Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-168

In the Matter of

Codification of the Commission's
Political Programming Policies

REPORT AND ORDER

Adopted: December 12, 1991; Released: December 23, 1991

By the Commission: Chairman Sikes concurring in part and dissenting in part and issuing a separate statement: Commissioners Quello, Marshall, Barrett and Duggan issuing separate statements.

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1. By this *Report and Order*, the Commission revises its existing rules[1] regarding political broadcasting. This action represents a comprehensive guide to political broadcasting and, as indicated herein, supersedes previous Commission interpretations of the political broadcasting provisions of the Communications Act.[2]

I. INTRODUCTION AND SUMMARY

2. We initiated the Notice of Proposed Rulemaking (*NPRM*) in this proceeding, 6 FCC Rcd 5707 (1991), in response to continuing questions concerning our political programming policies. As we described in the *NPRM*, a July 1990 audit of thirty television and radio stations revealed that political candidates often pay higher prices for airtime than commercial advertisers, primarily because "candidates purchase[ ] time at nonpreemptible 'fixed' rates while commercial advertisers purchase[ ] time at 'preemptible' rates." [3] The audit raised questions whether candidates' advertising choices may be related to a lack of the types of negotiations that often occur between a station and a commercial advertiser. [4] In addition, the numerous inquiries received by Commission staff in the wake of the audit made it clear that there is a need for a single, up-to-date source describing our political programming policies.

3. We have therefore sought in this proceeding to accomplish several objectives. First, we intend to more accurately and closely reflect the language, intent, and requirements of the political broadcasting portions of the Act. In addition, we seek to issue detailed and practical advice, spelled out in clear and specific Commission rules[5], so that broadcasters, candidates, advertising buyers and the public may be fairly and consistently apprised of the duties required by and rights accorded under the statute. Finally, we seek to revise our rules in order to promote achievement of the Act's objectives while being responsive to the evolving sales practices of broadcast

[1] The Commission's rules are codified in Sections 73.1940 and 76.205, pertaining to broadcasting stations and cable television systems, respectively.

[2] 47 U.S.C. Sections 312(a)(7), 315. *See infra* at para. 3. Previously, the Commission has had occasion to issue numerous interpretations, both comprehensive and *ad hoc*, of these statutory requirements. For example, in 1978 the Commission issued a comprehensive guide to complying with the Commission's political programming rules, which it then revised in 1984. *The Law of Political Broadcasting and Cablecasting: A Political Primer*, 100 FCC 2d 1476 (1984) (*"1984 Political Primer"*). The primer was followed by a *1988 Public Notice*, which concentrated on the application of Section 315(b)'s lowest unit charge provision. *See* 4 FCC Rcd 3823 (1988).

[3] *Mass Media Bureau Report on Political Programming Audit*, 68 RR 2d 113 (1990) (*"1990 Audit Report"*).

[4] *Id.*

[5] We have decided to issue detailed rules rather than a *Primer*. In addition, we will ensure that oral advice of the Commission staff on new and significant issues is reflected in written form, which is publicly available.

stations. [6] Toward that end, we have determined that licensees must provide more timely, accurate, and complete information on rates and sales practices to candidates. Such information will help candidates take advantage of the full benefits to which they are entitled under the law.

4. The following discussion addresses the concerns raised by the commenting parties and resolves the issues raised in the *NPRM*. [7] Specifically, by this action the Commission does the following:

(A) *Reasonable Access.* Section 312(a)(7) requires stations to afford reasonable access for federal candidates to their facilities, or to permit federal candidates to purchase "reasonable amounts of time." [8] In this regard the Commission will:

(i) Continue to rely upon the reasonable good faith judgments of licensees to determine what constitutes reasonable access.

(ii) Adhere to its current interpretation that Section 312(a)(7) does not apply to cable television systems.

(iii) Retain our policy of permitting stations to ban federal candidates from news programming.

(iv) Permit sales of a "news-adjacency" class of time to candidates only if such a class of time is sold at rates no higher than sales of such time to most-favored commercial advertisers.

(v) Require stations to provide access for federal candidates to the station over the weekend preceding an election if that station has provided similar services to any commercial advertiser during the year preceding the relevant election period.

(B) *Equal Opportunities.* Section 315(a) requires stations that permit legally qualified candidates to use their station to afford equal opportunities to the candidates' opponents. Bona fide newscasts, as well as news interviews, documentaries, and news events, are exempt from these requirements. [9] In this regard the Commission will:

(i) Continue to interpret the "bona fide newscast" exemption as requiring only that licensees exercise control over the newscast by exercising editorial discretion whether or not to air the program.

(ii) Narrow the definition of a "use" by a "candidate" to include only uses of a licensee's facilities that are controlled, approved or sponsored by a candidate after becoming legally qualified.

(iii) Continue to defer to licensees' reasonable, good faith judgment in determining whether sufficient sponsorship identifications have been provided in political programming and advertising.

(iv) Require *both* audio and visual sponsorship identification for television advertisements.

(v) Continue our present policy that permits stations to request candidates to submit their advertisements in advance to allow the station to determine whether the ad constitutes a use by a candidate and whether it complies with the sponsorship identification requirements. If a candidate refuses to allow the station to pre-screen the ad, the station should advise the candidate that it will take whatever steps are necessary to add the appropriate sponsorship identification to the submitted material.

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[6] As we stated in the *NPRM*, over the years the industry has moved away from a system based primarily upon the sale of volume discounts to a system that uses a "grid card" to give stations greater flexibility in selling their fixed inventory of advertising time. The latest development appears to be the introduction of a "yield maximization" system, under which spots are in essence auctioned off to the highest bidder, and the price of a given class of time changes constantly to respond to the broadcasters' needs and advertisers' fluctuating demand.

[7] We received 39 comments and 13 reply comments in this proceeding. *See* Appendix A.

[8] Section 312(a)(7) of the Communications Act creates a specific right of access only as to federal candidates. It provides:

> (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.

[9] Section 315(a) of the Communications Act states:

> (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 hereby 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:
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> (1) bona fide newscast,
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> (2) bona fide news interview,
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> (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
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> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
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> 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 Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance. 47 U.S.C. Section 315(a).
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> For purposes of Section 315, the terms "broadcasting station" or "licensee" includes "community antenna television."

(C) *Lowest Unit Charge.* Section 315(b) prohibits stations from charging candidates more than the lowest unit charge of the station for each class and period of time, and requires stations to offer candidates all discounts and privileges afforded its most-favored advertiser. [10] In this regard, the Commission will:

(i) Require stations to disclose to candidates all classes of time, discount rates, and privileges afforded to commercial advertisers. Furthermore, stations are required to sell such time to candidates upon request.

(ii) Continue to apply the "most-favored advertiser" standard to factors which affect the value of an advertisement, including (but not limited to) priorities against preemption.

(iii) Permit stations to establish their own reasonable classes of immediately preemptible time so long as some demonstrable benefit besides price or identity of the advertiser (such as preemption protection, scheduling flexibility, or guaranteed time-sensitive make goods) distinguishes each class. The licensee must adequately define each class, disclose it, and make it available to candidates.

(iv) Permit stations to establish their own reasonable classes of preemptible with notice time so long as they adequately define such classes, disclose them, and make them available to candidates.

(v) Permit stations to treat non-preemptible and fixed position as distinct classes of time, provided that they articulate clearly the differences between such classes, fully disclose them, and make them available to candidates.

(vi) Continue the policy of prohibiting stations from creating premium-priced, candidates-only class of time.

(vii) Adopt a policy requiring stations to calculate rebates and provide them to candidates promptly.

(viii) Adopt a policy requiring that all rates found in all package plans sold to commercial advertisers be included in the station's calculation of the lowest unit rate.

(ix) No longer require stations to include in lowest unit charge calculations noncash merchandise incentives (*e.g.*, vacation trips). Bonus spots, however, must still be calculated into lowest unit charge.

(x) Require that fire sale rates be calculated as the lowest unit charge for all classes of time sold that air during the fire sale period, but restrict that calculation to the time period or program actually covered by the fire sale.

(xi) Continue the policy of prohibiting stations from increasing their rates during an election period unless the rate increase is an ordinary business practice.

(xii) Require stations to provide make goods prior to the election if the station has provided a time-sensitive make good to any commercial advertiser during the year preceding the 45- or 60-day election period. *All* make-good spots must be included in the calculation of the lowest unit charge.

(xiii) Continue the existing policy that, while there is no obligation to sell spots in a particular program to candidates, once a station has decided that it will sell spots in a program, daypart, or time period, it cannot inflate the price of the spot sold to a candidate beyond the minimum necessary to clear by claiming that all "preemptible time" is sold out.

(D) *Political File.* The Commission's current policies and Section 73.1940(d) will continue to provide adequate guidance to licensees concerning maintenance of a public political file.

5. Finally, the Commission has determined that the policies reflected in this *Report and Order* should serve as legally binding rules. We thus have codified new rules, as set out in Appendix B, to effectuate the policies enumerated in this proceeding. Henceforth, any staff and Commission interpretative rulings will also be made public in order to provide clear and consistent guidance to the public. To the extent that anything contained herein conflicts with prior rules or Commission policies (such as the 1984 *Primer)*, the policies adopted herein are controlling.

II. REASONABLE ACCESS

6. As indicated above, Section 312(a)(7) of the Act requires stations to provide federal candidates "reasonable access" to their facilities. [11] As noted in the *NPRM*, in 1978, after notice and inquiry, the Commission concluded that additional formal rules regarding what constituted "reasonable access" would not help licensees because of the varying circumstances under which broadcasters and

[10] Section 315(b) of the Communications Act states:

> 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 a 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.

[11] In the *NPRM*, we asked for comment on our earlier interpretation that Section 312(a)(7) does not apply to cable television systems. *NPRM* at paragraph 19. Few commenters addressed this issue. Those that believe Section 312(a)(7) should apply argue that growing cable penetration makes cable access increasingly important to candidates. In our view, however, the statutory language of FECA and its legislative history indicate that Congress never intended to apply reasonable access to cable television. We note, for example, that Section 312(a)(7) is in a license revocation provision of the Act, making it unlikely that Congress intended its application to nonlicensee cable systems. Moreover, even if Congress initially intended to apply reasonable access to cable, the amendment of FECA in 1974 established that reasonable access does not apply. In that 1974 legislation, Congress repealed Title I of FECA, containing the only statutory language arguably supporting Section 312(a)(7)'s

candidates operate. Instead, the Commission determined that it would continue to rely upon the reasonable, good faith judgments of its licensees to provide reasonable access. It did, however, articulate guidelines that would be applied to determine whether a particular licensee's judgment was reasonable. Subsequently, additional questions have been raised regarding standards for reasonableness, as outlined in the *NPRM*.

A. Formal guidelines for reasonable access for federal candidates.

7. *Issue and Comments.* The *NPRM* proposed to incorporate existing Commission guidelines on what constitutes "reasonable access" into a more formal scheme. The majority of commenters did not address this issue. Of the four that did, three asked for quantifiable access, i.e., a specific number of hours per week, or formulas that consider the market's various stations and populations. [12]

8. *Decision.* On further reflection, the Commission continues to believe that formal rules would not be practical and that we should continue to rely upon the reasonable, good faith judgments of licensees to provide reasonable access to federal candidates. Reasonable access does not lend itself to a specific number of hours based on complex formulas. Rather, what constitutes "reasonable access" depends on the circumstances surrounding a particular candidate's request for time and the station's response to that request. We will thus continue to determine compliance with Section 312(a)(7) on a case-by-case basis.

9. In evaluating whether a particular licensee's judgment in affording access is reasonable, we will continue to rely on the following guidelines, which reflect a combination of policies articulated by the Commission in its 1978 *Report and Order* on reasonable access, [13] and approved by the Supreme Court in *Carter/Mondale:* [14]

a) Reasonable access must be provided to legally qualified federal candidates through the gift or sale of time for their "uses" of the station. *See Report and Order,* 68 FCC 2d at 1088.

b) Reasonable access must be provided at least during the 45 days before a primary and the 60 days before a general or special election. The question of whether access should be afforded before these periods or before a convention or non-primary caucus will be determined by the Commission on a case-by-case basis. *Id.* at 1091. [15]

c) Both commercial and noncommercial educational stations must make program time available to legally qualified federal candidates during prime time and other time periods unless unusual circumstances exist that render it reasonable to deny access. *Id.* at 1090.

d) Commercial stations must make spot announcements available to federal candidates in prime time. The same rule applies to noncommercial stations that utilize spot time for underwriting announcements. Where a noncommercial educational station normally broadcasts spot promotional or public service announcements only, it generally need not make those spot times available to political candidates. *Id.* at 1092 and n. 22.

e) If a commercial station chooses to donate rather than sell time to candidates, it must make available to federal candidates free time of the various lengths, classes, and periods that it makes available to commercial advertisers. *Id.* at 1090 n. 18. [16]

f) Noncommercial stations may not reject material submitted by candidates merely on the basis that it was originally prepared for broadcast on a commercial station. *Id.* at 1094.

g) A station may not use a denial of reasonable access as a means to censor or otherwise exercise control over the content of political material, *e.g.,* by rejecting it for nonconformance with any of the station's suggested guidelines. *Id.*

h) Licensees may not adopt a policy that flatly bans federal candidates from access to the types, lengths, and classes of time which they sell to commercial advertisers. Noncommercial educational stations must provide program time which conforms to normal parts of the station's broadcast schedule. *Id.* at 1094.

i) In providing reasonable access, stations may take into consideration their broader programming and business commitments, including the multiplicity of candidates in a particular race, the program disrup-

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applicability to cable. Thus, upon careful review of the statute, the relevant legislative history, and the comments received in this proceeding, we find no reason to alter the conclusion in *Subscription Video Services,* 51 Fed. Reg. 1821 n. 27 (1986), that Section 312(a)(7) does not apply to cable television.

[12] *See* comments of Greater Media at 3; Outlet Broadcasting at 1.

[13] *Report and Order,* 68 FCC 2d 1079 (1978).

[14] *Carter/Mondale Presidential Committee, Inc.,* 44 FCC 2d 631, *recon. denied,* 74 FCC 2d 657 (1979), *aff'd sub. nom. CBS, Inc. v. FCC,* 629 F.2d 1 (D.C. Cir. 1980), *aff'd.,* 453 U.S. 367 (1981).

[15] The Supreme Court has recognized the Commission's need to evaluate when access should be afforded on a case-by-case basis, and has also affirmed the Commission's use of objective criteria in a national campaign. Those criteria included the facts that: (a) a number of candidates had formally announced their intention to seek a nomination; (b) various states had begun their delegate selection process; (c) candidates were fund raising and making speeches across the country; and (d) national print media had already given campaign activities prominent coverage. After weighing these criteria, the Commission determined that access should be given 11 months before a presidential election and 8 months before the Democratic National Convention. *CBS, Inc. v. FCC,* 453 U.S. at 392.

[16] In its comments, the Federal Election Commission (FEC) notes that, in 1986, it initially approved an advisory opinion which would have prohibited corporate licensees' offering free advertising to candidates. That opinion, however, was later vacated when the FEC revisited the issue. The FEC vote on reconsideration was deadlocked at 3-3. The FEC points out that it is currently unable to offer guidance on this issue apart from its "advisory opinion" process. Under that procedure, an interested party would need to present its question in the form of a new advisory opinion request, and the FEC would then have the opportunity to further consider the issue. However, at this time there appears to be no FEC ruling which squarely prohibits advertising donations by corporations.

tion that will be caused by political advertising, and the amount of time already sold to a candidate in a particular race. *Id.* at 1090.

B. Access for state and local candidates.

10. *Issue and Comments.* The Commission requested comment on whether stations are required by law to make facilities available to state and local candidates for their "uses." The few commenters that address this issue all state that Section 312(a)(7) is distinct and more demanding than stations' general public interest obligation,[17] and that stations may satisfy any public interest obligations with respect to state and local elections through news and general public affairs programming. Unlike federal candidates' reasonable access, they state, the public interest standard does not accord state and local candidates any specific access rights.

11. *Decision.* The Commission will not require a specific right of access for non-federal candidates. Section 312(a)(7), the only access provision in the political broadcasting laws, is quite explicit in creating a right of "reasonable access" exclusively for federal candidates. [18] Thus, no statutory basis exists to create a right which Congress implicitly rejected.

12. Moreover, the Supreme Court has declined to extend the general public interest obligations of broadcasters to encompass specific access requirements. As the Court explained in *CBS, Inc. v. FCC*, under the "public interest" standard," an individual [non-federal] candidate can claim no personal right of access." [19] Indeed, except for the "reasonable access" required for federal candidates under Section 312(a)(7) and the "equal opportunities" that must be provided to all candidates once a "use" by an opponent has been broadcast under Section 315, Section 3(h) of the Act states that broadcast stations cannot be treated as common carriers with an obligation to accord access to any particular person, group, or entity.[20]

C. News Programming.

13. *Issue and Comments.* The *NPRM* requested comment on whether the Commission should keep its current policy that permits broadcasters the editorial discretion to determine whether political advertisements should be aired during news programming. The majority of commenters argue that licensees should retain their discretion to exclude political advertising from news programming.[21] Such parties contend that mandatory access may compromise the journalistic integrity of news programming and confuse the public. They also point out that Section 312(a)(7) affords federal candidates reasonable -- not extraordinary or mandatory -- access, and does not entitle them to specific placement or programs.[22]

14. By contrast, three media buyers argue that television news programming reaches the highest concentration of those likely to vote. Accordingly, limiting candidates' access to news curtails their access to voters.[23] These commenters also contend that voters are able to distinguish partisan messages from news programming.

15. *Decision.* The Commission will continue its policy of allowing broadcasters to ban the sale of political advertising to federal candidates during the news.[24] The preponderance of comments received on this issue support retention of this longstanding policy, based upon our conclusion that Section 312(a)(7) was never intended to provide candidate access to specific programming.[25]

16. Indeed, so long as a station makes available to candidates a wide array of dayparts and programs, access to news programming is simply not essential to afford "reasonable access." We continue to believe that allowing the station discretion to refuse to run political advertising within its news programming does not unreasonably hamper the access of federal candidates to broadcast time, but does serve the public interest by preserving the journalistic integrity of the licensee in this vital area of programming.[26]

17. As we concluded in 1978: "[A]lthough a candidate for Federal office is entitled under Section 312(a)(7) to varied broadcast times, such candidate is not entitled to a particular placement of his or her political announcement on a station's broadcast schedule. We recognize that it would be very difficult for a licensee to afford 'equal opportunities' to opposing candidates if one candidate has his or her spot placed adjacent to a highly rated program, which was broadcast only once or very rarely. Additionally, there may be circumstances when a licensee might reasonably refuse broadcast time to political candidates during certain parts of the broadcast day. It is best left to the discretion of a licensee when and on what date a candidates spot announcement or program should be aired." *Report and Order,* 68 FCC 2d at 1091. We reaffirm our longstanding policy in this *Report and Order.*

D. News Adjacencies.

18. *Issue and Comments.* The *NPRM* also asked for comment on the Commission's policy that prohibits stations from creating "news adjacencies" that are sold only

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[17] The comments of AFB at 18-19; NBC at 10-11; Shamrock at 19,23; RTNDA at 5.

[18] As originally reported in the Senate, Section 312(a)(7) would have applied to any legally qualified candidate, but the Conference Committee expressly limited the provision to candidates seeking federal office. S. Conf. Rep. No. 92-580, p. 22, (1971); *See, CBS Inc. v. FCC,* 453 U.S. 367,380 (1981).

[19] 453 U.S. 367, 378-79, n. 6. (1981). Of course, once a broadcaster decides to sell or give time to a state or local candidate for political advertising, it is required to meet all of its statutory obligations including equal opportunities, lowest unit charge, and sponsorship identification.

[20] *CBS v. Democratic National Committee,* 412 U.S. 94 (1973).

[21] *See, e.g.,* the comments of ABC at 2-3; CBS at 21-23; INTV at 9-10.

[22] Comments of Dow, Lohnes and Albertson at 33.

[23] The comments of MPC at 2; National Media at 2; and Wilson at 3.

[24] Because state and local candidates have no right of access to broadcast facilities, stations may ban the sale of advertisements during news programming to such candidates regardless of the Commission's policy with respect to federal candidates.

[25] *See Report and Order,* 68 FCC 2d 1079, 1091 (1978); *Carter-Mondale Presidential Committee,* 74 FCC 2d 631, *recon. denied,* 74 FCC 2d 657 (1979), *aff'd sub nom. CBS, Inc. v. FCC,* 629 F.2d 1 (1980), *aff'd,* 453 U.S. 367 (1981).

[26] In this regard, we note that Congress generally has recognized the special status of news programming in the context of licensees' political broadcasting obligations. 47 U.S.C. Section 315 (a)(1)-(4).

to candidates at premium rates. [27] While the comments were mixed, more commenters state that news adjacencies should be considered as part of the news period and priced consistently with the lowest unit rate for the entire news period. [28] Apparently, this approach would be consistent with customary business practice. [29] Other commenters contend that the scheduling of news adjacencies is certain and precise, and therefore justifies a higher, premium rate. [30]

19. *Decision.* Based on the record compiled in this proceeding, we are persuaded that the scheduling attributes of news adjacencies may be sufficient to justify treating them as a separate class of time. We will permit sales of a "news-adjacency" class of time to candidates, however, *only* if such a class is sold at rates no higher than sales of such time to most-favored commercial advertisers. Thus, a station may charge no more for the news-adjacency class of time than the lowest unit rate charged to commercial advertisers during the news itself. We believe that this additional requirement, coupled with our disclosure requirements, will provide adequate safeguards against abuse.

E. Weekend Hours.

20. *Issue and Comments.* The Mass Media Bureau has previously noted that it does not require stations to make "extraordinary efforts" to remain open outside of normal business hours for the purpose of selling political advertising time.[31] However, if the station is formally closed but is otherwise open for purposes of "arranging and providing programming," the Bureau has stated that it may be unreasonable and inconsistent with the requirements of Section 312(a)(7) and 315(a) to deny access to political candidates on the weekend before the election.[32] The *NPRM* requested comment on the Bureau's policy that requires a station to afford "weekend" or "after hours" access to political candidates for placement and/or scheduling of advertisements on the weekend before the election if they would so treat their most-favored advertiser.

21. The majority of commenters oppose mandated weekend and after-hour access to stations for candidates in order to provide for the placement and/or scheduling of advertisements.[33] To require stations to accommodate candidates' requests outside normal business hours, several argue, presents staffing and financial hardships.[34] Moreover, several commenters argue that the Commission has erroneously extended Section 315(b) lowest unit charge provision's "most-favored commercial advertiser" considerations to non-rate related candidate benefits, such as weekend access.[35]

22. In contrast, Wilson claims that a station's political sales should mirror its commercial practices. Thus, if a station's most-favored commercial advertiser is afforded weekend/after hour access, so should candidates.[36] According to Dow Lohnes and Albertson, stations should only be required to accommodate federal candidates if they did so for a commercial advertiser within the 60 days preceding the statutory period.[37]

23. *Decision.* The Commission will require that stations provide access to federal candidates for purposes of "arranging and providing programming" the weekend before an election if they have so accommodated any commercial advertiser during the previous year. Regardless of how a station treats its "most-favored advertiser," if it has provided weekend access for any commercial advertiser during the year preceding the election, then it is "reasonable" for federal candidates to expect similar treatment.[38]

III. EQUAL OPPORTUNITIES

24. Section 315(a) of the Communications Act provides that if a broadcast station permits any legally qualified candidate (federal, state or local) to "use" its station, the licensee is required to provide equal opportunities to all other candidates for the same office to "use" the station. The Commission has held that the candidate "use" that triggers equal opportunities is an appearance by the candidate by voice or picture in which the candidate is identifiable to the audience.[39] Section 315(a) further stipulates that the licensee shall have no power of censorship over material broadcast pursuant to these requirements.

25. In 1959, Congress, in an effort to encourage increased news coverage of political campaign activity, amended Section 315 to exempt from the equal opportunity requirements appearances by legally qualified candidates in the following news programs:

(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 a bona fide news event (including but not limited to political conventions and activities incidental thereto).

47 U.S.C. Section 315(a).

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[27] News adjacencies are the commercial breaks immediately preceding or following a news program.

[28] *See generally* comments of Busse at 3-4, CBS at 21-23.

[29] One media buyer states that news adjacencies should be treated as "swing breaks," which are sold as part of the higher rated program, consistent with normal business practices. National Media's comments at 2.

[30] The comments of Covington and Burling at n. 14 and n. 24; Osborn at 13.

[31] Letter Ruling released July 3, 1990 (DA 99-871).

[32] *Id.*

[33] *See, e.g.,* the comments of CBS at 23-25; Cox at 11-12; NAB at 18-19.

[34] *Id.*

[35] The comments of CBS at 23-25; Dow Lohnes and Albertson at 15; NBC at 12-14.

[36] Wilson at 3.

[37] Dow, Lohnes and Albertson at 15.

[38] Furthermore, a licensee that affords weekend access to state and local candidates must do so on a non-discriminatory basis.

[39] *1984 Political Primer,* 100 FCC 2d at 1489.

A. Bona Fide Newscast Exemption.

26. *Issue and Comments.* The *NPRM* asked for comment on the extent to which a licensee must have control over the production of a bona fide newscast in order for it to be exempt from equal opportunities under Section 315(a), and the criteria for establishing such control. The majority of commenters support the Commission's decision in *Oliver Productions, Inc.*, 4 FCC Rcd 5953 (1989), *appeal dismissed sub nom., TRAC v. FCC,* 917 F.2d 585 (D.C. Cir. 1990), in which the Commission concluded that the absence of complete licensee control over a newscast's production does not exclude application of the statutory exemption from equal opportunities. [40] These commenters state that the news exemptions depend on the nature of the programming, not the source of production. To qualify as a bona fide newsexempt program, they argue, the selection of material should be based on legitimate news judgments and not be designed to advance any particular candidacy. They also point out that licensees exercise reasonable news judgments in acquiring and airing the material, and are ultimately responsible for all their programming. Further, they argue that a narrow interpretation would inhibit the free flow of information and curtail diversity.[41]

27. In opposition, TRAC argues that *Oliver Productions* should be expressly overruled. TRAC contends that to qualify for a news exemption, programming must be subject to full licensee editorial control.[42] According to TRAC, full editorial licensee control means that a licensee should supervise production or retain the right to refuse to air programming if it so decides, without contractual limitations. Such control is necessary, TRAC argues, to protect the electoral process from abuse, because while licensees must answer to the FCC, independent producers are not accountable to anyone. Additionally, TRAC defines a newscast as a multi-faceted news program with timely segments.[43] TRAC argues that inclusion of a newscast segment in a non-exempt program does not warrant exemption. [44]

28. INTV, PBS and RTNDA object to TRAC's standard of unhindered licensee editorial control. They state that such a requirement would undermine the purpose of the news exemptions by discouraging, rather than facilitating, election coverage.[45] Moreover, PBS and RTNDA regard TRAC's analysis as unrealistic, particularly with respect to late-breaking and "live" news coverage of interviews.

29. *Decision.* We continue to believe that a determination of whether a program qualifies as a *bona fide* newscast should be judged solely on the basis of whether the program reports news of some area of current events in a manner similar to more traditional newscasts.[46] Regarding TRAC's concern that this view will lead to abuse because we have no jurisdiction over third parties who may have produced the news segments, we of course note that we have jurisdiction over the licensee itself, the party ultimately responsible for exercising editorial control in determining whether or not to air the program. Thus, we believe that, for purposes of the newscast exemption, the exercise of such control will alleviate this concern. Third-party produced newscasts featuring candidates not for their *newsworthiness,* but to promote a particular candidacy, will not be viewed as qualifying for the exemption Congress set forth for a *bona fide* newscast. Regardless of any contractual obligations the station may have to the third party, if a station chooses to air such programming for the purpose of promoting a particular candidacy, it must comply with the equal opportunity requirements of our rules and the Act.

B. "Uses" under Section 315(a).

30. *Issue and Comments.* As noted above, the Commission currently defines a "use" by a "legally qualified candidate" under Section 315(a) as any "positive" appearance of a candidate by voice or picture. The Commission staff has advised licensees that, in the event a candidate's name or picture is used by opponents in an advertisement in a disparaging manner, such appearance of the candidate is not a "use" and does not therefore trigger the equal opportunities clause.[47] In contrast, if any unauthorized third-party advertiser or programmer uses a picture or other depiction of a candidate to *endorse* that candidate, even if the candidate considers such an endorsement to be harmful because of the identity of the advertiser, such appearance is still considered a "use" that would trigger the equal opportunity provision. Current policy permits licensees to adopt a policy of selling time only to authorized spokesparties for any candidate. However, once a station permits a "use" by an unauthorized third party, the equal opportunities clause is triggered. We sought comment on these policies in the *NPRM.*

31. Spurred by the rash of recent negative campaign advertisements, several commenters request that the Commission clarify or modify the definition of "use." Many suggest that "uses" be restricted to programs and announcements that are either paid for or authorized by the candidate (or his campaign committee).[48] Such a simplified definition, they argue, will ease Section 315 administration, preserve candidates' campaign strategies, and avoid stations' subjective assessment of announcements'

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[40] *See generally,* the comments of CBS at 25-27; Dow, Lohnes and Albertson at 36; Koteen and Naftalin at 38-41.

[41] Koteen and Naftalin, PBS, and RTNDA argue that this rationale should be extended to news interview programming. Koteen and Naftalin at 3841; PBS at 3; reply comments of RTNDA at 2-5. We believe that the arguments raised in these comments may warrant further consideration. We specifically stated in the *NPRM,* however, that such matters were beyond the scope of the proceeding. *NPRM* at fn. 39. Thus, we invite interested parties to file a petition for declaratory ruling on this issue, which will give the public adequate opportunity to comment so that we can evaluate this issue based upon a complete record.

[42] TRAC's comments at 3-9; TRAC's reply comments at 4-7.

[43] Comments of TRAC at 10-13.

[44] TRAC argues that this factor distinguishes the program in *Oliver Productions* from other programs such as "Nightline." In "Nightline," the newscast segment is not a bona fide newscast; rather, its exempt status is due to its integration with an exempt news interview program. Comments of TRAC at 19-22.

[45] The reply comments of INTV at 5; PBS at 4; RTNDA at 5.

[46] *Oliver Productions, Inc.*, 4 FCC Rcd 5953, 5954 (1989).

[47] The FCC staff has advised licensees accordingly, relying upon a report it gave to Congress in 1981. *See Report of the Staff of the Federal Communications Commission on the Operation and Application of the Political Broadcasting Laws During the 1980 Political Campaign,* submitted to Senator Barry Goldwater in 1981.

[48] *See, e.g.,* the comments of Cox at 29; Dow, Lohnes & Albertson at 7; reply comments of NCAB at 22-24.

content and impact.[49] In this connection, Group W and NCAB request that the Commission reiterate that licensees are not obligated to sell airtime to entities not authorized by, or related to, candidates.

32. In contrast, only one commenter argues that any appearance by a candidate should constitute a use, given the potential for candidate abuse. INTV contends that if the Commission restricts "uses" only to appearances authorized by candidates, candidates could collude with, and channel money to, independent entities whose uses would not trigger the equal opportunities requirement, thereby denying the candidate's opponents' requests for time.[50]

33. *Decision.* We have decided to narrow our interpretation of "use" under Section 315(a) to include only non-exempt candidate appearances that are controlled, approved, or sponsored by the candidate (or the candidate's authorized committee) after the candidate becomes legally qualified.[51] In doing so, we note that Section 315 is limited specifically to "uses" by a "legally qualified candidate." At the very least, then, the plain language of the statute suggests the candidates' tacit approved participation in the broadcast. Moreover, the legislative history of Section 18 of the Radio Act, which preceded Section 315, indicates that Congress primarily was addressing candidate-initiated appearances and speeches when enacting the equal opportunities requirement.[52] Similarly, in considering the 1959 news exemptions amendment, various legislators also expressed the view that "use" was directed only to candidate-initiated appearances.[53] Thus, the relevant legislative history of Section 315(a) supports a narrower interpretation of the term "use" as well.

34. Under our narrower interpretation, if a legally qualified candidate voluntarily appears as a performer, celebrity, or station employee in a non-exempt program, his opponents will continue to be entitled to equal opportunities. In these circumstances, the candidate controls his appearance on the air and therefore is properly viewed as having "used" the station's facilities. By contrast, if a legally qualified candidate does not voluntarily appear in a non-exempt broadcast, such as in unauthorized, independently sponsored advertisements or rebroadcasts of appearances that were made prior to his attaining the status of a legally qualified candidate, his appearance would not constitute a use.[54]

35. As a practical consequence, this interpretation will have the effect of overruling decisions such as *Adrian Weiss,* 58 FCC 2d 342, *review denied,* 58 FCC 2d 1389 (1976), where the Commission upheld a Bureau determination that the broadcast of Ronald Reagan motion pictures during applicable campaign periods would constitute a "use" for purposes of Section 315. While President Reagan voluntarily appeared in the films when they were made, any control over when or whether the films were broadcast ended prior to his becoming a legally qualified candidate. Thus, under our new interpretation, such broadcasts would not be Section 315 "uses" by a "legally qualified candidate."[55]

36. However, if a legally qualified candidate voluntarily appears or otherwise consents to an appearance during the applicable campaign periods, such appearances would constitute a Section 315 "use." Thus, for example, a voluntary appearance on a live entertainment program during a campaign period would constitute a "use."[56] Likewise, the voluntary appearance of announcers, newscasters, interviewers, commentators and other talent would be deemed a Section 315 "use."[57] In each case, however, whether a "use" has occurred depends upon whether the appearance is voluntary (*i.e.,* under the candidate's control) after he or she has become a legally qualified candidate.[58]

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[49] The comments of Group W at 8; the reply comments of NCAB at 23.

[50] Comments of INTV at 11.

[51] Our ruling herein does not in any way affect news programming that is statutorily exempt pursuant to the provisions of subsections 315(a)(1)(4). Congress has directly addressed the circumstances in which such news programming falls outside the equal opportunities requirement. As to these programs, we shall continue to be guided by the explicit standards set out in the statute, the legislative history, and court and Commission precedents. For example, to qualify for the exemption, the news programming at issue must still be "bona fide" (*i.e.,* must be of genuine news value and not designed by the broadcaster to advance any particular candidate). *See,* Conference Rep. No. 1069, 86th Cong., 1st Sess. 4 (1959); 105 Cong. Rec. 14442 (Pastore); *id.* at 16224 (Brown); *id.* at 17828 (Pastore); *id.* at 17777 (Scott). Additionally, news interview programs must still be regularly scheduled and licensee-controlled, and news documentaries must still focus on matters other than the candidate.

[52] *See* 67 Cong. Rec. 12502-12504.

[53] *See* S. Rep. No. 562, 86th Cong., 1st Sess. 6 (1959)(remarks of former Senator Dill, who sponsored the original legislation in the 1927 Radio Act); *See also* Cong. Rec. 16244 (Brown) and 14442 (Pastore).

[54] Independent entities that oppose or support candidates do not have any access rights; only federal candidates are accorded access rights. Thus, licensees are not required to accept any political material that is not authorized by candidates. In this connection, we note that several commenters expressed the belief that the lowest unit charge provision currently applies to "uses" sponsored by independent entities. Even under our prior broader interpretation of "use," however, we have never held that independent entities were entitled to the lowest unit charge. The legislative history of Section 315(b) clearly demonstrates Congressional effort to reduce *candidates'* escalating campaign costs. *See* S. Rep. No. 92-96, 92d Cong., 1st Sess. 20 (1971). Therefore, we reiterate that the lowest unit charge inures to the benefit of candidates only.

[55] The Commission, of course, retains the discretion to revisit these rules if abuses become apparent. As stated, we believe the approach outlined above more closely comports with both the plain language and intent of the Act. If, however, the accomplishment of Congress' objectives under the political broadcasting provisions is not enhanced under this approach, we will respond accordingly.

[56] *See Paulsen,* 33 FCC 2d 835 (1972); *aff'd sub nom. Paulsen v FCC,* 491 F.2d 887 (9th Cir. 1974).

[57] For examples of candidate appearances that will continue to be considered uses, *see RKO General, Inc.,* 25 FCC 2d 117 (1970) (daily interview host); *Station WBAX,* 17 FCC 2d 316 (1969) (station announcer); *KUGN* 40 FCC 293 (1958) (broadcaster's occasional appearances).

[58] Public Broadcast Licensees also argue that the Commission should clarify that where candidate A appears by invitation in another candidate's program or advertisement, candidate A's appearance is not a use and does not create equal opportunities for his opponents, since candidate A did not "control" the use. Joint Comments of Public Broadcast Licensees at 11-12. We believe, however, that if a candidate chooses to appear on another candidate's advertisement, the appearance is voluntary and thus constitutes a "use" under Section 315(a).

37. We believe that defining "use" in terms of an appearance that is controlled, sponsored, or approved by a candidate should simplify administration of Section 315. In determining the applicability of Section 315's no censorship provisions, for example, the candidate, s control, approval, or sponsorship, or lack thereof, would be dispositive. Such a determination may readily be ascertained and does not necessitate any review of the broadcast material. Additionally, a narrower definition of use ensures candidates greater control of their campaigns by attributing to them only those messages or associations they authorize or approve.

38. Finally, we are not persuaded by the argument that a narrower definition of use will result in "collusion" between candidates and independent groups. This concern is purely speculative. Moreover, FECA expressly requires that political advertising clearly state who pays for a political advertisement and whether or not it was authorized by a candidate. 2 U.S.C. Section 441(d). Thus, federal candidates or committees that attempted to collude by channeling money to independent groups without an appropriate announcement would violate federal law.[59] Further, given the fact that only candidates are entitled to lowest unit charge benefits, *see* n. 55, *supra*, we think it is highly unlikely that candidates will be motivated to channel scarce resources to independent groups.

C. Sponsorship ID Guidelines.

39. Section 317 provides generally that the identity of the party providing consideration (*i.e.*, paying) for broadcast material must be disclosed on the air at the time of broadcast. The Commission has determined previously that it is not practical to adopt quantifiable standards to govern the sponsorship identification requirements contained in this provision and codified in Section 73.1212 of our rules. *Sponsorship Identification Requirements*, 41 RR2d 761 764 (1967). Rather, we have generally advised that the sponsorship announcement must be displayed in letters of sufficient size to be legible to the average viewer; set against a background that does not reduce the announcement's legibility; and exhibited on the screen for a sufficient amount of time to be read in full by the average viewer.[60] The Commission has applied these criteria to sponsorship identifications involving both political broadcasts and commercial matter.[61]

40. There are, however, additional requirements for political announcements that are designed to make information about their sponsors more available to the public. Sections 73.1212(d) and (e) of the rules require that: 1) licensees retain lists of information regarding the political sponsors' identity for public inspection; and 2) announcements be made both at the beginning and the end of political material five minutes or more in length. *See Amendment of Sponsorship Identification Requirements*, 52 FCC 2d 701 (1975).

41. The Commission has also made clear that "liability for incorrect sponsorship identification rests with licensees."[62] As a consequence, licensees may "require that proposed [political] broadcasts" contain appropriate sponsorship announcements. The Commission has characterized this as an exception to the no censorship provision set forth in Section 315(a), which otherwise precludes stations from influencing the content of political broadcasts. [63] In identifying the appropriate sponsor of the political material, however, licensees are only required to exercise reasonable diligence. [64]

42. *Issue and Comments.* The *NPRM* proposed adoption of objective guidelines that could be used by stations to assess whether a paid political broadcast complies with the sponsorship identification requirement. In particular, it proposed that letters equal to or greater than 4% of picture height, to air for not less than six seconds, should be required for video identification. It further proposed that a clearly audible statement at the beginning and end of the message, setting forth the name of the sponsor, should be required for audio identification.

43. The majority of commenters support, or do not oppose, [65] adoption of objective sponsorship identification standards.[66] According to Koteen and Naftalin, objective standards will better inform the public of the sponsor of political broadcasts -- a public interest benefit that is made all the more necessary, they claim, given the negative campaign climate. [67] In contrast, CBS, Group W, NAB and NCAB oppose the adoption of quantitative criteria. [68] NAB contends that such standards will require licensees to make precise measurements, which are difficult to calculate. [69] CBS agrees with NAB, and further states that the proposed criteria would be unnecessarily restrictive and may substantially curtail candidates' political presentations. [70] Moreover, several commenters argue that the

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[59] Indeed, in order to qualify as an "independent expenditure" that supports or opposes a candidate under FECA, the expenditure cannot be made in "cooperation or consultation" with any candidate, any authorized committee, or agent of such candidate. 2 U.S.C. Section 431 (17).

[60] *Id.* at 763. With respect to television, the Commission stated that announcements could be aural or visual. *Id.*

[61] *See Lotus Broadcasting Co.*, 10 RR 2d 921, 923 (1967); *Amendment of Sponsorship Identification Rules*, 34 FCC 829, 848-49 (1963). *See also, National Broadcasting Co.*, 20 RR2d 901, 903 (1970), in which the Commission applied the same size and length criteria for political sponsorship announcements to sponsors of cash and prizes awarded on game and audience participation shows.

[62] *See Joint Agency Guidelines for Broadcast Licensees*, 69 FCC 2d 1129, n. 2 (1978).

[63] *Id. See also, KOOL-TV*, 26 FCC 2d 42 (1970) ("A Lot of People Who Would Like To See Sam Grossman Elected To The U.S. Senate" failed to represent that this was a committee, and thus lacked the specificity necessary to comply with Section 317).

[64] *See Voter*, 46 RR 2d 350, 352 (1979).

[65] *See, e.g.*, the comments Busse at 4; FEC at 3-5; Group W at 9-10; PAW/MAP at 21-24.

[66] MPC states that sponsorship identifications should appear both at the beginning and end of radio announcements. MPC Comments at 4.

[67] Koteen and Naftalin's comments at 41-42.

[68] Group W's comments at 9-10.

[69] NAB's comments at 20-22. NCAB also states that the new standards will be difficult for licensees to implement and enforce.

[70] CBS' comments at 29-30.

burden of compliance should be imposed on the candidates and enforced by the Federal Election Commission ("FEC") -- not licensees or the Commission. [71]

44. *Decision.* After carefully reviewing the record, we are not persuaded that we should adopt specific, objective criteria for meeting sponsorship identification obligations. We are concerned that specific requirements, such as those proposed in the *NPRM*, would place undue burdens upon licensees and would interfere with candidates' ad design and preparation. Thus, we favor maintaining flexibility for both broadcasters and candidates, and will continue to rely upon the licensees' reasonable, good-faith judgment as to whether a particular sponsorship identification meets the statutory requirements.

45. We note, however, that broadcasters must be mindful of the importance of assuring that the audience is able to discern the sponsor of a paid political broadcast. Thus, while no specific, quantifiable standards will be established, we will continue to require that the sponsorship identification for television must be sufficiently large, and of sufficient length on radio and television, to allow members of the audience to reasonably comprehend the identity of the sponsor. Moreover, although we decline to make them mandatory, we believe that the specific requirements outlined in the NPRM (and described above in paragraph 40) would be sufficient to satisfy the statutory mandate.

D. Audio and Visual Identification.

46. *Issue and Comments.* The *NPRM* also sought comment on its proposal to require both audio and visual identification for television advertisements. Several commenters addressing this issue supported this proposal.[72] NAB, on the other hand, described the visual and aural requirement as overreaching, particularly given the non-emergency nature of political messages.[73]

47. *Decision.* The Commission will adopt the proposed policy of requiring both audio and visual identification for political advertisements carried by television stations. We believe that this requirement will better inform those persons suffering from aural or visual impairments. In addition, the requirement will convey the sponsor's identity to viewers listening, but not actually watching a program, or those receiving programming from the class of radios that has been specifically designed to receive the audio portion of television programs.

E. Pre-Airing Submissions.

48. *Issue and Comments.* Current Commission policy does not *require* candidates to submit their political broadcasts to stations before airing so that the station can determine whether the broadcast complies with the sponsorship ID rules. Most commenters argue that, if we were to adopt objective sponsorship identification standards, those standards must be coupled with a right by the station to preview candidate material to ensure compliance. ABC explains that fairness and effective enforcement necessitate such preview rights, particularly since the proposed standards require screen size and time duration calculations. [74] In this connection, several commenters specify time periods in which licensees should be permitted to require candidates to furnish material in advance of the scheduled airtime. [75] Additionally, Public Broadcast Licensees state that licensees should be able to refuse material that does not conform to the sponsorship identification standards. [76]

49. *Decision.* In view of our decision not to require sponsorship identification announcements to meet specific regulatory criteria, we do not believe it is necessary to adopt a policy which *requires* pre-airing submissions. Such a policy would be difficult to implement and could result in improper station involvement in the timing and content of political broadcasts. We will, however, continue to enforce our current policy, which permits broadcasters to ask for pre-airing submissions to determine compliance with technical standards, including compliance with sponsorship ID requirements. If a candidate nonetheless refuses to allow a broadcaster to pre-screen an ad, the licensee should presume that it must provide its own sponsorship identification or risk violating the Act and our rules.[77] We emphasize, however, that, consistent with the Commission's traditional approach, we are not requiring licensees to provide additional time, free of charge, to add the required sponsorship ID. Rather, the broadcaster may choose whatever means are appropriate to ensure sponsorship ID compliance.

IV. LOWEST UNIT CHARGE

50. Section 315(b) of the Communications Act directs broadcast stations and cable television systems to charge political candidates the "lowest unit charge of the station" for the same class and amount of time for the same period, during the 45 days preceding a primary or runoff election and the 60 days preceding a general or special election. Congress added Section 315(b) in 1972 as part of a plan "to give candidates for public office greater access to the media and... to halt the spiraling cost of campaigning for public office." [78] By adopting the lowest unit charge requirement, Congress intended to place candidates on a par with a broadcast station's most-favored advertiser.[79]

A. Obligation to Make Rates Available.

51. *Issue and Comments.* Broadcasters currently have a duty, under Section 73.1940(b), to make all discount rates and privileges offered to commercial advertisers available to candidates. As we stated in the *Notice*, we believe that

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[71] *See, e.g.* the comments of CBS at 29-30; Dow Lohnes and Albertson at 38; NAB at 20-22.

[72] *See, e.g.*, comments of FEC at 4; Gillett at 8-9.

[73] *See also*, NCAB Reply at 25.

[74] ABC's comments at 3-6.

[75] Public Broadcast Licensees also state that candidates should be required to furnish in advance written scripts for "live" announcements, to enable licensees to ensure compliance. *Id* at 5.

[76] Joint Comments of Public Broadcast Licensees at 6.

[77] We note that the NAB form contract for political advertising specifies that broadcasters are authorized to include appropriate sponsorship ID.

[78] S. Rep. No. 96, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S. Cong. 7 Ad. News 1773, 1774.

[79] *Id.* at 1780.

this duty contains two obligations: an affirmative duty to disclose to candidates information about rates, make goods, and discount privileges offered commercial advertisers; and an obligation to sell to candidates all types of discount privileges made available to commercial advertisers.

52. In the *NPRM* we sought comment upon the scope of the affirmative disclosure obligation. Almost all commenters agree that some form of mandatory disclosure requirement is reasonable, and most request specific guidance on what must be done to satisfy such an obligation. Pulitzer argues that the Commission should leave the method of disclosure to the discretion of the licensee to assure maximum flexibility and that the FCC should adopt a policy of relying generally on the reasonable good faith judgment of licensees.[80] Numerous commenters request that the Commission adopt a standard disclosure report form or specify exactly what information must be conveyed to meet the obligation.[81]

53. Many commenters suggest that the amount of disclosure required should be tailored to the needs of the buyer. They maintain that more sophisticated buyers -- who would often include political time buyers -- would not need as much repetitious disclosure. [82] MPC disagrees, and states young and inexperienced. [83] INTV suggests that disclosure statements should not be required to include every conceivable package or option, but that the Commission could adopt a general rule that prohibits stations' use of selling techniques that obscure the availability of less expensive types of spots for candidates. [84]

54. Numerous commenters emphasize that there was no disclosure obligation prior to the *1990 Audit Report.* They contend that the only requirement "implicit" in the LUC obligation was that broadcasters act in good faith. [85] Thus, many commenters request that the Commission make an explicit finding that, prior to 1990, there was no required affirmative course of conduct with respect to disclosure. [86] Conversely, Kahn and Jablonski argue that ever since Congress enacted the lowest unit charge provision, broadcasters have had an affirmative obligation to disclose to candidates all discounts and options given to the most-favored commercial advertiser. They contend that the fact that the industry has developed an official position now demonstrates that broadcasters as a group have been collaborating to avoid the spirit and intent of the law. [87] They emphasize that without disclosure, "the statute is meaningless." [88]

55. *Decision.* The Commission believes that broadcasters must disclose and make available to candidates all discount privileges available to commercial advertisers, including the lowest unit charges for the different classes of time sold by the station. This requirement serves to ensure that candidates are able to avail themselves of their statutory rights and are not steered to purchase more expensive categories of time. Candidates must have full information about the discount privileges made available with various classes of time in order to ensure parity of treatment with commercial advertisers. [89]

56. Political broadcasting obligations are imposed upon station licensees, not on candidates and their representatives. The representatives' or candidates' knowledge, or lack thereof, does not replace the broadcaster's obligation to offer candidates the benefits of the lowest rates and any associated discount privileges for the various classes and lengths of time and time periods. It is thus incumbent upon the broadcaster to disclose to candidates all information concerning the lowest unit charges made available to commercial advertisers, together with the discount privileges associated by the broadcaster with those rates. The absence of such full disclosure hampers candidates' ability to evaluate what is being made available to them and is inconsistent with Congress' intent to place candidates on par with favored commercial advertisers. Indeed, the benefits of disclosure not only were underscored in the comments but were also made clear in the Commission's 1990 political audit. In a number of instances, the Commission noted that lowest unit charge issues arising from the audit stemmed in large measure from incomplete disclosure to candidates of individual stations' commercial sales practices. [90]

57. As noted *infra,* discount privileges afforded favored commercial advertisers include all sales practices which affect rates.[91] These include priorities against preemption,[92] time-sensitive make goods, [93] and any other privilege which essentially adds value to the spot purchased. Thus, in addition to disclosing to candidates the rates offered commercial advertisers for the various classes of time, broadcasters must also disclose all pertinent information about the privileges associated by the broadcaster with the rates.

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[80] Pulitzer comments at 15. Kahn and Jablonski respond that "there is nothing in the history of political broadcasting to suggest that there is any intention [on the part of broadcasters] to act in good faith." Kahn and Jablonski Reply at 10.

[81] *See, e.g.,* comments of AFB at 42; Covington and Burling at 27; Shamrock at 9.

[82] Comments of Fox at 4-5; Cox at 16; Covington and Burling at 9; Dow Lohnes and Albertson at 15; NBC at 41. AFB contends that the fact that fixed or non-preemptible time is purchased through the use of sophisticated advertising agencies "confirms that candidates are not's teered' to fixed time, but purchase such time as a matter of their own informed choice." AFB Reply at 7.

[83] MPC comments at 2.

[84] INTV comments at 14-15.

[85] *See, e.g.,* ABC comments at 9. ABC acknowledges, however, that a fact pattern demonstrating a pattern of deliberate concealment of rate options or steering would not be consistent with "good faith." *Id.*

[86] *Id.*

[87] Kahn and Jablonski comments at 5-6.

[88] Kahn and Jablonski Reply at 6. *See also* Pulitzer comments at 14 (agreeing with Commission's position that disclosure is inherent in the LUC obligation).

[89] However, we recognize that neither the Commission nor the Mass Media Bureau had articulated the disclosure requirement before September 1990.

[90] *See, e.g.,* Letters of December 12, 1991, to KGO Television, Inc.; KDFW-TV, Inc.; TVX Broadcast Group, Inc.; and Chronicle Publishing Company, all of which were adopted contemporaneously with this *Report and Order.*

[91] *See* discussion para. 61, *infra.*

[92] Preemption priorities are any hedges against the likelihood of preemption.

[93] Make goods are the spot announcements rescheduled as a result of technical difficulty or preemption.

58. We understand that implementation of the disclosure requirement is complicated by the divergent sales practices in the industry, the rapid changes in such practices, and the proliferation of individually negotiated packages and rates. We believe that, in light of the vast array of approaches to the sale of time, a Commission-sanctioned "disclosure form" would be impractical. The more reasoned approach would be to afford each "broadcaster the reasonable discretion to decide how best to disclose its particular practices. However, we believe that, at a minimum, this disclosure should include:

(a) a description and definition of each class available to commercial advertisers which is complete enough to allow candidates to identify and understand what specific attributes differentiate each class;

(b) a complete description of the lowest unit charge and related privileges (such as priorities against preemption and make goods prior to specific deadlines) for each class of time offered to commercial advertisers;

(c) a description of the station's method of selling preemptible time based upon advertiser demand, commonly known as the "current selling level," with the stipulation that candidates will be able to purchase at these demand-generated rates in the same manner as commercial advertisers;

(d) an approximation of the likelihood of preemption for each kind of preemptible time; and

(e) an explanation of the station's sales practices, if any, that are based on audience delivery.

Finally, once disclosure is made, stations must negotiate in good faith to actually sell time to candidates in accordance with this disclosure.

59. While the method of disclosure is left to the discretion of individual stations, we believe that broadcasters can meet the disclosure obligation by reducing their sales practices, as noted above, to some kind of outline format that briefly describes the various rates and discount privileges available at the station. For example, a station need not list every rotation offered by the station, but must make clear that other rotations are available upon request if that is the case. [94] In addition, since our policies now require stations to include all negotiated package rates in their lowest unit charge calculations, *see* para. 93, *infra*, every individually negotiated deal does not need to be disclosed. We also understand that time is of the essence in the context of an election campaign. Accordingly, after a licensee has once made full disclosure to a particular candidate or the candidate's representative during a given campaign, full disclosure need not occur each time a buy is made, although any changes in rates or other information that may arise subsequent to the initial disclosure (or subsequent candidate transactions) must be disclosed during each succeeding negotiation.

60. Finally, we understand that candidates or their representatives may wish to pursue specific purchase objectives with regard to a station and may not wish an oral or written catalogue of available rates. Clearly, a station cannot compel candidates or their representatives to read or listen to a presentation of rate packages. Rather, it is sufficient that the station attempt to inform candidates of its sales practices in accordance with the requirements set forth above.

B. Most-favored advertiser.

61. *Issue and Comments.* In response to our *NPRM*, several commenters argue that the most-favored advertiser standard applies only to rates and that Commission policies should not force stations to apply the concept to other station sales practices, such as make goods and preemption priorities. NBC and Cox state that the purpose of the 1972 amendments enacting the LUC provision was to place the candidate on par with a broadcast station's "mostfavored commercial advertiser" with respect to advertising rates. [95] CBS argues that the notion of a most-favored commercial advertiser originally contemplated volume discounts in an era when time was sold at stable prices. Now, however, the concept of a most-favored commercial advertiser is a fiction because advertiser advantages are dispersed in a wide variety of ways beyond price discounts. [96] Cox contends that the Commission's interpretations of benefits that must accrue to candidates are now based on a composite picture of the most-favored commercial advertiser, and that no single advertiser would ever receive all the advantages that candidates must receive through the Commission's "cherry-picking" of benefits given to all commercial advertisers. [97] Thus, these commenters argue, the effect of the Commission's current policy is to afford candidates greater benefits than those actually conferred upon the "most-favored commercial advertiser."[98]

62. Conversely, Kahn and Jablonski argue that Section 315 was intended to put candidates on a par with the most-favored commercial advertiser, and thus, candidates should receive all of the same benefits. They observe that, for the most-favored commercial advertiser, class-of-time distinctions are "rare," preemption is extremely unlikely, timely make goods are provided, preemptions are not based exclusively upon price, and rates are guaranteed over the long term. [99] They argue that candidates should receive similar treatment. Moreover, they argue, for a major advertiser, stations do not sell time on a true auction basis -- the major advertisers who pay lower volume prices will not get preempted if they object or are in the late stages of a buy, and, thus, higher priced spots for other advertisers are more likely to be preempted. Thus, Kahn and Jablonski assert, candidates should receive the preemption treatment given to the most-favored advertiser, not the station's "usual" preemption policy. [100]

63. *Decision.* We believe that we should continue to apply the most-favored advertiser standard not only to the advertising rates themselves but also to station sales prac-

[94] By the same token, stations need not disclose which commercial advertisers are getting which rates; rather, it is sufficient merely to disclose the rates themselves.

[95] NBC comments at 25.

[96] CBS comments at 4.

[97] Cox comments at 15.

[98] *See, e.g.*, the comments of Cox at 15; CBS at 4-5; NBC at 25.

[99] Kahn and Jablonski comments at 17.

[100] *Id.* at 11, 15.

tices and other discount privileges that improve the value of the spot to the advertiser. These would include make goods, preemption priorities, and any other factors that enhance the value of a spot. These characteristics effectively determine the particular class of time at issue. Hence, they must be disclosed and made available to candidates at the LUC. Even if it were true that no *single* advertiser would ever receive all such benefits (a conclusion some commenters dispute), nonetheless we believe that, because all such factors enhance the value of a particular class of time and improve the value of individual spots (even though the price itself does not necessarily reflect such value), each such benefit must be made available to candidates. Any other approach would be inconsistent with the statute's express directive that candidates be charged no more than the station's most-favored advertiser for the "same class" of time.

C. Classes of Time.

64. *Issue and Comments.* Section 315(b) of the Communications Act requires that stations charge candidates, during the 45-day period preceding a primary and the 60 days preceding a general election, no more than the lowest unit charge for the same class and amount of time for the same period. Regarding classes of time, the Commission historically has stated that "fixed" [101] or "non-preemptible," [102] "preemptible with notice," [103] and "run-of-schedule" [104] constitute separate classes of time. [105] In addition, current Commission policy provides that there is only one class of "immediately preemptible" time for lowest unit charge purposes. [106] The NPRM sought comment on whether it is lawful to have more than one class of immediately preemptible, preemptible-with-notice, and non-preemptible time.

65. *Preemptible Time.* Several commenters argue that the Commission's decision, announced in the *1988 Public Notice,* [107] to treat all immediately preemptible time as a single class of time confers extra benefits upon candidates not intended by the statute. [108] Moreover, some commenters point out that this decision was made without the benefit of public comment. [109] Greater Media, for example, argues that it is not fair to require stations to give refunds to candidates if any other preemptible rate clears at a lower rate during the same time period. Greater Media notes that the advertiser placing the lower-priced spot took a greater risk of not clearing than the political candidate, and the spot was priced accordingly. By requiring a rebate, the candidate is achieving a higher preference against preemption without having to pay for it.[110]

66. The vast majority of commenters contend that evolving sales practices have significantly complicated the calculation of the LUC. They seek flexibility in creating classes of time, made available to both commercial and political advertisers, so that they can adapt to individual market demands.[111] Most argue that the disclosure requirements will protect candidates against any manipulation of rates resulting from allowing broadcasters to create separate classes of time. [112] Thus, the commenters generally suggest that the Commission should allow flexibility in creating classes of time, require full disclosure, and articulate a general rule that stations cannot use class distinctions to defeat the purpose of the LUC requirement. [113] With respect to this latter point, the parties assert that candidates should continue to be allowed to challenge classes viewed as manipulative or discriminatory. [114]

67. NBC argues that each succeeding price increase in immediately preemptible time should be treated as a separate class for LUC purposes. [115] Other commenters contend that "class of time" is a function of two interrelated attributes: preemptibility and spot location. [116] A change in either attribute affects the desirability to the advertiser of the particular spot (demand) as well as the availability of time slots for it (supply), and thus is reflected in the price. The broader the time periods (spot location parameters) selected by the advertiser, the lower the value of the spot to the station because the licensee has increased flexibility in scheduling it. The commenters outlining these principles argue that the effect of such attributes should not be ignored when identifying appropriate "classes" of time. [117]

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[101] Fixed or fixed position connotes the guarantee of placement during a particular time (*e.g.,* the spot will run at the 6:45 p.m. break, Wednesday, January 1, 1992).

[102] Non-preemptible connotes any spot which is not subject to preemption during a particular daypart, program or time period. By comparison to a fixed position, non-preemptible may run anywhere during the designated program, daypart or time period.

[103] Preemptible with notice is preemptible time which cannot be preempted without prior notice given by a specific time, for example, one week before airing. Often, at the time notice is provided, the advertiser is accorded the option of paying more for the spot in order to avoid preemption.

[104] Run-of-schedule refers to preemptible time that can be scheduled at any time during the broadcast day at the discretion of the station.

[105] *See 1988 Public Notice,* 4 FCC Rcd 3823, 3824 (1988).

[106] *Id.*

[107] *Id.*

[108] *See, e.g.,* comments of Shamrock at 14; Koteen and Naftalin at 1519; AFB at 21; reply comments of Gray at 4. Several commenters, such as Covington and Burling, extensively cite the legislative history of FECA and Section 315(b) to show that early provisions requiring that candidates be sold fixed time at run of schedule or preemptible rates were specifically rejected by Congress. Covington and Burling comments at 2-3.

[109] *See* comments of AFB at 5, NAB at 3, Gray Reply at 3, NCAB Reply at 2.

[110] Greater Media comments at 7.

[111] *See, e.g.,* Comments of Paducah at 4; INTV at 7; Cox at 19; Dow, Lohnes and Albertson at 15; ABC at 7. NCAB notes that Section 315(b) was intended to be interpreted so as to "make use of each broadcaster's own commercial practices rather than impose on him an arbitrary discount rate applicable to all stations without regard to their differences," citing the Senate Report on the 1972 amendments establishing the LUC requirements. NCAB Reply at 13.

[112] *See, e.g.,* comments of Paducah at 2.

[113] *See, e.g.,* comments of INTV at 7, 13 and 15.

[114] *See, e.g.,* Paducah at 7; Shamrock at 12-13; Busse Broadcasting at 6; AFB at 27. AFB also argues that the high cost of auditing sales rates *after* the ads run, which is necessary to enable the station to provide any requisite rebates throughout such an "extensive" class of time, imposes significant extra costs upon *all* advertisers. *Id.* at 30.

[115] NBC comments at 29.

[116] Comments of Fox at 6.

[117] Fox Reply at 7.

68. In contrast, Kahn and Jablonski argue that changing sales practices make the calculation of LUC easier, not more complex. They contend that advertising rates are "so competitive that heavy advertisers are able to negotiate cheap rates without any distinction based on class." They thus conclude that there is only one class of time -- negotiated -- and further claim that Section 315(b) requires that the lowest rate of the station for each daypart should be provided to candidates. [118] These commenters also cite the court's statement in *Hernstadt v. FCC* [119] that "if broadcasters have total discretion to define 'class of time'... they will be free to return to pre-1952 rate discrimination simply by defining a 'political' class of time, with higher rates than other classes, and offering candidates only 'political' time." [120] They thus argue against broad discretion, claiming that it will only lead to abuse.

69. ABC asks the Commission to clarify that run of schedule is a separate class of preemptible time that gives broadcasters maximum scheduling discretion because the station merely has to place the ads so that the advertiser's overall rating point objective is met. [121] Koteen and Naftalin contend that "class of time" should be defined to refer primarily to distinctions affecting the likelihood that a particular spot will run at a particular time. [122] Kahn and Jablonski respond that a spot's chances of preemption are not governed by price alone, and argue that whether a spot is preempted or not depends upon how "favored" the advertiser is. [123]

70. *Decision.* We are persuaded by the arguments of the overwhelming majority of commenters that our current policy of treating all immediately preemptible time as an all-inclusive single class does not appear to effectuate what Congress envisioned when it enacted Section 315(b). We accordingly conclude that our policy should be changed to reflect more accurately the realities of the advertising marketplace. As we stated in the *NPRM*, it is our understanding that, over the years, the industry has moved away from a system based primarily on the sale of volume discounts to a system that uses a "grid card" to give stations greater flexibility when selling inventory. The latest development appears to be the introduction of a "yield maximization" system, under which spots are in essence auctioned to the highest bidder and the price of a given class of time changes constantly to respond to fluctuating supply and demand. [124]

71. Under certain current sales practices, a commercial advertiser may choose to take a significant *prospective* risk of nonclearance -- and pay less accordingly -- that a political advertiser would not accept. Under our current method of interpreting *all* immediately preemptible time as a single class, however, a candidate could select a "higher" priced level of immediately preemptible time to ensure that his ad runs, ostensibly paying that higher price for associated increased preemption protection, knowing that he will nevertheless be rebated to the lowest priced preemptible level that ultimately clears -- without having assumed the additional risk of nonclearance that other advertisers have accepted when they purchased time at the lower price. Thus, the "higher" payment is a fiction, and the candidate is essentially afforded "fixed" status at a preemptible rate, a result specifically rejected by Congress. [125]

72. Nonetheless, as the court noted in *Hernstadt v. FCC*, 677 F.2d 893 (D.C. Cir. 1980), broadcasters do not have *total* discretion under Section 315(b) to define classes of time in any manner. [126] We thus believe the better interpretation of the law is that, while stations may not use class distinctions to defeat the statutory purpose of the LUC requirement, they may establish and define their own reasonable classes of immediately preemptible time. The differences between classes, however, may not be based solely upon price or the identity of the advertiser; rather, some other demonstrable benefit, such as varying levels or assurances of preemption protection, scheduling flexibility, or special make-good benefits, must be used to distinguish between different classes of immediately preemptible time. Furthermore, as discussed above, we hereby hold that all classes of time must be disclosed to candidates and made available in compliance with the lowest unit charge requirements. [127] To further safeguard against possible abuse in the creation of various classes, candidates will be able to file complaints with the Commission to challenge classes viewed as manipulative or discriminatory.

73. These same principles apply to establishing permissible classes of "preemptible with notice" time. Under our new policy, licensees will be allowed to establish reasonable classes of time (such as preemptible with one day's, two days', one week's or two weeks' notice) so long as they clearly define all such classes, disclose them to candidates, and offer *all* such classes of preemptible with notice time to candidates in compliance with the lowest unit charge requirements. [128]

74. *Non-preemptible.* The *NPRM* also sought comment on whether nonpreemptible and fixed (or "fixed position") should be considered distinct: (classes for LUC purposes and, if so, how each type should be defined. [129] Few candidates address whether "fixed position" and "non-preemptible" should be treated as separate classes of time. Gillett supports this approach, proposing that "fixed position" should refer to spots designated to air at specific times on specific days, and "non-preemptible" should re-

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[118] Kahn and Jablonski at 15.
[119] 677 F.2d 893 (D.C. Cir. 1980).
[120] *Id.* at 900, cited in Kahn and Jablonski Reply at 9.
[121] Comments of ABC at 8.
[122] Koteen and Naftalin comments at 32.
[123] Kahn and Jablonski Reply at 10.
[124] *NPRM* at para. 19.
[125] *See* 117 Cong. Rec. 29, 026-29 (1971).
[126] *See Hernstadt v. FCC*, 677 F.2d 893 (D.C. Cir. 1980).
[127] Of course, stations will be required to provide timely rebates to candidates in the event that a commercial advertiser's spot clears at a lower rate within the same class of time, as established and disclosed by the station.
[128] We note that nothing herein changes our current policy that runof-schedule time is a separate class of time that gives broadcasters maximum scheduling discretion in that the broadcaster is merely required to place the ads purchased so that the advertisers' overall rating point objective is met. We note, however, that as in the case of any other class of time offered by a licensee to commercial advertisers, information regarding run-of-schedule time must be disclosed and the class must be made available to candidates.
[129] *NPRM*, 6 FCC Rcd at n. 63.

fer to spots designated to air in a particular time period or on particular days that cannot be preempted for any reason by any other spot except for a fixed position spot.[130] Fox contends that "non-preemptible" means that the spot may not be deleted by the broadcaster *once scheduled,* but that the station has flexibility in placing the spot within the same time period or daypart specified by the advertiser.[131]

75. *Decision.* Consistent with our decision to give licensees greater discretion in establishing different classes of immediately preemptible and preemptible with notice time, we conclude that stations may treat nonpreemptible and fixed position as distinct classes of time, provided that they articulate clearly the differences between such classes, fully disclose them to candidates, and make them available to political candidates in compliance with the lowest unit charge requirements.

76. *Candidate-Only Class of Time.* In our *1988 Public Notice,* we recognized that "non-preemptible 'fixed rate' spots are frequently offered to political candidates only."[132] We noted that rates for non-preemptible time are typically higher than preemptible rates because they carry a guarantee of airing at a particular time, and further recognized that because of this guarantee, candidates "often choose to pay the higher non-preemptible rate."[133] In its *"Questions and Answers"* released following the 1990 political programming audit, the Mass Media Bureau informed licensees that broadcasters "can charge candidates a premium for a non-preemptible class of time, only if such a higher priced class of time is also made available to commercial advertisers." [134] It stated further that a station cannot create a special class of non-preemptible time that it knows only candidates will purchase while at the same time offering a less expensive "preemptible" class to commercial advertisers that in reality offers virtually the same benefits as the higher priced class of time.[135]

77. *Issue and Comments.* The *NPRM* sought comment on our existing policies concerning the creation of candidate-only classes of time. In response, many parties argued that stations should be able to sell a special class of fixed or non-preemptible time to candidates, regardless of whether any commercial advertisers choose to purchase such time. [136] Most complained that such a practice was clearly condoned by the *1988 Public Notice* , and that the 1990 *Questions and Answers*' prohibition of such a practice was a radical departure from precedent that should be reversed. [137] These commenters also contend that broadcasters should be able to create a special class of time to deal with the candidates' special needs and that any concern about higher rates can be dealt with through adequate disclosure requirements. [138] Such a rate is justified, they say, because "candidates' demand for certainty in the scheduling and broadcast of their political advertising messages is relatively inelastic." [139]

78. Kahn and Jablonski argue, however, that if a broadcaster has not actually sold fixed time to commercial advertisers, there is no objective method for determining a fixed LUC. [140] They contend that "approving a fixed political rate would be tantamount to granting the industry a license to overcharge." [141]

79. CBS suggests that, if the Commission prohibits sales of non-preemptible time to candidates unless the licensee has also made *bona fide* efforts to sell such time to commercial advertisers, an offer of non-preemptible time to commercial advertisers should be presumed to be *bona fide* so long as it is included on the commercial rate card, even if no commercial advertiser buys it. [142] Kahn and Jablonski acknowledge that "if a record of good faith efforts to comply existed, this concept [creation of a special class of fixed time at a discount rate for candidates] might merit consideration." [143]

80. *Decision.* The Commission will continue to prohibit the creation of a special, premium-priced class of time that is sold only to candidates. While we recognize that candidates often seek to purchase fixed or nonpreemptible spots because they are more suited to candidates' needs, we are concerned that allowing stations to create a special class of time sold *only* to candidates would lead to abuse. We will, however, permit stations to sell to candidates premium-priced fixed or non-preemptible time if (1) such a higher priced class of time is made available on a *bona fide* basis to *both* candidates and commercial advertisers, and (2) no lower-priced class of time (*i.e.*, a preemptible class) sold to commercial advertisers is functionally equivalent to the non-preemptible class.

81. The Commission will view a preemptible class as functionally the same as a non-preemptible class if, due to the station's own priorities against preemption or other discount privileges, a commercial advertiser is, in practice, assured of not being preempted while paying a lower preemptible rate. The Commission will not require that commercial advertisers actually *purchase* a non-preemptible or fixed class; rather, to be considered *bona fide,* the class must be offered to commercial advertisers and must legitimately be available to them. [144]

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[130] Gillett comments at 13.
[131] Fox Reply at 5.
[132] *1988 Public Notice,* 4 FCC Rcd 3823, 3824 (1988).
[133] *Id.*
[134] *Questions and Answers Relating to Political Programming Law,* 68 RR 2d 113 (1990).
[135] *Id.*
[136] *See generally,* comments of CBS at 7; Shamrock at 5; NBC at 32; Cox at 21. MPC agrees that the law permits broadcasters to structure both preemptible and non-preemptible classes of time for candidates. MPC comments at 4.
[137] Comments of CBS at 7-8; Shamrock at 5; Cox at 21; Paducah Newspapers at 5.
[138] *See, e.g.,* comments of NBC at 32. NBC further notes that the 1990 *Questions and Answers* released by the Bureau appeared to create a *per se* prohibition against selling fixed time to candidates if a licensee has not sold fixed time to any commercial advertiser. By contrast, NBC claims, the *NPRM* appears to indicate that the Commission would replace such a *per se* prohibition with a case-by-case analysis to determine whether a station has sold what is actually "fixed" time to a commercial advertiser under a "preemptible" label, finding a violation if the same opportunity was not made available to candidates. NBC comments at 36. NBC states that such a refinement of the prior policy that permitted the sale of fixed time to candidates only is appropriate and would be consistent with the requirements of Section 315(b).*Id.* at 38.
[139] NCAB Reply at 15.
[140] Kahn and Jablonski comments at 10.
[141] *Id.* at 11.
[142] CBS comments at 10.
[143] Kahn and Jablonski comments at 5.
[144] Nothing in this decision precludes a station from offering a nonpreemptible, candidate-only class of time at a discount to

D. Weekly Rotations.

82. *Issue and Comments.* In the *NPRM,* we noted that stations increasingly sell preemptible time to advertisers in weekly rotations. [145] Under this system, an advertiser purchases one or more preemptible spots to run over the course of the week during pre-determined dayparts. The specific time and day that each spot airs is determined by the station; the only constraint is that each of the advertiser's spots must run during the chosen dayparts. As stated in the *NPRM,* the lowest unit charge for preemptible time sold by stations using weekly rotations is the lowest price that any advertiser paid in a particular rotation during a particular week.

83. Most commenters agree that LUC rates should be permitted to fluctuate week to week if time is sold in weekly rotations, with some commenters stating that the LUC may vary even more often. [146] For example, Fox observes that, for prime time, rates may vary on a daily or even per-program basis. [147] Thus, the LUC for each class of service could be determined on a daily, program-by-program basis. [148] Similarly, CBS observes that the LUC may vary program to program in the same time spot in a given week, week to week within a given program, and week to week for weekly rotations. [149]

84. ABC asks the Commission to clarify that different time blocks offered in weekly rotation plans are different "periods" for LUC purposes, whether or not they overlap. For example, a 9:00 a.m. to 4:00 p.m. rotation is not the same as 3:00 p.m. to 4:00 p.m. ABC at 14. Similarly, CBS contends that "Geraldo," Monday - Friday is one class, while Monday, 8:00 p.m. to 10:30 p.m. (during which Geraldo may be aired) is a separate class. [150] Fox agrees, stating that Tuesday, 12:00 p.m. to 5:00 p.m., Tuesday, 4:00 p.m. to 5:00 p.m. and Monday - Friday, 4:00 p.m. to 5:00 p.m. are all separate rotations and should be treated as separate classes because they offer the station different degrees of scheduling flexibility.[151]

85. *Decision.* The Commission will continue its policy of permitting stations to calculate the lowest unit charge on a weekly basis in connection with the sale of weekly rotations. This policy recognizes the fact that many stations sell preemptible time on a weekly basis and that the lowest price paid by any advertiser may vary from week to week. Stations, however, must verify that the lowest unit charge is the lowest price paid by any advertiser during a given period in the relevant week, including those commercial advertisers or other political candidates whose spots appeared in the relevant week but who may have contracts that are in effect over the course of several weekly rotations.

86. In addition, the Commission will continue to recognize that distinctly different rotations constitute separate periods of time for purposes of calculating lowest unit charge, regardless of whether or not they overlap. *Distinctly* different rotations are rotations that have meaningful differences in value to an advertiser. For example, a radio drive-time rotation of 6:00 a.m. to 9:00 a.m. is a distinctly different rotation from a 6:00 a.m. to 3:00 p.m. rotation because of the high possibility that the advertiser's spot will run in the less valuable 10:00 a.m. to 3:00 p.m. time period. If, however, the second and less expensive rotation is 6:00 a.m. to 10:00 a.m., the rotations would not be considered *distinctly* different because of the small likelihood that the spot will air outside of the prime time drive period of 6:00 a. m. to 9:00 a. m.

87. In a similar vein, we will also continue our policy of recognizing that prime-time programs can differ in value on a program-by-program basis. Where such differences are reflected in a station's sales practices, we will allow the station to treat each prime-time program as a separate rotation or time period for purposes of calculating the lowest unit charge.

E. Increase in Rates During Election Period.

88. *Issue and Comments.* Current Commission policy provides that stations may not increase rates for candidate advertising during the election period except for ordinary business practices, such as rate changes when new audience ratings are published, or seasonal changes, such as the start of a new schedule. As discussed in the preceding section, Commission policy also recognizes that, in some circumstances, rates for spots may vary from week to week, or even program to program.

89. The majority of commenters support retention of these Commission policies. MPC, however, asserts that major advertisers such as McDonald's, Proctor & Gamble, Pepsi, and Bristol Meyers do not pay different rates for the same daypart or programs in different weeks; they get the same low rate because they are buying in volume. [152] Thus, MPC claims, candidate rates should not vary weekly. Kahn and Jablonski state that if licensees lock in rates for their most-favored commercial advertiser that do not vary weekly, then they should not be permitted to raise rates over the course of the election period for candidates.[153] These commenters add that licensees also should be required to allow candidates to place advance orders where the station's most-favored advertiser is entitled to do the same. [154]

90. *Decision.* The Commission will continue its policy of not permitting rate increases during election periods except in circumstances governed by "ordinary business practices," which we have defined in the past to include changes in audience ratings, seasonal program changes, and, for stations that sell time on weekly rotations, rate changes on a weekly basis. We also will continue to follow our current policy that candidates who contract to

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political advertisers. Nothing in the statute or its legislative history prohibits such a sales practice which would, in effect, confer a greater benefit upon candidates than that afforded to the station's most-favored advertiser.

[145] Weekly rotations connote time which can run anytime Monday through Friday during a particular program, daypart or time period at the station's discretion (*e.g.,* spot will run during Jeopardy, 7:00 to 7:30, at some point Monday to Friday).

[146] *See e.g.,* Shamrock comments at 18; AFB at 37; NAB at 17.

[147] Fox comments at 7-8.

[148] Fox Reply at 13.

[149] CBS comments at 12.

[150] *Id.* at 11.

[151] Fox comments at 7.

[152] MPC comments at 4.

[153] Kahn and Jablonski comments at 13.

[154] *Id.* at 14.

purchase time after the effective date of such a rate increase are entitled to the lower rates charged to other advertisers (commercial or political) who contracted for time before the rate increase so long as the spots are of the same class and amount of time. If, for example, a station has a long-term contract with a commercial advertiser that is less than the lowest rate sold on a weekly basis for a particular week, the long-term contract rate is the lowest unit charge for those weeks in which spots are aired for the same class and amount of time. In addition, as the commenters note, stations may have different rates for various days and programs during prime time [155], or, indeed, for any program based on audience ratings. As discussed above, if different programs have different rates, the lowest unit charge can change program-by-program.

F. Calculation of Rebates

91. *Issue and Comments.* The *NPRM* recognized that candidates may be entitled to rebates where they pay more than the lowest unit charge for a given class of time.[156] When addressing the issue of refunds, some commenters state that licensees should be required to review their program logs weekly to determine whether rebates are required, giving such rebates or credits promptly.[157] National Media emphasizes that the timeliness of rebates is critical to candidates, and suggests that the FCC should set guidelines on when rebates must be calculated. In particular, it recommends that notifications should be sent to candidates every Tuesday or Wednesday following air dates. [158]

92. *Decision.* The Commission recognizes that timely rebates are crucial to candidates, who need to use all available funds to continue their campaigns. We accordingly will henceforth require that stations review their program logs periodically during the election period to determine whether rebates are required, and issue any such rebates or credits promptly. Although we will not mandate a weekly review or designate specific days for the licensee to review its logs, we expect that licensees will conduct periodic audits on a timely basis, making every effort to afford necessary rebates or credits before the election when possible. Thus, recognizing candidates' need to maximize their immediate campaign funds, stations will be expected to provide rebates on a more expeditious basis as the election day approaches.

G. Package Plans.

93. *Issue and Comments.* Many of the commenters express confusion about treatment of package plans [159] and ask the Commission to clarify its policy that individually negotiated packages must be included in a station's calculation of lowest unit charge. Commenters interpret the *1990 Audit Report* as now concluding that all individually negotiated package plans are simply volume discounts that must be factored into the LUC for each segment of the package, whereas "special discount rates" or "special package plans" offered to all commercial advertisers constitute a separate class of time. [160] Many commenters argue that candidates should not be permitted to cherry-pick the most favorable rates from package plans without buying the entire package. For example, Fox contends that, while all package plans should be offered to candidates, each should be treated as a separate class of time, even if tailored for particular advertisers. It also asks the Commission to clarify that candidates must buy comparable combinations of dayparts to obtain package plan rates. [161] AFB argues that treating package plans as mere volume discounts is particularly unfair when applied to the value of spots in sports packages, because some games are more valuable than others." [162] It claims that sports packages should be special package plans constituting a separate class of time, not mere volume discounts; at a minimum, the licensee should have discretion to assign a separate value to each game for LUC purposes so long as the total value for all games does not exceed the price of the package.

94. Cox raises some package plan issues peculiar to cable systems. Cable package plans often involve spots on different cable channels that have different values. Cox asks the Commission to define cable "package plans" as established combinations of spots, announcements, channels and program sponsorships that constitute a separate class of time, and to state that a candidate must purchase a proportionate number of spots on all channels to qualify for the LUC package rate -- candidates should not be permitted to dissect a package and establish a LUC for each channel separately.[163]

95. *Decision.* Based on a reevaluation of the statutory lowest unit charge requirements, we will discontinue our policy of permitting stations to treat "packages" as a separate class of time. [164] We will now require stations to include in their LUC calculations all rates offered to commercial advertisers in packages. This policy will apply to all packages, whether individually negotiated or generally available to every advertiser. Thus, stations must include rates found in any packages when computing or disclosing to candidates the lowest unit charge for any request for a class and length of time in the same time period.

96. The statutory language of Section 315(b) expressly entitles candidates to the lowest *unit* charge for the same class and amount of time for the same period. It is well established that, through this language, Congress intended for candidates to receive the benefits of rates without having to purchase in bulk or over extended periods of time. [165] Since packages are, in effect, volume discounts, we conclude that candidates will no longer have to buy an

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155 *See 1988 Public Notice*, 4 FCC Rcd at 3824.

156 While this *Report and Order* provides stations with more discretion with respect to defining different classes of immediately preemptible and preemptible-with-notice time (*see* paras. 68-71, *supra.)*, we note that stations are still required to provide rebates to candidates where they pay more than the lowest unit charge for a given class of time.

157 *See e.g.*, Shamrock comments at 18, AFB at 37, NAB at 17.

158 National Media comments at 8.

159 As used herein, package plans are established combinations of spots offered at a given price, which are generally available to all advertisers.

160 Koteen and Naftalin comments at 21.

161 Fox comments at 9.

162 AFB comments at 31.

163 Cox comments at 23.

164 *Political Primer*, 68 FCC 2d 2209, 2276-77 (1978); *Political Primer*, 100 FCC 2d 1476, 1515 (1984).

165 *See* Sen. Rep. No. 96, 92d Cong., 1st Sess. (1971).

entire package or a proportionate package in order to derive the benefits of rates found in packages. In addition, today's sales practices regularly involve the sale of commercial time in individually negotiated packages. Because most-favored advertisers are usually those advertisers who individually negotiate packages on a monthly, quarterly, and sometimes yearly basis, it would frustrate the intent of the statute to exclude rates offered in those packages from LUC calculations.

97. The Commission, however, will continue to rely on the reasonable good faith judgment of the station as to the value of a particular spot in a package. For example, if a station has a sports package which includes several games at a single package price, then the per-game rate for lowest unit charge purposes is the total package price divided by the number of games. If, however, each game in a package is priced separately in the contracts with commercial advertisers, then the specified contract price will be the value of a spot in that game. A package rate may or may not be the lowest unit charge for a specified time period, depending on the price of other spots sold in the time period. A candidate is entitled to the lowest rate sold during the time period. [166]

98. We believe that this policy will simplify the calculation of lowest unit charge and will also simplify the disclosure process. Individual package terms will not have to be disclosed to candidates as long as the *rates* contained in those packages have been included in the station's calculation of the lowest unit charge for each program or daypart.

H. Merchandising Incentives and Bonus Spots.

99. *Issue and Comments.* Numerous commenters contend that, while noncash promotional incentives [167] such as bumper stickers, mailings, displays, tickets, or trips won for achieving certain volume levels should be offered to candidates and commercial advertisers on the same terms and conditions, they should not be factored into LUC calculations because they are either too difficult to value or only add a *de minimis* value. [168] National Media agrees that the use of billboards [169] and merchandising incentives such as trips and tickets should be excluded from LUC calculations, but contends that bonus spots of 30 seconds or longer should be factored into the LUC calculation. [170]

100. Kahn and Jablonski contend that there is no authority to exclude contingent bonuses [171] from LUC calculations, and argue that if the Commission allows stations to disregard contingent bonuses that vest after the election, then "stations would simply time such contingencies to occur after the election" so they could avoid lower LUCs. [172] Kahn and Jablonski also argue that all free spots or bonus spots of any kind should be factored into LUC calculations because stations use bonus spots to avoid the required candidate discounts. [173]

101. *Decision.* The Commission agrees with the commenters' assertion that noncash promotional incentives should not be included in calculations of lowest unit charge. Inclusion of such items is confusing, burdensome to broadcasters and appears not to offer candidates significant benefits on a per-spot basis. Moreover, inclusion of these items is not required in order to place candidates on a par with the most-favored advertisers. Rather, stations need merely to offer all noncash merchandise to political advertiser on the same basis as commercial advertisers. Therefore, the Commission will not require such promotional materials as mugs, bumper stickers, and trips to be included in the calculation of lowest unit charge.

102. Bonus spots will, however, be factored into LUC calculations, as the value of such spots is readily ascertainable. We believe, for example, that a reasonable way of calculating the value of bonus spots for purposes of determining the LUC would be to compute an "average cost," reached by dividing the total cost of the spots by the number of spots, including bonus spots, sold.

I. Fire Sale.

103. *Issue and Comments.* The *NPRM* asked for comment on the Commission's "fire sale" policy, which provides that a discount on time afforded to a last-minute buyer establishes the lowest unit charge for its particular class of time throughout the election period. NAB contends that the fire sale policy should be abolished because it is unreasonable to force stations to apply a price given to liquidate perishable inventory to an entire campaign period. [174] CBS argues that a last minute discount should not establish the LUC for an entire election period, but that a fire sale should establish the LUC only for the week, program or daypart (whatever the LUC fluctuation period is) in which the fire sale advertisement airs. [175] Pulitzer contends that candidates should be offered fire sale inventory on the same terms as commercial advertisers, but that they should only apply to a specific time period, such as a weekend or special sporting event, for LUC purposes. [176]

104. Group W states that the fire sale policy should be retained because it is a "bright line test that is simple to use." [177] Kahn and Jablonski argue that "abolition of this

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[166] We also reiterate that make goods, preemption priorities, and other factors that add value to spots, may be associated with packages and will affect the lowest unit charge calculation. *See* para. 61, *supra*.

[167] Also known as advertiser incentive arrangements, these are products or other rewards given to advertisers who spend a certain minimum amount on advertising. They are often utilized to encourage advertisers to purchase time from a station.

[168] *See generally*, comments of Koteen and Naftalin at 47-48; INTV at 14-15. Kahn and Jablonski respond that excluding noncash incentives from LUC calculations would ensure their widespread use in the future so as to "subvert" the Communications Act. Kahn and Jablonski Reply at 11.

[169] Billboards are groups of short promotional announcements (10 seconds or less) listing the sponsors of advertising for a particular daypart or program.

[170] National Media comments at 7.

[171] Contingent bonuses are bonus spots provided when a promised audience is underdelivered, for example, where only 4000 households of a promised 7500 are reached by the purchased schedule, requiring additional "contingent bonuses" to meet the promised goal.

[172] Kahn and Jablonski Reply at 14.

[173] *Id.* at 15.

[174] NAB comments at 17.

[175] CBS comments at 12.

[176] Pulitzer comments at 10-11.

[177] Group W comments at 14.

doctrine would mean that stations would consider all spots sold below their artificially inflated political rate as 'fire sale' spots." [178]

105. *Decision.* The Commission will modify its interpretation of its "fire sale" policy. There has been considerable confusion with respect to how the sale of available inventory at the last minute affected the LUC. When the fire sale policy was first adopted in 1972, many, if not most, spots were sold on a non preemptible basis. As sales practices have evolved, however, the last-minute sale of available inventory has included preemptible time, which may be offered at different rates in relationship to supply and demand. Thus, applying the original fire sale policy results in a last-minute sale of preemptible time, changing the LUC for the entire statutory period even though higher rates in the weeks preceding the fire sale may have been fully justified by demand.

106. To correct this inequity, the Commission will now treat the sale of all available inventory at the last minute as affecting all classes of time, but *only* during the particular time period (daypart or program) in which the "fire sale" spots are broadcast. When a station faces the extraordinary situation of conducting a fire sale to dispose of excess inventory, it is not accurate to treat such sales as affecting only one class of time. The effect of a fire sale is to eliminate class distinctions. All sales on a "fire sale" basis are, in essence, sales of non-preemptible time. In such instances, in order to comply with the intent of Section 315(b), we believe that the fire sale rate should be considered the LUC for *all* classes of time sold, but only during the time period in which the fire sale actually occurs, *i.e.*, a daypart, program, day, etc. [179]

107. This approach is fully consistent with our policy that rates may change on a weekly basis in response to demand and our similar policy that rates for preemptible time, which may also fluctuate in response to demand, may be treated as separate classes of time. The fire sale rate must, of course, be made available to candidates. The availability of 'fire sale' spots also must be fully disclosed to candidates. Moreover, in response to the concerns of some of the commenters, we see little danger that abuses will occur if we adopt this policy. To the extent candidates have purchased time during the same time period in which the fire sale occurs, they will -- to their benefit -- be equally entitled to the fire sale rate. Further, if examination of a licensee's records revealed a pattern indicating that fire sale rates were afforded repeatedly only to particular advertisers, we would be alerted to the possibility of abuse.

J. Timely Make Goods.

108. *Issue and Comments.* The *NPRM* asked for comment on the Commission's policy that a station must offer candidates make goods on a timely basis if it would so treat its most-favored advertiser. The Mass Media Bureau has also stated that timely make goods must be offered to candidates if they were ever offered to even one commercial advertiser. Numerous commenters contend, however, that it is unreasonable to require broadcasters to guarantee that preempted candidate spots will be made good prior to the election if the station has *ever* guaranteed a make good on a time-sensitive basis to a commercial advertiser. [180] These commenters argue that such a requirement effectively confers non-preemptible status upon all spots purchased by candidates without regard to the normal preemptibility of the spot, thus giving them better treatment than even the station's most-favored commercial advertiser. [181] Rather than mandating an absolute guarantee, they claim, the Commission should require broadcasters to employ a "best efforts" policy, based upon available inventory, to air the make good prior to the election. [182]

109. Cox and NAB contend that stations should be able to place limitations on pre-election make goods and should only be required to air any such make goods if they have provided similar time-sensitive make goods to commercial advertisers within a specified period of time preceding the relevant campaign period. [183] Outlet suggests that stations be permitted to provide make goods on a run of schedule basis, with the candidate given the opportunity to accept or reject the proffered make good.[184]

110. National Media argues that stations should be required to make good political spots within the planned air dates or the following week. [185] In response to the commenter's "best efforts" suggestion, Kahn and Jablonski argue that such a make good policy would have the same effect as no make good policy, and is "contrary to the Act." [186]

111. *Decision.* We continue to believe that licensees who offer timely make goods to commercial advertisers must also offer timely make goods to political candidates before election day. This policy comports with Congress' intent to place candidates on par with a station's most-favored commercial advertiser. Time-sensitive make goods are a discount privilege and assure timely rescheduling of preempted spots during comparable, or even superior, time periods. As we have previously noted, make goods form an integral part of the industry practice of selling preemptible time. In essence, they permit the broadcaster to maintain revenue from a preempted spot and at the same time enable the advertiser to retain the "reach" of the missed spot.

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[178] Kahn and Jablonski Reply at 11.

[179] For example, if a station finds that it has excess inventory during a particular program or daypart and offers to sell those spots to any commercial advertiser for a significant discount -- a "fire sale" -- it is clear that any commercial advertiser purchasing those spots will receive essentially non-preemptible time regardless of what would normally run in that program of daypart. Thus, any candidate who purchased time during that same program or daypart must receive the fire sale rate regardless of the class of time the candidate originally purchased.

[180] Comments of Koteen and Naftalin at 29; Covington and Burling at 6; AFB at 33; NCAB Reply at 18.

[181] Comments of NBC at 44; Covington and Burling at 6; NCAB Reply at 18.

[182] Comments of NBC at 4; Koteen and Naftalin at 29; NCAB Reply at 18.

[183] Cox suggests sixty days before the statutory period (Cox comments at 16); NAB suggests six months before the LUC period (NAB comments at 17).

[184] Outlet comments at 4.

[185] National Media comments at 6.

[186] Kahn and Jablonski Reply at 11.

112. Accordingly, we will continue to require stations to offer make goods to candidates if make goods are also offered to the stations' commercial advertisers who purchased time in the same class. We agree, however, that the Act does not mandate that this obligation remain completely open-ended. In this regard, we believe that candidates should be entitled to timely make goods only if the broadcaster has provided a make good to any commercial advertiser during the year preceding the 60- or 45-day statutory LUC period. We believe that such a one-year period will be sufficient to establish the licensee's current make good practices with regard to its most-favored advertisers. We also affirm our prior ruling that make goods for political spots must air before the election "where the licensee would so treat its most-favored commercial advertiser where time is of the essence." [187]

K. Calculation of Make Good in LUC.

113. *Issue and Comments.* The *NPRM* also reiterates the Commission's policy that prices paid for make goods must be included in the station's calculation of lowest unit charge. [188] Many commenters assert that make-good options should be provided to candidates on the same terms as to commercial advertisers, but that make-good spots should not be included in calculating the LUC. [189] According to the commenters, make goods can be used (1) to "make up" to a commercial advertiser for any inconvenience in preemption, [190] (2) to make up for any failure to meet audience reach or ratings requirements, [191] or (3) to correct for preemptions outside the station's control, such as network changes, technical problems, show cancellations or sports overruns. [192] The commenters argue that make goods given for such reasons do not confer additional benefits or discounts, and thus should not be included in LUC calculations. [193] Moreover, the commenters assert that an advertiser generally values a make good spot less than the original spot purchased, while another advertiser might place a higher value on the same time, so it is not fair or accurate to factor any charge for the make good into the LUC. [194]

114. *Decision.* As discussed above, we recognize that make goods are an integral aspect of the sale of preemptible time and that they may, in some circumstances, bestow an additional benefit or discount on the advertiser whose preemptible spot is made good. In order to ensure that political buyers also are able to enjoy these advantages, we will continue our policy of requiring stations to include make goods in LUC calculations. This means that, when computing the LUC for a given class of time, a broadcaster must include the rate paid by an advertiser whose spot was "made good" during the relevant period.

115. Where the value of the make-good spot is equal to that of the original spot, our policy obviously will have no practical effect on the LUC, since the rate for either spot will be the same. We recognize, however, that stations sometimes choose to "appease" an advertiser whose spot has been preempted by running a make-good spot in a more valuable time period. In this situation, the advertiser receives an additional benefit or discount that should also accrue to candidates who have purchased the same class of time in the same period. Accordingly, we will require that, where a station places a make good in a more valuable program or daypart, the value of that make good must be factored into the calculation of the LUC for that more valuable program or daypart. Candidates purchasing the same class of time who have paid a higher rate for the program or daypart will be entitled to a rebate of the difference between the rate they paid and the rate of the made good spot.

116. In addition, the Commission will continue to permit exclusion from make-good calculations any make goods or bonus spots furnished to meet contracted-for promises of certain audience numbers, demographics, or ratings, when that is the station's practice for selling time to both commercial and political advertisers. Further, just as for commercial advertisers, if a candidate's promised audience delivery fails to be realized, the candidate is entitled to additional make-good or bonus spots in the same manner as commercial advertisers.

L. Sold-Out Time.

117. *Issue and Comments.* The *NPRM* sought comment on whether preemptible time could ever be sold out since a buyer can offer to pay a higher rate and preempt an incumbent. ABC states that the Bureau's statement in the 1990 *Questions and Answers* that "unless the entire inventory is sold out on a non-preemptible basis, a licensee must sell to candidates at the commercial selling level for preemptible time" effectively creates mandatory access at odds with Section 315.[195] Other commenters note that price alone is not the driving force behind the availability of time because the disruption to program logs or potential advertiser dissatisfaction from preemption could outweigh the benefits from a slightly or even significantly increased rate. [196] Conversely, National Media asserts that preemptible time can never be sold out; MPC states that it is "highly unlikely" that preemptible time would ever be sold out, with the Olympics and the Super Bowl creating possible exceptions. [197]

118. *Decision.* We take this occasion to clarify our sold-out policy. This policy would not, as some commenters seem to believe, force stations to afford candidates access to a particular program. Such a concern confuses our sold-out policy as it refers to LUC with the concept of "reasonable access" for federal candidates. Our

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[187] *1988 Public Notice*, 4 FCC Rcd at 3823.

[188] *Id.*

[189] *See, e.g.*, comments of AFB at 34; NBC at 44; Gillett at 18; INTV at 16; Cox at 25.

[190] Group W comments at 15.

[191] ABC comments at 15.

[192] Gillett comments 17.

[193] Cox further asks the Commission to confirm that, with respect to cable, make goods given for audience underdelivery on one cable channel should not impact the LUC on any substitute channel. We agree with this interpretation. For example, if an advertiser buys time on the Discovery Channel, fails to achieve the bargained-for audience reach and is then given a make good on TNT, that make good will not be presumed to have a separate value that must be included in the LUC calculations for TNT sales. Cox comments at 25.

[194] NBC comments at 44.

[195] Comments of ABC at 12.

[196] Dow Lohnes and Albertson comments at 31.

[197] Comments of National Media at 7; MPC at 5.

LUC sold-out policy states that stations may not tell candidates that the preemptible time is sold out in order to force them to purchase non-preemptible spots in the same program or time period. There is no requirement, however, that stations sell candidates spots in a particular program in the first place. We merely state that once a station decides to sell time within a given period, it cannot inflate the price of a spot sold to a candidate beyond the minimum necessary to clear by claiming that all "preemptible" time is sold out.

119. We believe that this policy should be maintained in order to assure that candidates are not improperly steered toward buying fixed time in a program on the basis that all the preemptible time in a particular show is sold out. Preemptible time is not only a class of time but also a discount privilege, and, as such, it cannot be both offered to commercial advertisers and denied to candidates. In addition, preemptible time, by its very nature, cannot be "sold out" because an offer of a higher price will almost always preempt a lower priced spot. In the event a station uses varying levels of preemption protection as a means of establishing different classes of immediately preemptible time, it may disclose to candidates that lower priced spots are unlikely to clear in light of previous sales. [198] However, we emphasize that stations may not use this disclosure process to persuade candidates to buy premium-priced fixed or nonpreemptible spots by claiming that a given level of preemptible time has been fully sold and, therefore, is unavailable.

V. POLITICAL FILE REQUIREMENTS.

120. *Issue and Comments.* In addition to those requirements spelled out in the Commission's rules, the Commission has developed policies aimed at assuring complete, accurate and readable political files. [199] Some commenters maintain that the Commission should leave the political file rules alone -- they are adequate and should not be made more burdensome. [200] Others request that the Commission establish a uniform political file format for licensees to follow. [201] Some commenters specify what documents should be included in the file. MPC suggests that all rates as disclosed to candidates should be placed in the political file. [202] CBS suggests that the file include a record of all requests for time, records of time purchased, the time/date/rate/class of each spot, a notation if the spot was not aired as originally purchased (preempted, rescheduled, made good), but that it should not be required to include a notice of the exact time each ad runs because that "would be too burdensome." [203]

121. Kahn and Jablonski state that the file should be self-explanatory and should provide descriptions of the various classes of time; spots ordered; rate applied; whether and when spot ran; if preempted, whether a make good was provided; the amount of refunds, if any; reconciliation of any rebates; rate cards and a written statement of the licensee's political policies. [204] Wilson requests that the Commission confirm that the requirement to place advertising orders in the public file "as soon as possible" means as long as it takes to make a copy and put it in the file without delay. [205]

122. PBS suggests that the Commission should accept the good faith exercise of licensee judgment in organizing and maintaining the public file, enforcing a "rule of reason." [206] PBS maintains that there should be no penalties for good faith attempts at compliance because there can be reasonable disputable violations of the file rules.

123. *Decision.* We believe that our current rule 73.1940(d) adequately addresses the political file requirements and that continuation of our existing policies will best serve the interests of both candidates and broadcasters. We will continue to require that stations maintain neat and accurate political files so that anyone viewing the contents of the file will be able to readily discern what the station has sold or otherwise provided to each and every candidate.

124. In addition, the rule requires stations to document the "disposition of requests." Therefore, we will continue the policy requiring a station to file information showing the schedule of the time provided or purchased, when spots actually aired, the rates charged and the classes of time purchased. This vital information is necessary to determine whether a station is affording equal opportunities and whether the candidate is getting favorable or unfavorable treatment in the placement of spots, especially in light of the wide rotations offered by most stations. We will also continue to interpret "as soon as possible" as meaning immediately, under normal circumstances.

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[198] We note that stations selling preemptible time on a strict auction basis (*i.e.*, price is the *only* variable and thus only a single class of time is involved) could not steer candidates to purchase a premium-priced *class* of time (for example," non-preemptible' time) by informing them that all preemptible time was "sold out," because, by definition, such preemptible time cannot be sold out.

[199] Section 73.1940(d) of the Commission's rules requires broadcasting stations to:

> ... [K]eep and permit public inspection of a complete record (political file) of all *requests* for broadcast time made by or on behalf of candidates for public office, together with an appropriate notation showing the *disposition* made by the licensee of such requests, and the *charges made*, if any, if the request is granted. When free time is provided for use by or on behalf of such candidates, a record of the free time provided shall be placed in the political file. All records required by this section shall be placed in the political file as soon as possible and shall be retained for a period of two years.

47 C.F.R. 73.1940(d) (emphasis added). *See also,* 47 C.F.R. Section 76.205(d) for cable provision.

[200] Gillett comments at 19.

[201] Koteen and Naftalin comments at 48. AFB also suggests that the Commission specify what information related to rebates should be maintained in the political file. AFB comments at 44.

[202] MPC comments at 5.

[203] CBS comments at 31.

[204] Kahn and Jablonski comments at 16.

[205] Wilson comments at 2.

[206] PBS comments at 14.

ORDERING CLAUSES

125. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 312(a)(7), 315, and 317 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 312(a)(7), 315, and 317, Parts 73 and 76 of the Commission's rules, 47 C.F.R. Parts 73 and 76, ARE AMENDED, as set forth below. Moreover, because the primary season for the 1992 presidential elections begins January 4, 1992, and because candidates and broadcasters need certainty in the administration of our political broadcasting rules, pursuant to 5 U.S.C. Section 553(d)(3), we find GOOD CAUSE to make these rules effective January 4, 1992.

126. IT IS FURTHER ORDERED that MM Docket No. 91-168 is terminated. Further information on this proceeding may be obtained by contacting Milton O. Gross, Robert L. Baker, or Marsha J. MacBride, Mass Media Bureau at (202) 632-7586, or Diane Hofbauer, Office of General Counsel, at (202) 632-7020.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A
FORMAL COMMENTS

Alabama Broadcaster's Association (ABA)

American Broadcasting Company (ABC)

American Family Broadcast Group, Inc. (AFBG)

Association of Independent Television Stations, Inc. (INTV)

Busse Broadcasting Corp. (Busse)

California State University (San Diego State University) (CSU)

CBS Inc. (CBS)

Covington & Burling: Benedek Broadcasting Group; Lin

Broadcasting Corporation; Midwest Television, Inc.;

Post-Newsweek Stations, Inc.; Providence Journal Company;

The Spartan Radiocasting Company (Covington and Burling)

Cox Cable Communications, Inc. (Cox)

Dow, Lohnes & Albertson: A. H. Belo Corporation; Booth American Company; Brill Media Company, Inc.; Cosmos Broadcasting Corp.; Cox Enterprises, Inc.; Diversified Communications; Great Empire Broadcasting Corp.; Multimedia, Inc.; Stauffer Communications, Inc. (Dow, Lohnes and Albertson)

Federal Election Commission (FEC)

Fisher, Wayland, Cooper & Leader, State Broadcasters Association of: Arizona, Connecticut, Iowa, Maryland/District of Columbia/Delaware, Minnesota, Missouri, New Hampshire, New Jersey, Oklahoma, Tennessee, West Virginia, Wisconsin. (SBA) Gillett Communications, *et al.* (Gillett)

Greater Media, Inc. (Greater Media)

Hogan & Hartson: Fox Television; Albritton Communications Company; Federal Broadcasting Company (Hogan and Hartson) Joint Comments of Public Broadcasting Licensees (JCPBL) KIVI Channel 6 Television (KIVI) Koteen & Naftalin on Behalf of 8 Broadcasters: Great American Television and Radio Company, Inc.; Kelly Broadcasting Company; Kelly Television Company; McGraw-Hill Broadcasting Company, Inc.; The New York Times Company; Renaissance Communications Corporation; Castle Broadcasting;

WFRV-TV, Inc. (Koteen and Naftalin) Law firms: Barnes, Browning, Tanksley & Casurella; Long, Aldridge, & Norman; Savell & Williams; Venema, Towery, Thompson & Chambliss (Kahn & Jablonski) Media Placement Consultants, Inc. (MPC) National Association of Broadcasters (NAB)

National Media Inc. (National Media)

NBC, Inc. (NBC)

North Carolina Association of Broadcasters (NCAB)

Osborn Communications Corp. (Osborn)

Outlet Broadcasting, Inc. (Outlet)

Paducah Newspapers, Inc. (Paducah)

Public Broadcasting Service (PBS)

People for the American Way(Citizen's Petition)

People for the American Way/Media Access Project (PAW/MAP)

Pulitzer Broadcasting Company and WDSU Television, Inc. (Pulitzer)

Reed Smith Shaw & McClay on Behalf of: California Oregon Broadcasting, Gannett Co., Inc.; Gaylord Broadcasting Company; Lee Enterprises, (RSSM)

RTNDA/Society of Professional Journalists (RTNDA)

Shamrock Broadcasting, Inc. (Shamrock)

State of Connecticut

Telecommunications Research and Action Center & Washington Area Citizens

Coalition Interested in Viewers' Constitutional Rights (TRAC)

Washington State University (WSU)

Westinghouse Broadcasting Company, Inc. (Westinghouse)

Wilson Communication Services, Inc. (Wilson)

REPLY COMMENTS

Allbritton Communications Company (Allbritton)

American Family Broadcast Group, Inc. (AFB)

Association of Independent Television Stations, Inc. (INTV)

Channel 40 Licensee, Inc. (KTXL)

Gray Communications Systems (Gray)

Law Firms; Barnes, Browning, Tanksley & Casurella; Long, Aldridge, & Norman; Savell & Williams; Venema, Towery, Thompson & Chambliss (Kahn & Jablonski)

Media Placement Consultants Inc. (MPC)

Media Plus

National Association of Broadcasters (NAB)

North Carolina Association of Broadcasters (NCAB)

People for the American Way/Media Access Project (PAW/MAP)

Public Broadcasting Licensees (PBL)

Radio - Television News Directors Associations, Reporters Committee for Freedom of the Press and Society of Professional Journalists (RTNDA) Telecommunications Research and Action Center and Washington Area Citizens

Coalition Interested in Viewers' Constitutional Rights (TRAC)

Appendix B

Title 47 CFR, Parts 73 & 76 are amended as follows:

1. The authority citation for Part 73 continues to read as follows: Authority: 47 U.S.C. 154, 303.

2. Section 73.1940 is revised in its entirety to read as follows:

Section 73.1940 Legally Qualified Candidates for Public Office.

(a) A legally qualified candidate for public office is any person who:

(1) Has publicly announced his or her intention to run for nomination or office;

(2) Is qualified under the applicable local, State or Federal law to hold the office for which he or she is a candidate; and

(3) Has met the qualifications set forth in either paragraphs (b), (c) or (d) of this section.

(b) A person seeking election to any public office including that of President or Vice President of the United States, or nomination for any public office except that of President or Vice President, by means of a primary, general or special election, shall be considered a legally qualified candidate if, in addition to meeting the criteria set forth in paragraph (a) of this section, that person:

(1) Has qualified for a place on the ballot, or

(2) Has publicly committed himself or herself to seeking election by the write-in method and is eligible under applicable law to be voted for by sticker, by writing in his or her name on the ballot or by other method, and makes a substantial showing that he or she is a bona fide candidate for nomination or office.

(c) A person seeking nomination to any public office, except that of President or Vice President of the United States, by means of a convention, caucus or similar procedure, shall be considered a legally qualified candidate if, in addition to meeting the requirements set forth in paragraph (a) of this section, that person makes a substantial showing that he or she is a bona fide candidate for such nomination: Except, that no person shall be considered a legally qualified candidate for nomination by the means set forth in this paragraph prior to 90 days before the beginning of the convention, caucus or similar procedure in which he or she seeks nomination.

(d) A person seeking nomination for the office of President of Vice President of the United States shall, for the purposes of the Communications Act and the rules thereunder, be considered a legally qualified candidate only in those States or territories (or the District of Columbia) in which, in addition to meeting the requirements set forth in paragraph (a) of this section:

(1) He or she, or proposed delegates on his or her behalf, have qualified for the primary or Presidential preference ballot in that State, territory or the District of Columbia, or

(2) He or she has made a substantial showing of a bona fide candidacy for such nomination in that State, territory or the District of Columbia; Except, that any such person meeting the requirements set forth in paragraphs (a)(1) and (2) of this section in at least 10 States (or nine and the District of Columbia) shall be considered a legally qualified candidate for nomination in all States, territories and the District of Columbia for purposes of this act.

(e) The term "substantial showing" of a bona fide candidacy as used in paragraphs (b), (c) and (d) of this section means evidence that the person claiming to be a candidate has engaged to a substantial degree in activities commonly associated with political campaigning. Such activities normally would include making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee, and establishing campaign headquarters (even though the headquarters in some instances might be the residence of the candidate or his campaign manager). Not all of the listed activities are necessarily required in each case to demonstrate a substantial showing, and there may be activities not listed herein which would contribute to such a showing.

3. Section 73.1941 is added to read as follows:

Section 73.1941 Equal Opportunities.

(a) General requirements. Except as otherwise indicated in Section 73.1944, no station licensee is required to permit the use of its facilities by any legally qualified candidate for public office, but if any licensee shall permit any such candidate to use its facilities, it shall afford equal opportunities to all other candidates for that office to use such facilities.

Such licensee shall have no power of censorship over the material broadcast 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 news events (including, but not limited to political conventions and activities incidental thereto) shall not be deemed to be use of a broadcasting station. (Section 315(a) of the Communications Act.)

(b) Uses. As used in this Section and Section 73.1942, the term "use" means candidate appearance (including by voice or picture) or political advertisement that is not exempt under Section 73.1941(a)(1)-(4) and that is controlled, approved or sponsored by the candidate or the candidate's authorized Committee after the candidate becomes legally qualified.

(c) Timing of Request. A request for equal opportunities must be submitted to the licensee within 1 week of the day on which the first prior use giving rise to the right of equal opportunities occurred:

Provided, however, That where the person was not a candidate at the time of such first prior use, he or she shall submit his or her request within 1 week of the first subsequent use after he or she has become a legally qualified candidate for the office in question.

(d) Burden of proof. A candidate requesting equal opportunities of the licensee or complaining of noncompliance to the Commission shall have the burden of proving that he or she and his or her opponent are legally qualified candidates for the same public office.

(e) Discrimination between candidates. In making time available to candidates for public office, no licensee shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any licensee make any contract or other agreement which shall have the effect of permitting any legally qualified candidate for any public office to broadcast to the exclusion of other legally qualified candidates for the same public office.

4. Section 73.1942 is added to read as follows:

Section 73.1942 Lowest Unit Charge.

(a) Charges for use of stations. The charges, if any, 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 or her 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 a 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.

(i) A candidate shall be charged no more per unit than the station charges its most favored commercial advertisers for the same classes and amounts of time for the same periods. Any station practices offered to commercial advertisers that enhance the value of advertising spots must be disclosed and made available to candidates. Such practices include but are not limited to any discount privileges that affect the value of advertising, such as bonus spots, time-sensitive make goods, preemption priorities, or any other factors that enhance the value of the announcement.

(ii) The Commission recognizes non-preemptible, preemptible with notice, immediately preemptible and run-of-schedule as distinct classes of time.

(iii) Stations may establish and define their own reasonable classes of immediately preemptible time so long as the differences between such classes are based on one or more demonstrable benefits associated with each class and are not based solely upon price or identity of the advertiser. Such demonstrable benefits include, but are not limited to, varying levels of preemption protection, scheduling flexibility, or associated privileges, such as guaranteed time-sensitive make goods. Stations may not use class distinctions to defeat the purpose of the lowest unit charge requirement. All classes must be fully disclosed and made available to candidates.

(iv) Stations may establish reasonable classes of preemptible with notice time so long as they clearly define all such classes, fully disclose them and make them available to candidates.

(v) Stations may treat non-preemptible and fixed position as distinct classes of time provided that stations articulate clearly the differences between such classes, fully disclose them, and make them available to candidates.

(vi) Stations shall not establish a separate, premium-priced class of time sold only to candidates. Stations may sell higher-priced nonpreemptible or fixed time to candidates if such a class of time is made available on a *bona fide* basis to *both* candidates and commercial advertisers, and provided such class is not functionally equivalent to any lower-priced class of time sold to commercial advertisers.

(vii) Unit rates charged for the last-minute sale ("fire sale") of available inventory must be included in the calculation of the lowest unit charge for all time sold to candidates during the period or daypart or program (regardless of when candidates originally purchased/ordered their spots), but such calculation establishes the lowest unit charge *only* for the period, daypart, or program in which such fire sale spots actually aired. Moreover, if a licensee permits candidates to use its broadcast facilities, such last minute sales must also be made available to candidates.

(viii) Lowest unit charge may be calculated on a weekly basis with respect to time that is sold on a weekly basis, such as rotations through particular programs or dayparts. Stations electing to calculate

the lowest unit charge by such a method must include in that calculation all rates for all announcements scheduled in the rotation, including announcements aired under long-term advertising contracts. Stations may implement rate increases during election periods only to the extent that such increases constitute "ordinary business practices," such as seasonal program changes or changes in audience ratings.

(ix) Stations shall review their advertising records periodically throughout the election period to determine whether compliance with this section requires that candidates receive rebates or credits. Where necessary, stations shall issue such rebates or credits promptly.

(x) Unit rates charged as part of any package, whether individually negotiated or generally available to all advertisers, must be included in the lowest unit charge calculation for the same class and length of time in the same time period. A candidate cannot be required to purchase advertising in every program or daypart in a package as a condition for obtaining package unit rates.

(xi) Stations are not required to include non-cash promotional merchandising incentives in lowest unit charge calculations; provided, however, that all such incentives must be offered to candidates as part of any purchases permitted by the licensee. Bonus spots, however, must be included in the calculation of the lowest unit charge calculation.

(xii) Make goods, defined as the rescheduling of preempted advertising, shall be provided to candidates prior to election day if a station has provided a time-sensitive make good to any commercial advertiser who purchased time in the same class during the pre-election periods, respectively set forth in paragraph (a)(1) of this section.

(xiii) Stations must disclose and make available to candidates any make good policies provided to commercial advertisers. If a station places a make good for any commercial advertiser or other candidate in a more valuable program or daypart, the value of such make good must be included in the calculation of the lowest unit charge for that program or daypart.

(2) At any time other than the respective periods set forth in paragraph (a)(1) of this section, stations may charge legally qualified candidates for public office no more than the charges made for comparable use of the station by commercial advertisers. The rates, if any, charged all such candidates for the same office shall be uniform and shall not be rebated by any means, direct or indirect. A candidate shall be charged no more than the rate the station would charge for comparable commercial advertising.

(b) If a station permits a candidate to use its facilities, the station shall make all discount privileges offered to commercial advertisers, including the lowest unit charges for each class and length of time in the same time period and all corresponding discount privileges, available to candidates. This duty includes an affirmative duty to disclose to candidates information about rates and all value-enhancing discount privileges offered commercial advertisers. Stations may use reasonable discretion in making the disclosure; provided, however, that the disclosure includes, at a minimum, the following information:

(1) A description and definition of each class of time available to commercial advertisers sufficiently complete to allow candidates to identify and understand what specific attributes differentiate each class;

(2) A description of the lowest unit charge and related privileges (such as priorities against preemption and make goods prior to specific deadlines) for each class of time offered to commercial advertisers;

(3) A description of the station's method of selling preemptible time based upon advertiser demand, commonly known as the "current selling level," with the stipulation that candidates will be able to purchase at these demand-generated rates in the same manner as commercial advertisers;

(4) An approximation of the likelihood of preemption for each kind of preemptible time; and

(5) An explanation of the station's sales practices, if any, that are based on audience delivery, with the stipulation that candidates will be able to purchase this kind of time, if available to commercial advertisers.

(c) Once disclosure is made, stations shall negotiate in good faith to actually sell time to candidates in accordance with the disclosure.

(d) This rule (Section 73.1942) shall not apply to any station licensed for non-commercial operation.

5. Section 73.1943 is added to read as follows:

Section 73.1943 Political File.

(a) Every licensee shall keep and permit public inspection of a complete and orderly record (political file) of all requests for broadcast time made by or on behalf of a candidate for public office, together with an appropriate notation showing the disposition made by the licensee of such requests, and the charges made, if any, if the request is granted. The "disposition" includes the schedule of time purchased, when spots actually aired, the rates charged, and the classes of time purchased.

(b) 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.

(c) All records required by this paragraph shall be placed in the political file as soon as possible and shall be retained for a period of two years. As soon as possible means immediately absent unusual circumstances.

5. Section 73.1944 is added as follows:

Section 73.1944 Reasonable Access.

(a) Section 312(a)(7) of the Communications Act provides that the Commission may revoke any station license or construction permit 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.

(b) Weekend Access. For purposes of providing reasonable access, a licensee shall make its facilities available for use by federal candidates *on the weekend before the election* if the licensee has provided similar access to commercial advertisers during the year preceding the relevant election period. Licensees shall not discriminate between candidates with regard to weekend access.

6. Section 73.1212 is amended by adding a last sentence to paragraph (a)(2)(i) to read as follows:

Section 73.1212(a)(2)(i) Sponsorship Identification

* * * * *

(a)(2)(i) * * * In the case of political television broadcasts under this paragraph and paragraph (d) of this section, the broadcast must contain both a visual and aural announcement.

* * * * *

1. The authority citation for Part 76 continues to read as follows: Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085; 47 U.S.C. 152, 153, 154, 301, 303, 307, 308, 309.

2. Section 76.205 is revised in its entirety to read as follows:

Section 76.205 Origination Cablecasts by Legally Qualified Candidates for Public Office. Equal Opportunities.

(a) General requirements. No cable television system is required to permit the use of its facilities by any legally qualified candidate for public office, but if any system shall permit any such candidate to use its facilities, it shall afford equal opportunities to all other candidates for that office to use such facilities. Such system shall have no power of censorship over the material broadcast 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 news events (including, but not limited to political conventions and activities incidental thereto) shall not be deemed to be use of a system. (Section 315(a) of the Communications Act.)

(b) Uses. As used in this Section and Section 76.206, the term "use" means candidate appearance (including by voice or picture) or political advertisement that is not exempt under Section 76.205(a)(1)-(4) and that is controlled, approved or sponsored by the candidate or the candidate's authorized Committee after the candidate becomes legally qualified.

(c) Timing of Request. A request for equal opportunities must be submitted to the system within 1 week of the day on which the first prior use giving rise to the right of equal opportunities occurred: *Provided, however,* That where the person was not a candidate at the time of such first prior use, he or she shall submit his or her request within 1 week of the first subsequent use after he or she has become a legally qualified candidate for the office in question.

(d) Burden of proof. A candidate requesting equal opportunities of the system or complaining of noncompliance to the Commission shall have the burden of proving that he or she and his or her opponent are legally qualified candidates for the same public office.

(e) Discrimination between candidates. In making time available to candidates for public office, no system shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any system make any contract or other agreement which shall have the effect of permitting any legally qualified candidate for any public office to cablecast to the exclusion of other legally qualified candidates for the same public office.

3. Section 76.206 is added to read as follows:

Section 76.206 Lowest Unit Charge.

(a) Charges for use of cable television systems. The charges, if any, made for the use of any system by any person who is a legally qualified candidate for any public office in connection with his or her 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 a general or special election in which such person is a candidate, the lowest unit charge of the system for the same class and amount of time for the same period.

(i) A candidate shall be charged no more per unit than the system charges its most favored commercial advertisers for the same classes and amounts of time for the same periods. Any system practices offered to commercial advertisers that enhance the value of advertising spots must be disclosed and made available to candidates. Such practices include but are not limited to any discount privileges that affect the value of advertising, such as bonus spots, time-sensitive make goods, preemption priorities, or any other factors that enhance the value of the announcement.

(ii) The Commission recognizes non-preemptible, preemptible with notice, immediately preemptible and run-of-schedule as distinct classes of time.

(iii) Systems may establish and define their own reasonable classes of immediately preemptible time so long as the differences between such classes are based on one or more demonstrable benefits associated with each class and are not based solely upon price or identity of the advertiser. Such demonstrable benefits include, but are not limited to, varying levels of preemption protection, scheduling flexibility, or associated privileges, such as guar-

anteed time-sensitive make goods. Systems may not use class distinctions to defeat the purpose of the lowest unit charge requirement. All classes must be fully disclosed and made available to candidates.

(iv) Systems may establish reasonable classes of preemptible with notice time so long as they clearly define all such classes, fully disclose them and make them available to candidates.

(v) Systems may treat non-preemptible and fixed position as distinct classes of time provided that systems articulate clearly the differences between such classes, fully disclose them, and make them available to candidates.

(vi) Systems shall not establish a separate, premium-priced class of time sold only to candidates. Systems may sell higher-priced nonpreemptible or fixed time to candidates if such a class of time is made available on a *bona fide* basis to both candidates and commercial advertisers, and provided such class is not functionally equivalent to any lower-priced class of time sold to commercial advertisers.

(vii) Unit rates charged for the last-minute sale ("fire sale") of available inventory must be included in the calculation of the lowest unit charge for all time sold to candidates during the period or daypart or program (regardless of when candidates originally purchased/ordered their spots), but such calculation establishes the lowest unit charge only for the period, daypart, or program in which such fire sale spots actually aired. Moreover, if a system permits candidates to use its cablecast facilities, such last minute sales must also be made available to candidates.

(viii) Lowest unit charge may be calculated on a weekly basis with respect to time that is sold on a weekly basis, such as rotations through particular programs or dayparts. Systems electing to calculate the lowest unit charge by such a method must include in that calculation all rates for all announcements scheduled in the rotation, including announcements aired under long-term advertising contracts. Systems may implement rate increases during election periods only to the extent that such increases constitute "ordinary business practices," such as seasonal program changes or changes in audience ratings.

(ix) Systems shall review their advertising records periodically throughout the election period to determine whether compliance with this section requires that candidates receive rebates or credits. Where necessary, systems shall issue such rebates or credits promptly.

(x) Unit rates charged as part of any package, whether individually negotiated or generally available to all advertisers, must be included in the lowest unit charge calculation for the same class and length of time in the same time period. A candidate cannot be required to purchase advertising in every program or daypart in a package as a condition for obtaining package unit rates.

(xi) Systems are not required to include non-cash promotional merchandising incentives in lowest unit charge calculations; provided, however, that all such incentives must be offered to candidates as part of any purchases permitted by the system. Bonus spots, however, must be included in the calculation of the lowest unit charge calculation.

(xii) Make goods, defined as the rescheduling of preempted advertising, shall be provided to candidates prior to election day if a system has provided a time-sensitive make good to any commercial advertiser who purchased time in the same class during the year preceding the pre-election periods, respectively set forth in paragraph (a)(1) of this section.

(xiii) Systems must disclose and make available to candidates any make good policies provided to commercial advertisers. If a system places a make good for any commercial advertiser or other candidate in a more valuable program or daypart, the value of such make good must be included in the calculation of the lowest unit charge for that program or daypart.

(2) At any time other than the respective periods set forth in paragraph (a)(1) of this section, systems may charge legally qualified candidates for public office no more than the charges made for comparable use of the system by commercial advertisers. The rates, if any, charged all such candidates for the same office shall be uniform and shall not be rebated by any means, direct or indirect. A candidate shall be charged no more than the rate the system would charge for comparable commercial advertising.

(b) If a system permits a candidate to use its cablecast facilities, the system shall make all discount privileges offered to commercial advertisers, including the lowest unit charges for each class and length of time in the same time period and all corresponding discount privileges, available to candidates. This duty includes an affirmative duty to fully disclose to candidates information about rates and all value-enhancing discount privileges offered commercial advertisers. Systems may use reasonable discretion in making the disclosure; provided, however, that the disclosure includes, at a minimum, the following information:

(1) A description and definition of each class of time available to commercial advertisers sufficiently complete enough to allow candidates to identify and understand what specific attributes differentiate each class;

(2) A description of the lowest unit charge and related privileges (such as priorities against preemption and make goods prior to specific deadlines) for each class of time offered to commercial advertisers;

(3) A description of the system's method of selling preemptible time based upon advertiser demand, commonly known as the "current selling level," with the stipulation that candidates will be able to purchase at these demand-generated rates in the same manner as commercial advertisers;

(4) An approximation of the likelihood of preemption for each kind of preemptible time; and

(5) An explanation of the system's sales practices, if any, that are based on audience delivery, with the stipulation that candidates will be able to purchase this kind of time, if available to commercial advertisers.

(c) Once disclosure is made, systems shall negotiate in good faith to actually sell time to candidates in accordance with the disclosure.

3. Section 76.207 is added to read as follows:

Section 76.207 Political File

(a) Every cable television system shall keep and permit public inspection of a complete and orderly record (political file) of all requests for cablecast time made by or on behalf of a candidate for public office, together with an appropriate notation showing the disposition made by the system of such requests, and the charges made, if any, if the request is granted. The "disposition" includes the schedule of time purchased, when spots actually aired, the rates charged, and the classes of time purchased.

(b) 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.

(c) All records required by this paragraph shall be placed in the political file as soon as possible and shall be retained for a period of two years. As soon as possible means immediately absent unusual circumstances.

4. Section 76.221 is amended by adding a last sentence to paragraph (a) to read as follows:

Section 76.221(a) Sponsorship Identification; List Retention; Related Requirements.

* * * * *

(a) * * *In the case of political cablecasts under this paragraph and paragraph (c) of this section, the cablecast must contain both a visual and aural announcement.

* * * * *

Statement of Commissioner James H. Quello
Political Broadcasting Report and Order

Although only one item relating to our political broadcasting rules is on the Agenda, we are announcing a series of actions today. Taken together, the *Report and Order*, the *Declaratory Ruling* on jurisdiction and the enforcement actions should bring some order out of the chaos that lately has characterized our political broadcasting rules.

The *Report and Order* is a long overdue and welcome update and clarification of the Commission's rules governing political broadcasting, particularly those relating to lowest unit charge requirements. Advertising practices have changed radically over the past few years and our interpretations of the law had not kept pace. I believe that by codifying our policies, we will make our requirements more understandable to candidates and easier to apply by broadcasters. I want to congratulate the staff for the excellent job they did in preparing this difficult item.

The *Declaratory Ruling* consolidates jurisdiction over both liability and damages for Section 315(b) violations where it belongs and always has been — at the Commission. Although I think the *Ruling* establishes new complaint procedures without adequate opportunity for public comment, I can enthusiastically support it in all other respects. I am issuing today a separate statement on the *Declaratory Ruling*.

The series of enforcement actions announced today should end the confusion about the findings of last year's political broadcasting audit. Although I think the fines in some of the cases are higher than we have assessed for violations of other rules, I generally support them to help demonstrate the Commission's intent to enforce the law. It is also important to note that of the 30 stations audited, only two were found to have overcharged candidates. The other three fines were for political file violations.

I believe this record of compliance will improve. I think we will find that when our rules are clear, broadcasters are eager to comply.

December 12, 1991

STATEMENT OF
COMMISSIONER SHERRIE P. MARSHALL

Re: Report and Order in MM Docket No. 91-168 Codification of the Commission's Political Broadcasting Policies

The revised political broadcasting rules we adopt today are both timely and significant because they should allow political candidates and broadcasters alike to easily discern their respective rights and obligations as we enter the 1992 election cycle. In particular, there should be no doubt after today that broadcasters have an affirmative duty to disclose all ad rates and sales practices to political candidates.

Full disclosure is an absolute must, for only through full disclosure can candidates, as well as the Commission, be assured that they are, in fact, receiving the same lowest unit charge as a station's most favored commercial advertiser.

Full disclosure will also remove the shroud of mystery (and controversy) surrounding the standard broadcast practice of offering different classes of advertising time for sale. Yet, even in the offering of such classes (or unit rates), one rule stands clear: for each class of time sold, political candidates must receive the station's lowest offered rate.

Our rules also make it clear that all classes of preemptible time offered by a station must be based on objective, discernible criteria and not the identity of the advertiser.

Also, with respect to rebates (and make-good obligations), our rules now mandate that they should be paid (or made good) promptly, which, in most cases will mean well before the applicable election. After all, in our current age of media-based political campaigns, receipt of several rebates before an election may make the difference between a successful candidate and an "also-ran".

To me, the most difficult decision in this item is whether to reverse our longstanding policy of allowing licensees to determine whether or not to accept political advertisements for insertion in newscasts. On the one hand, I can fully understand the desire of politicians to have access to newscasts -- they reach the highest audience of likely voters. On the other hand, broadcasters understandably feel that their journalistic integrity and First Amendment rights may be compromised if they are required to run political spots during newscasts. In the end, my decision to support retention of the current policy is

December 12, 1991

SEPARATE STATEMENT OF COMMISSIONER ANDREW C. BARRETT

Re: Codification of the Commission's Political Programming Policies (MM Docket No. 91-168)

The political programming policies represent an important role for the Federal Communications Commission in the electoral process. Our policies effectuate the Congressional mandate to provide candidates "equal opportunities" and the "lowest unit charge" during the primary and general election phases. In light of the importance of political advertisement to an informed electorate and given the lack of clear guidelines from the Commission to handle todays media marketplace, it is fitting that we revise and clarify these policies. I have fully supported this review and support the Report and Order adopted today. I believe it will prove to be one of the most important items this Commission will handle on the mass media front. In addition, I am pleased that we establish an ongoing mechanism whereby the public can be kept informed of changes made to the interpretations of the political policies and rules in response to the evolving sales practices of broadcast stations.

I write separately to make clear to broadcasters, candidates, and the public my position on enforcement of these new policies. It has been suggested that our Preemption Declaratory Ruling adopted today and our new policies adopted in this Report and Order are an attempt to protect broadcasters. I can unequivocally state that the protection of broadcasters has not been a goal of mine. Throughout this process, my objective has been to devise a workable set of policies that clearly set forth the obligations of broadcasters and to enforce these policies.[1] I feel that leaving it to the state or federal court to enforce the political broadcast rules could be considered an abdication of my responsibility as a Commissioner. Congress established the political broadcast rules and provided for Commission implementation. It is our duty as public officials to fully comply with this mandate. A necessary corollary of that implementation mandate is the enforcement of the political broadcast policies and rules.

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[1] In this regard, I note that today the Commission has completed the enforcement action in relation to the thirty audited stations. Where necessary and legally sustainable, the Commission has issued forfeitures and required that the stations rebate candidates.

December 12, 1991

SEPARATE STATEMENT OF
COMMISSIONER ERVIN S. DUGGAN

In the Matter of Codification of the Commission's Political Broadcasting Policies (MM Docket No. 91-168)

This Report and Order represents a victory for virtually everyone affected by the political broadcasting provisions of the Communications Act. Broadcasters benefit from the considerable degree of clarity, consistency and coherence that we now lend to the Commission's complex, but vitally important, political rules. Candidates benefit from policy revisions which require that broadcast licensees provide political campaigns with full and complete disclosure of stations' commercial advertising practices, a major step toward ensuring that candidates receive the required lowest unit charge for their own spots. Finally, because this action cannot help but improve the delivery of political messages through broadcasting and cable outlets, the American voters are the ultimate beneficiaries.

In two related initiatives, we also are moving within our mandate under the Communications Act to bring enforcement of the Commission's policies under our exclusive jurisdiction, and we are making specific findings of apparent liability for violations discovered during the 1990 Political Audit. Through our jurisdictional ruling, we assure candidates and broadcasters alike that we intend to resolve political broadcasting complaints fairly and expeditiously through Commission procedures. In addition, our enforcement actions stemming from the Audit demonstrate our resolve to ensure that stations adhere to the letter and spirit of the law.

These actions are the product of spirited debate and considerable deliberation. The result is a carefully reasoned set of decisions that should provide clear guideposts in this sensitive area.