



MEMORANDUM

TO: Don Hicks
President, Missouri Broadcasters Association

FROM: Gregg P. Skall

DATE: August 30, 2006

RE: McCaskill for US Senate Lowest Unit Rate Issue

You have provided me with the memorandum of Cleta Mitchell, Foley & Lardner, LLP and Counsel for Talent for Senate, Inc. dated August 14, 2006 (the “Mitchell Memo”). The Mitchell Memo attached letters to specific Missouri broadcasters, also dated August 14, 2006, each of which asserts that certain advertisements aired on radio broadcasting stations in Missouri, produced and paid for by Claire McCaskill and her campaign committee, Clair McCaskill for US Senate, failed to comply with US law for several reasons.

The script of the advertisement confirms that the advertisement references Ms. McCaskill’s opponent in the general election, Sen. Jim Talent. As a result, the Mitchell Memo asserts that certain provisions of Section 315(b) of the Communications Act apply and were not adhered to:

- The campaign failed to submit to the radio stations the legally required documentation attesting that the advertisement is a political advertisement that referenced Ms. McCaskill’s opponent, Sen. Talent.
- The advertisement failed to contain in the disclaimer—generally referred to as “stand-by-your-ad”—a statement by Ms. McCaskill identifying the office she is seeking.

The Mitchell Memo and the other letters assert that, for the McCaskill campaign to qualify for the lowest unit charge (“LUC”), she must provide that station with a written certification that she will not make a direct reference to another candidate for the same office, unless such reference includes a personal audio statement by the candidate that:

- 1) Identifies the candidate,
- 2) Identifies the office the candidate is seeking, and

3) Indicates that the candidate has approved the broadcast.¹

A review of the questioned McCaskill advertisements reveals compliance with items one and three. The ad, however, failed to mention the office Claire McCaskill was seeking. In the absence of other factors, the failure to include this required component would result in McCaskill's loss of the entitlement to LUC for the balance of both the primary and the general election campaign.²

I. WERE THE McCASKILL ADS OF THE TYPE THAT REQUIRE COMPLIANCE WITH SECTION 315(b) AND WOULD PRECLUDE McCASKILL FROM LUC ENTITLEMENT WITHOUT COMPLIANCE?

Several questions are raised. First, Section 315(b)(2)(B) refers to “. . . **such** broadcast or any other broadcast during any portion of the 45-day and 60-day periods.” Thus if all the advertisements in question were aired outside of those LUC windows, they would not be **such** broadcasts, and would not cause a disqualification of the candidate for LUC. In other words, *if the violation occurred outside the election window for lowest unit charge, there is no basis to claim that the McCaskill for Missouri committee forfeited its right to receive lowest unit charge.*

The Missouri primary was August 8 and the General Election will be November 7, 2006. Accordingly, the LUC period for the primary began on June 24, and the LUC period for the general election begins on September 8, 2006. To be **such** a broadcast, for purposes of §315, one or more of them must fall between the dates of June 24 – August 8, or September 8 – November 8, as represented in the chart below.

| | Missouri Primary | General Election |
|------------|------------------|------------------|
| LUC Begins | June 24 | September 8 |
| LUC Ends | August 8 | November 7 |

The Mitchell Memo attached radio broadcast orders that are not fully legible. However, all appear to request flight dates outside the primary LUC windows, except for one. The exception seems to request a flight date beginning on August 8 and running through August 20 and attaches copy that does indeed omit identification of the office she is seeking. Thus, at least one of the

¹ 47 U.S.C. §315(b)(2)(A) and (D)

² 47 U.S.C. §315(b)(2)(B) Limitation on Charges. -- If a candidate for Federal office (or any authorized committee of such candidate) makes a reference described in subparagraph (A) in any broadcast that does not meet the requirements of subparagraph (C) or (D), such candidate shall not be entitled to receive the rate under paragraph (1)(A) **for such broadcast or any other broadcast during any portion of the 45-day and 60-day periods** described in paragraph (1)(A), that occur on or after the date of such broadcast, for election to such office. (Emphasis Added)

ads appears to fall within the LUC window and makes it an ad referred to as **such broadcast or any other broadcast during any portion of the 45-day and 60-day period.**

II. WHO MUST BE REFERENCED IN THE ADVERTISEMENT TO INVOKE THE REQUIRED STAND-BY-YOUR-AD STATEMENT PROVISIONS?

Section 315(b)(2)(A) requires a written certification that the candidate will not make any direct reference **to another candidate for the same office** unless that broadcast complies with the radio or television stand-by-your-ad requirements of subparagraphs (C) or (D); it is (D) that requires the candidate to identify in a radio broadcast the office being sought. The consequence of failing to comply with any of these provisions is that the candidate loses the entitlement to LUC.³

The key question is: **who is a candidate for the same office?** Since Section 315 is a provision of the Communications Act, we can seek guidance from prior FCC decisions and statements regarding this question. Under Section 315(a) (which covers equal opportunities), whenever a legally qualified candidate for any public office is allowed to use a broadcasting station, the licensee of that station must afford equal opportunities to all other such “. . . candidates for **that office.**” Since the term “same office” is grammatically interchangeable with “that office,” how the FCC interprets Section 315(a) should guide us with respect to interpretation of Section 315(b). The *Womble Carlyle Political Manual* states:

Rights to equal opportunities vest only in legally qualified opposing candidates. In order for candidates to be “opposing candidates” the same elective office must be involved. At a nominating convention or in a primary election, the opposing candidate would normally be from the same party, unless some type of coalition party is involved. Thus, a Republican seeking election in a Republican primary would not be an opposing candidate to a Democrat seeking election in a Democratic primary, but only to another candidate in the Republican primary. If a candidate is running unopposed in his or her party’s primary, then there would be no opposing candidate entitled to equal opportunities. Upon nomination, of course, equal opportunities would then accrue in favor of an opposing party’s nominee for the same public office.⁴

McCaskill was running unopposed in the Democratic Primary and, therefore, there was no opposing candidate. Since there was no opposing candidate, there could not have been “another candidate” for the same office for purposes of the LUC provisions.

³ 47 U.S.C. §315(b)(2)(A)

⁴ This statement is based on the FCC’s Political Primer 100 FCC 2d 1476, 1984 FCC LEXIS 2934, (January 1, 1984) at the discussion beginning at paragraph 29 and the case of *Kay v. FCC*. 443 F.2d 638, 645 (D.C. Cir. 1970) equating candidates for “that office” to “opposing candidates.” If candidates for “that office” are equal to “opposing candidates” for purposes of one provision of §315, then so should candidates for the “same office” be interpreted under the Commission and Court rulings for “Opposing Candidates.”

The Commission has long held that, while both primary and general elections fall within the scope of Section 315, such elections must be considered independently of each other, and equal opportunities, within the meaning of Section 315, need be afforded only to legally qualified candidates for the same office in the same election.⁵

Therefore, it is reasonable to conclude that McCaskill's references to Senator Talent were not references to an opposing candidate for the Missouri primary election, and were not references to "another candidate" under Section 315(b). Accordingly, the McCaskill campaign has not lost its entitlement to LUC in the primary or the general election LUC period.

III. WERE McCASKILL TO HAVE VIOLATED SECTION 315(b), MUST SHE BE DENIED LUC?

Upon a violation of the stand-by-your-ad provision, the candidate is no longer "entitled" to receive lowest unit charge. It has long been the position of the Missouri Broadcasters Association that this consequence disenfranchises the offending candidate from insisting on LUC as an entitlement, but does not disallow or prevent the broadcaster from voluntarily charging that candidate the LUC, provided that there is no discrimination among candidates for elective office. This position has not been held invalid in any legal forum. A consequence of the nondiscrimination requirement is that if a broadcaster continues to provide LUC to a candidate who has lost his or her entitlement, then the broadcaster must continue to provide LUC to **all** candidates who have lost their entitlements in that election period and who make a "use" of its station.

⁵ Id. at ¶30

Section 315 [47 USC §315]. Facilities for Candidates for Public Office

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any --

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) Charges. --

(1) In general. -- 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 --

(A) subject to paragraph (2), during the forty-five days preceding the date of a primary or primary runoff election and during the sixty 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

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

(2) Content of Broadcasts--

(A) In General. -- In the case of a candidate for Federal office, such candidate shall not be entitled to receive the rate under paragraph (1)(A) for the use of any broadcasting station unless the candidate provides written certification to the broadcast station that the candidate (and any authorized committee of the candidate) shall not make any direct reference to another candidate for the same office, in any broadcast using the rights and conditions of access under this Act, unless such reference meets the requirements of subparagraph (C) or (D).

(B) Limitation on Charges. -- If a candidate for Federal office (or any authorized committee of such candidate) makes a reference described in subparagraph (A) in any broadcast that does not meet the requirements of subparagraph (C) or (D), such candidate shall not be entitled to receive the rate under paragraph (1)(A) for such broadcast or any other broadcast during any portion of the 45-day and 60-day periods described in paragraph (1)(A), that occur on or after the date of such broadcast, for election to such office.

(C) Television Broadcasts. -- A candidate meets the requirements of this subparagraph if, in the case of a television broadcast, at the end of such broadcast there appears simultaneously, for a period no less than 4 seconds--

(i) a clearly identifiable photographic or similar image of the candidate; and

(ii) a clearly readable printed statement, identifying the candidate and stating that the candidate has approved the broadcast and that the candidate's authorized committee paid for the broadcast.

(D) Radio Broadcasts. -- A candidate meets the requirements of this subparagraph if, in the case of a radio broadcast, the broadcast includes a personal audio statement by the candidate that identifies the candidate, the office the candidate is seeking, and indicates that the candidate has approved the broadcast.

(E) Certification. -- Certifications under this section shall be provided and certified as accurate by the candidate (or any authorized committee of the candidate) at the time of purchase.

(F) Definitions. -- For purposes of this paragraph, the terms "authorized committee" and "Federal office" have the meanings given such terms by Section 301 of the Federal Election Campaign Act of 1971 (2 USC 431).

(c) For the purposes of this section:

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

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

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

(e) Political Record. --

(1) In General. -- A licensee shall maintain, and make available for public inspection, a complete record of a request to purchase broadcast time that--

(A) is made by or on behalf of a legally qualified candidate for public office; or

(B) communicates a message relating to any political matter of national importance, including--

(i) a legally qualified candidate;

(ii) any election to Federal office; or

(iii) a national legislative issue of public importance.

(2) Contents of Record. -- A record maintained under paragraph (1) shall contain information regarding--

(A) whether the request to purchase broadcast time is accepted or rejected by the licensee;

(B) the rate charged for the broadcast time;

(C) the date and time on which the communication is aired;

(D) the class of time that is purchased;

(E) the name of the candidate to which the communication refers and the office to which the candidate is seeking election, the election to which the communication refers, or the issue to which the communication refers (as applicable);

(F) in the case of a request made by, or on behalf of, a candidate, the name of the candidate, the authorized committee of the candidate, and the treasurer of such committee; and

(G) in the case of any other request, the name of the person purchasing the time, the name, address, and phone number of a contact person for such person, and a list of the chief executive officers or members of the executive committee or of the board of directors of such person.

(3) Time to Maintain File. -- The information required under this subsection shall be placed in a political file as soon as possible and shall be retained by the licensee for a period of not less than 2 years.

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