacies and their party stated that it had filed for ballot status in 15 States, had been certified in 6, and had collected nearly 500,000 signatures on nominating petitions. Were they legally qualified candidates for purposes of section 315 and 312 of the act? No. Under the Commission's rules a person must meet "the qualifications prescribed by the applicable laws to hold the office for which he is a candidate" before he will be considered a legally qualified candidate. Article II, Section I, Clause 4 of the United States Constitution states, among other things, that no one is eligible to the Office of President "who shall not have attained the age of thirty-five years." Article XII of the Constitution states that " * * * no person constitutionally ineligible to the Office of President shall be eligible to that of Vice President of the United States."[3]

3. A station asked whether it was required to sell time to members of the Communist Party who were running for the offices of President and Vice President, in light of the Smith Act.[4] The Commission replied that Section 312(a)(7) of the Communications Act requires licensees to give or sell reasonable amounts of time to candidates for Federal elective office, including Communist Party candidates if they are otherwise legally qualified to be candidates for the Federal office they

[1] *Sen. Eugene J. McCarthy*, 11 F.C.C. 2d 511, 512–13 (1968), aff'd *Eugene McCarthy* v. *Federal Communications Commission*, 390 F.2d 471 (D.C. Cir. 1968); see also, *Anthony R. Martin-Trigona*, F.C.C. 77–838.

[2] *William Vanden Heuvel*, 23 F.C.C. 2d 119 (1970).

[3] *Socialist Workers Party*, 39 F.C.C. 2d 89 (1972).

[4] 18 U.S.C. 2385.

seek. The Smith Act provides criminal penalties for individuals who actively advocate or seek to bring about the overthrow of the Government of the United States, but it does not specifically refer to the Communist Party, and the U.S. Supreme Court has ruled that the following language from 18 U.S.C. 783 is applicable to the provisions of the Smith Act:

> (f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or any other criminal statute.[5]

Ballot and Write-In Candidates

4. A candidate need not always be on the ballot to be legally qualified. It depends on the laws of the State in which the election will take place. In some States persons may be voted for as write-in candidates if they have not complied with the requirements for getting their names on the ballot. In such States, if a person makes a public announcement that he or she is a write-in candidate for a certain office, is eligible to hold the office if elected, and makes a "substantial showing" that he is a bona fide candidate who is actively seeking election (such as by establishing campaign headquarters, making campaign speeches, issuing press releases, etc.),[6] he will be considered a legally qualified candidate within the meaning of Sections 315 and 312. A mere announcement that he is a write-in candidate, by itself, does not entitle him to equal opportunities or other rights of candidates under the Communications Act. The laws of each State will determine whether on the facts of each case a candidate is entitled to a place on the ballot or, if he cannot qualify for ballot status, whether he may run as a write-in candidate. See rules quoted in the Appendix 1.[7]

Candidate Must Prove Qualifications

5. A candidate must prove that he is a legally qualified candidate in order to gain his rights under Sections 315 and 312(a)(7). Sections 73.1940 and 76.205 of the rules (47 CFR 73.1940 and 76.205) state that a candidate seeking equal opportunities has the burden of proving that he and his opponents are legally qualified candidates for the same public office. In one case, after qualifying for a place on the ballot for one office in a primary, a candidate notified State officials that he was withdrawing from that race, but later claimed that he had not intended to withdraw. However, the evidence indicated that he was

[5] *Scales* v. *U.S.*, 365, U.S. 203 (1961); *Ken Bauder (Station WLUC-TV)*, 62 F.C.C. 2d 849 (1976).

[6] See 47 CFR 73.1940(a)(5) and 76.5(y)(5) for further information on "substantial showing."

[7] *KGNS*, 40 F.C.C. 291 (1952); *Socialist Labor Party of America*, 40 F.C.C. 239 (1951). For a leading case in which a write-in candidate was held to have made a substantial showing that she was a bona fide candidate, see *Socialist Workers Party*, 26 F.C.C. 2d 244 (1970).

actually supporting another candidate for that office and personally was now seeking nomination for a different office. The Commission ruled that he was not entitled to the rights of a candidate for the first office because he had not made a clear showing that he was now a legally qualified candidate for that office.[8] In another case, the Commission stated that "where initial doubt is present as to whether in fact a candidate is actually legally qualified for the office he seeks, then it is incumbent upon that candidate to prove his qualifications.[9]

Candidates for Nomination by Convention

6. Except for Presidential or Vice Presidential candidates, candidates for nomination by convention or caucus must (i) publicly announce their intention to run for nomination; (ii) be eligible to hold the office they are seeking, and (iii) make a substantial showing that they are bona fide candidates. No one except a Presidential or Vice Presidential candidate will be considered a legally qualified candidate for nomination or caucus earlier than 90 days before the convention or caucus is to begin.[10]

Candidates for Presidency and Vice Presidency

7. A special situation arises in connection with candidates for President and Vice President, since they are running nationwide. Candidates for *nomination* to either of these offices must (i) make a public announcement of candidacy; (ii) be eligible to hold the office under the Constitution and other applicable laws and (iii) either the candidates or their proposed delegates must have qualified for the primary or Presidential preference ballot in the State in which they are running or have made a substantial showing of bona fide candidacy in that State, territory or the District of Columbia. Persons will be considered legally qualified candidates for nomination only in the State or States in which they qualify under the above standard, unless they qualify in 10 or more States (or 9 and the District of Columbia), in which event they will be considered legally qualified candidates for nomination in all States, territories and the District of Columbia.[11] Candidates for *election* to the Presidency or Vice Presidency must qualify in the same way as candidates for other offices; that is, make a public announcement of their candidacies, be eligible to hold the offices sought and either qualify for a place on the ballot in the States in which they qualify as candidates, or qualify as write-in candidates by committing themselves to seeking election by that method and making

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[8] *Lar Daly*, 40 F.C.C. 270 (1956).

[9] *American Vegetarian Party*, 40 F.C.C. 278 (1956); see also *Socialist Workers Party*, 40 F.C.C. 421 (1964); *Raymond Harold Smith*, 40 F.C.C. 430 (1964); *Frank J. Kuhn, Jr.*, 48 F.C.C. 2d 433 (1974); *Roy Anderson*, 14 F.C.C. 2d 1064 (1968), aff'd per curiam, *Anderson* v. *Federal Communications Commission*, 403 F.2d 61 (2d Cir. 1968).

[10] See §§73.1940(a)(3) and 76.5(y)(3) of the rules. Also, §§73.1940(a)(5) and 76.5(y)(5) for "substantial showing."

[11] See §§73.1940(a)(4) and 76.5(y)(4) of the rules in the Appendix.

a substantial showing that they are bona fide candidates for election. Like candidates for Presidential or Vice Presidential nomination, they will be considered legally-qualified candidates only in the States in which they have met these requirements unless they meet the requirements in 10 or more States (or 9 and the District of Columbia), in which event they will be considered legally qualified candidates in all States, territories and the District of Columbia.[12] Thus a Presidential or Vice Presidential candidate who qualifies in less than 10 States will be entitled to equal opportunities, freedom from censorship, lowest unit rates, "reasonable access," etc., only in those States in which he or she qualifies, but candidates who qualify in 10 or more States will gain these rights in all States.

Rulings by State Officials

8. When a State Attorney General or another State official who has authority to decide a candidate's legal qualifications has ruled that a candidate is not legally qualified under the State's election laws, a station normally is not required to make "equal opportunities" available to the candidate. The ruling of the authorized State official will normally be accepted as final unless there is a judicial decision to the contrary.[13]

9. A write-in candidate for mayor sought time equal to that given the only two candidates whose names appeared on the ballot. Under State law, only the two candidates receiving the largest number of votes in the primary election would become the "official candidates" in the final election. The Secretary of State, who was the "Ex-Officio Chief Elections Officer" of the State, gave an opinion that write-in candidates were not "official candidates" and therefore were not entitled to equal time. However, the licensee of the station sought a ruling from the Commission because the write-in candidate was eligible to hold the office of mayor if elected and his name could be written on the ballot. The Secretary of State's opinion stated only that write-in candidates were not "official candidates" and did not state that they were not "legally qualified candidates." The Commission found that since the candidate here could be voted for by the write-in method and was eligible to hold the office he sought, he might, under FCC rules, be a legally qualified candidate if he made a substantial showing that he was a bona fide candidate.[14] In a contrasting case that arose under the laws of a different State, the Commission held that since the Attorney General of the State had ruled that there was no provision in the law for casting write-in votes in a primary election and that a person did not become a legally qualified candidate in a

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[12] See §§73.1940(a)(2) and 76.5(y)(2) of the rules in the Appendix.

[13] *Socialist Workers Party* 40 FCC 280 (1956); *Lester Posner*, 15 FCC 2d 807 (1968); *Malcolm Cornell*, 31 FCC 2d 649 (1971). (For an example of a somewhat different result in a case involving a State official's opinion, see par. 9.)

[14] *Tom Leonard*, 29 FCC 2d 177 (1969).

primary until he filed his "notification and declaration paper" with the officer specified by law, the person was not a legally qualified candidate until this paper had been filed.[15]

Write-In Candidate Must Declare Self

10. Is a candidate entitled to "equal opportunities" as a write-in candidate while still seeking enough signatures on petitions to qualify for the ballot, if he tells the FCC that he intends to run as a write-in candidate if he fails to obtain a place on the ballot? In a ruling later appealed to the courts, the Commission found that the candidate was not entitled to equal opportunities as a write-in candidate since he intended to seek election by that method only if his current effort to obtain a place on the ballot failed.[16] The candidate appealed to the U.S. Court of Appeals for the 7th Circuit. Although for technical legal reasons the court did not vacate the particular Commission ruling that was challenged, it disagreed with the Commission's finding that the appellant could not obtain status as a write-in candidate while seeking ballot status by the petition method. The court said that "a candidate who has not yet qualified for ballot position under State election laws is nevertheless entitled to equal time if he is otherwise eligible under the [write-in rules] and commits himself to seeking election by the write-in method in the subsequent election." The court further stated that "it is sufficient that the candidate indicate to the stations from whom equal time is sought that he will continue to campaign as a write-in candidate regardless of the outcome of his petition efforts. We query whether it would be sufficient for a candidate merely to indicate that, if his petition effort failed, he would be agreeable to voters writing in his name, but that is not the case here. Flory [the candidate] indicated he would continue an active campaign."[17] As a result of this decision, the Commission amended its political broadcasting rules regarding the requirements for becoming a write-in candidate to read as quoted in the Appendix to this Primer and require a write-in candidate to have "publicly committed himself to seeking election by the write-in method * * * ."[18]

Who Is *Not* A Candidate For Public Office?

11. The names of candidates for delegates to the Democratic National convention did not appear on the ballot in the California Presidential primary. Instead, the electorate voted solely for the candidate for nomination to the Presidency. If one of the presidential candidate's proposed convention delegates appeared on a TV station,

[15] *Rady Davis* 40 FCC 435 (1965).

[16] *Ted Pearson*, 48 F.C.C. 2d 1091 (1974), review denied, F.C.C. 74–1087.

[17] *Flory* v. *Federal Communications Commission and the United States of America*, 528 F. 2d 124, 131 (7th Cir., 1975).

[18] *In the Matter of Amendment of Part 73 of the Commission's Rules*, 60 F.C.C. 2d 615 (1976).

would the station have to grant "equal opportunities" to anyone else because of his appearance? No. The Secretary of State and the Attorney General of California stated that: "California does not consider a candidate for delegate on a slate of delegates in a Presidential primary to be a legally qualified candidate for public office." The Commission ruled that in view of this opinion and the facts of the case, broadcasts by a delegate would not fall within the scope of section 315.[19] However, under the laws of some States, persons seeking election as delegates to State constitutional conventions have been considered legally qualified candidates for public office by the State officials authorized to make such rulings. In such cases, candidates for delegate are candidates for public office under the FCC rules.

12. A station refused to sell time to a person for a broadcast advocating the election of another person to the office of County Executive because the station believed that the message was "in bad taste." A complaint was filed, claiming that the station's action violated section 315(a) because it amounted to censorship, since the complainant himself was a candidate for County Republican Committeeman. The Commission upheld the station's right to use its discretion as to accepting the message the complainant wanted to broadcast. The Director of the New York State Election and Law Bureau ruled that the office which the complainant himself sought—County Republican Committeeman–was "a party position" and not a public office. Therefore the complainant was not a candidate for public office and the no-censorship provision of Section 315(a) did not apply to him.[20]

13. Under State law, the Maryland General Assembly was authorized to fill a vacancy in the office of Governor created by the resignation of the former Governor. A complainant sought air time on the grounds that he was a legally qualified candidate for the office of Governor. The station claimed that the complainant was not a legally qualified candidate for public office within the meaning of section 315. The station forwarded a letter from the Deputy Attorney General of Maryland which stated that "the impending legislative action (by the General Assembly) is not an election" as defined by Maryland law and that "the present contest for the office of Governor is not a process by which the voters of this State shall elect a Governor." The Commission found that the position of the station was not unreasonable in view of the circumstances of the case.[21]

14. A person who meets the definition of a candidate as given in the Federal Election Campaign Act is not necessarily a legally qualified candidate for purposes of the Communications Act. The only definition

[19] *KNBC-TV*, 23 F.C.C. 2d 765 (1968); see, also, *Russell H. Morgan*, 58 F.C.C. 2d 964 (1976).
[20] *Malcolm Cornell*, 31 F.C.C. 2d 649 (1971).
[21] *Lester Posner*, 15 F.C.C. 2d 807 (1968).

of a candidate appearing in the Federal Election Campaign Act applies only to Chapter 14 of that Act and does not affect the definition of a legally qualified candidate for purposes of section 315 of the Communications Act.[22]

15. Several New York City mayoralty candidates have filed "the necessary authorization of candidacy under Section 481 of the New York State Selection Law," which apparently is required before fund-raising operations may begin. Are they legally qualified candidates for public office under the Communications Act? Not necessarily. Unless such filings under State law "would also qualify such candidates for places on the ballot, such filings would not make these candidates 'legally qualified' so as to bring the equal opportunity provisions of Section 315 into play."[23]

Broadcasts On Distant Stations

16. Do "equal opportunities" apply to a broadcast by a candidate for Mayor of City "A" on a station in City "B" whose service area does not extend as far as City "A"? No. The candidate for Mayor of "A" is not a legally qualified candidate for public office in the area served by the station in "B" for the purposes of Section 315. The purpose of Section 315, as shown by its legislative history, is to prevent a candidate from obtaining an unfair advantage over an opposing candidate by broadcasting to the voters in the election in which both are taking part if the opposing candidate is denied a chance to broadcast to these voters. Here the candidate would not be broadcasting to the persons who were to vote in his election.[24]

Rivals In Recall Balloting Are Candidates

17. Citizens of a Colorado city were to vote whether to recall a District Attorney. On the same ballot, two other persons were listed as candidates to succeed the incumbent if the voters should decide to recall him. The incumbent asked to buy time on a TV station to defend his record and attack his critics. The station sought a declaratory ruling on whether the incumbent District Attorney was a legally qualified candidate for public office within the meaning of Section 315. The Colorado Attorney General stated that the two alternative candidates on the ballot were legally qualified candidates for public office, but he had not decided whether the incumbent office holder was a legally qualified candidate. If he were a legally qualified candidate, Section 315(a) would prohibit censorship of his broadcasts. The U.S. Supreme Court has held that since a station cannot censor a legally

[22] *In re Federal Election Campaign Amendments of 1974*, 55 F.C.C. 2d 279 (1975); *Anthony Martin-Trigona*, F.C.C. 77-838. For further discussion of the Federal Election Campaign Act, see para. 3, section L of this part of the primer.

[23] *Letter to Hon. Percy E. Sutton*, 67 F.C.C. 2d 188 (1977).

[24] *Letter to Peter A. Mobilia, Jr.*, June 17, 1977.

qualified candidate, the station will not be subject to liability for civil damages for any libelous statements the candidates may broadcast.[25] The Commission ruled that the incumbent and the two alternative candidates on the ballot all should be considered legally qualified candidates for public office. It stated that to rule otherwise would be unfair to the incumbent who could be censored while defending himself, whereas his two opponents could not be censored. Also, the alternative candidates, but not the incumbent, could obtain the station's lowest unit charge for time. Even the alternative candidates might be at a disadvantage if the incumbent were ruled not to be a legally qualified candidate, since they would not be entitled to opportunities equal to those of the incumbent if he should appear on the air. Thus, a contrary ruling would result in inequities to both the District Attorney and the alternative candidates.[26] However, when the recall ballot lists only the official on whose recall the public is to vote and does not list any candidates seeking to succeed him, the incumbent official is not a "legally qualified candidate for public office" for purposes of Section 315. The fairness doctrine would, of course, apply to the recall proposition.

Candidates "With No Chance To Win"

18. A station may not deny "equal opportunities" to a candidate because it believes he has no chance of being nominated or elected. If a candidate is legally qualified as defined in the rules and further explained in this section, he is entitled to his rights under sections 315 and 312(a)(7) regardless of whether a station licensee thinks he has any chance of success.[27]

Election Ends "Equal Time" Rights

19. If a candidate does not prove his legal qualifications until after the date of nomination for the office which he was seeking, or if, although a candidate was qualified from the beginning, he files a complaint after the nomination has taken place, he is not entitled to the "equal opportunities" that would have been available to him if he has proved his qualifications or filed a complaint before the nomination date. The occurrence of nomination or election ends the possibility of affording equal opportunity. However, the Commission itself can take post-election action against a broadcaster who is found to have violated the law before the election.[28]

[25] *Farmers Educational and Cooperative Union of America* v. *WDAY, Inc.*, 360 U.S. 525 (1959).

[26] *Petition of Station KOAA TV*, F.C.C. 73–286 (April 25, 1978).

[27] *Columbia Broadcasting System, Inc.*, 40 FCC 244 (1952).

[28] *Lar Daly*, 40 FCC 273 (1956), aff'd by order dismissing appeal entered March 7, 1957, *Lar Daly* v. *U.S.A.* and *FCC* Case No. 11946 (7th Cir., 1957), rehearing denied by order entered April 2, 1957, cert. den., 355 U.S. 826, rehearing denied 355 U.S. 885 (1957); *Lar Daly*, 40 FCC 317 (1960).

B.—When are Candidates "Opposing Candidates"?

When Congress adopted section 315 it indicated that its reason for requiring equal opportunities was to make sure that opposing candidates receive the same treatment—that if one candidate for an office gets air time, his opponent "for that office" will be entitled to equal time. The FCC has for many years interpreted Section 315 to mean that before the primaries or the nominating conventions take place, only those candidates who seek the nomination of the same party for the same office are entitled to opportunities equal to those of each other, since only *they* are opponents at that point. The U.S. Court of Appeals for the District of Columbia Circuit upheld the Commission's position on this question in *Kay* v. *FCC*,[1] stating, in part,

> * * * Congress intended by the language it did employ to * * * restrict the benefits of "equal opportunities" *to candidates of the same class or character* as the candidate or candidates who may have been permitted to use a broadcasting station in the first place.

This interpretation of the statute also allows a station to serve the public interest more fully in some instances by devoting more time to one primary race than to another. For example, an incumbent office holder may have little or no opposition to renomination by his party, and consequently there may be little public interest in that party's nomination for that office, whereas half a dozen candidates may be waging vigorous campaigns for nomination to the same office by the other major party. The station may rightly decide that the public interest will be better served by allocating more time to the hotly contested race than to the other one.

Examples of Application of Law

1. Examples of how the "equal opportunities" law applies to different situations are given in the following paragraphs:

(a) *Candidates for nomination by same party to same office.* A, B, and C are candidates for nomination for sheriff by the Good Government Party. If a station makes time available to A, and if B and C request equal opportunities, the station must grant their request because they are opposing candidates for nomination by the same party to the same office.

(b) *Candidates for nomination by different parties.* A station makes time available to A, B, or C, candidates for nomination for sheriff by the Good Government Party. X, Y, and Z are seeking the nomination for sheriff by the Square Deal Party. If they demand time equal to that made available to A, B, or C, the station need not make it available to them so far as section 315 is concerned, since at this point X, Y, and Z are opponents of each other but not of A, B, or C. The Commission

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[1] *Kay* v. *FCC*, 443 F. 2d 638, 645 (D.C. Cir. 1970).

has long held that while both primary and general elections fall within the scope of section 315, such elections must be considered independently of each other, and equal opportunities, within the meaning of section 315, need be afforded only to legally qualified candidates for the same office in the same election.[2] However, it should be noted that a station's actions in such cases also are subject to its general public interest responsibility to present discussion of important political matters and to comply with the Fairness Doctrine; moreover, if the nomination is for a Federal elective office, section 312(a)(7) of the Communications Act requires the station to provide "reasonable access" to all of the candidates upon request. For further discussion of these subjects, see part III, sections H and K.

(c) *Candidates for Different Offices.* May a station make time available to all candidates for one office in a general or primary election and refuse time to all candidates for another office? Yes. So far as the requirements of section 315(a) are concerned, a licensee may limit the sale of time to candidates for those offices which the licensee determines are particularly important.[3] However, see par. 1(b) above on other factors to be considered, including the "reasonable access" requirement for Federal elective candidates.

(d) *Candidates in primary elections and general election for same office.* A station which makes time available for candidates for nomination to an office in a *primary* election need not make time available to a candidate for the same office in the *general* election unless it has made time available to another candidate for the office in the *general* election. Primary and general elections must be considered independently of each other, as explained in (1)(b) above.[4]

(e) *When does nomination take place?* On May 3, 1964, a Congressman from New York made a television appearance. At this time, he was the only person who had been designated by petition under New York law as Republican nominee for election to his Congressional seat. The only designated Democratic-Liberal nominee filed a complaint requesting equal time. Primaries of both parties were to be held on June 2, 1964, but if no petitions for write-in nominees were filed by May 5, 1964, no primaries would be held, since the incumbent and the complainant each would have the uncontested

[2] *Hon. Joseph S. Clark*, 40 FCC 332 (1962); *Hon. Clarence E. Miller*, 23 FCC 2d 121 (1970); *Richard B. Kay*, 24 FCC 2d 426 (1970), aff'd; *Kay* v. *FCC*, 443 F. 2d 638 (D.C. Cir. 1970); *KTTS*, 23 FCC 2d 771 (1970); reconsid. denied, 24 FCC 2d 541 (1970).

[3] *Lew Breyer*, 31 FCC 2d 548 (1968); *Foster Furcolo*, 48 FCC 2d 565 (1974).

[4] *KWFT, Inc.*, 40 FCC 237 (1948).