

Political Broadcasting



Political Rules in a Nutshell

- A broadcast licensee must provide to **LEGALLY QUALIFIED** political candidates for federal office (President, Vice President, U.S. Congress) **REASONABLE ACCESS**.
- When a legally qualified candidate makes a **USE** of a broadcast facility during a **NON-EXEMPT PROGRAM**, then an opposing candidate is entitled to make a **REQUEST** for **EQUAL OPPORTUNITIES**.
- Certain uses may qualify for the station's **LOWEST UNIT CHARGE**. A full **DISCLOSURE** of the station's selling practices must be made to all political advertisers.

Nutshell (cont.)

- All uses must be free from **CENSORSHIP**, and must bear the proper **SPONSORSHIP IDENTIFICATION**.
- Each request for a use of the station's facilities, and the disposition of that request, must be recorded in the station's **POLITICAL FILE**.
- Issue Ads: The **FAIRNESS DOCTRINE** has been repealed. Court invalidated **POLITICAL EDITORIALS, PERSONAL ATTACKS** corollaries.
- Stations are still subject to **NEWS DISTORTION** rule
- **BCRA** requires some 3rd party ads be noted in the political file.

Legally Qualified Candidate

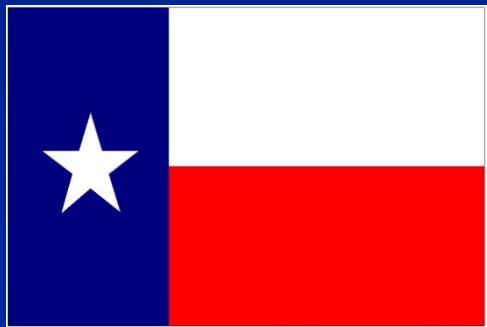
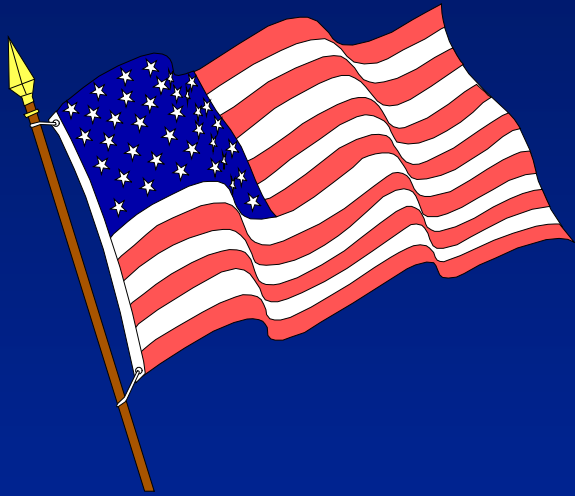
- Three part test:
 1. Must have announced intention to run
 2. Must be qualified under state law to hold the office
 3. Has qualified under state law to be on the ballot, or
qualified for a write-in candidate and
has mounted a *bona fide* candidacy

The Key Element of Political Broadcasting Is a Candidate “Use”

- A “use” is a positive candidate appearance by an *identifiable* voice or picture for at least 4 sec.
- The appearance does *not* have to be controlled or approved by the candidate



Candidate Access: Two Different Standards



- Federal candidates —
Have access rights
- State and local
candidates — Access
at station discretion

Federal Candidates Are Entitled to Reasonable Access

- Applies during entire campaign
- Stations cannot set limits on amount or type of time that candidates can buy
- Stations may reject unreasonable requests and negotiate with candidates

Program Access (Federal Candidates)

- Must be offered prime time, program time
- May be excluded from news
- May *not* be excluded from any other category of programs
 - Not necessarily when they want – Subject to negotiation
- Stations must consider odd program lengths

Non-Standard Lengths

- Stations are required to negotiate with federal candidates for the sale of non-standard length spots and program-length segments, regardless of whether they have sold such lengths in the past.
- If not previously sold, rates can take into account lost revenue, including any diminution of revenue due to lost ratings for immediately following programs.

State and Local Candidates

- Stations can take ads from some races and not others
- Stations can limit the number of ads
- Stations can restrict dayparts in which ads will run
- Equal Opportunities, No Censorship and Lowest Unit Charge apply
 - Stations must make all “discount classes” available

Deadlines

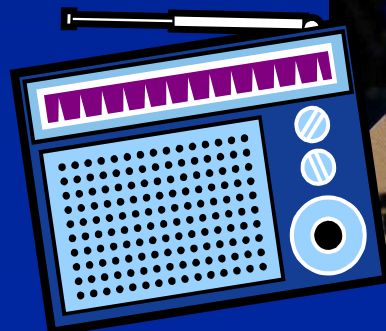
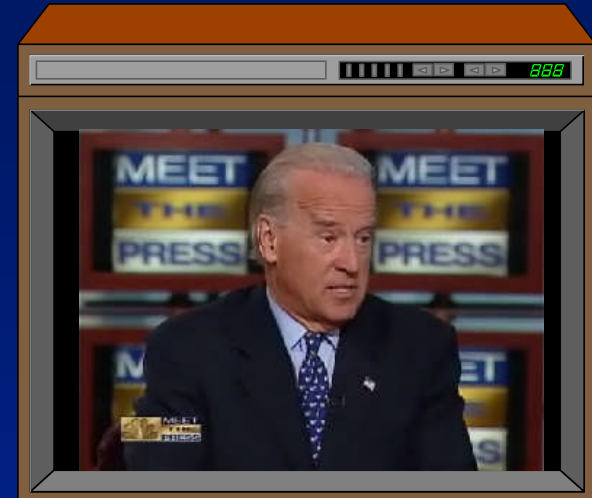
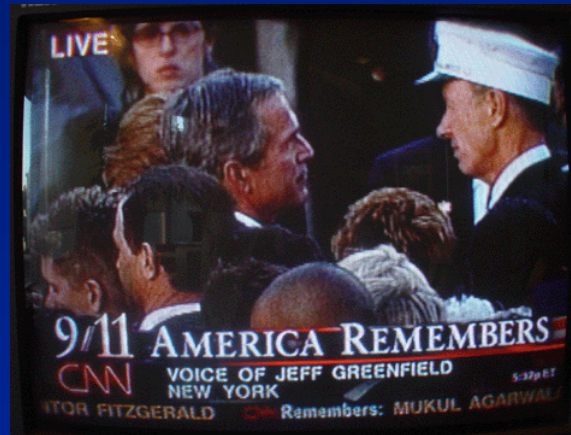
Access to Personnel

- Weekend Access –During Campaign
 - political advertisers -- only to the extent provided to commercial advertisers at any time during the previous year
 - If weekend access is provided only for modifying copy and canceling spots, that is all that need be given candidates
- **Final weekend before the election**
 - Required: giving candidates access to station personnel to purchase and schedule spots may be necessary to permit candidates to exercise their equal opportunities rights

Equal Opportunities

- Applies when candidate becomes legally qualified
- Applies to candidates in same race
- Candidates must request equal opportunities within seven days
- Triggered by non-exempt use

Are Any Programs or Times Exempt from Equal Opportunities?



Exempt Programs

- Bona fide newscasts
- Bona fide news interview programs
- Bona fide documentaries
- On-the-spot coverage of bona fide news events (includes station-sponsored debates)



Content

- Can you refuse to air a political “use” which is in conflict with another federal statute, such as a use that is indecent?
 - obscene?
- ***TALK TO YOUR LAWYER FIRST!***
- You are free to reject political ads which do not contain a “use”
 - Because stations have the power of censorship in such situations, they are not immune to libel and defamation actions based on such advertising

Subject of Use

- Because of the no-censorship provision, a candidate may use the time as he or she sees fit – not required to discuss his or her candidacy
- What about Problem Ads

No Censorship

Farmers Educational and Cooperative Union of America v. WDAY, Inc. 360 U.S. 525, 1959

- “. . . the licensee has consistently been denied “power of censorship” in the area of political broadcasts.” §315
- “Since the power of censorship of political broadcasts is prohibited it must follow as a corollary that the mandate prohibiting censorship includes the privilege of immunity from liability for defamatory statements made by the speaker” citing the ND Supreme Court

Prior Review

- Stations **may ask** to review political advertising in advance to ensure:
 - That it constitutes a “use” by the candidate, and
 - That the ad contains the necessary sponsorship identification, and
 - That it does not exceed the agreed length.
- Candidate not required to comply – 1 bite rule
- When requesting a script or tape for such a review, inform the candidate you are prohibited from censoring the material

Rates

- Legally qualified candidates are entitled to purchase time for a use at rates **COMPARABLE** to those charged other advertisers outside the 60 & 45 day periods.
- Stations may never discriminate against a candidate or charge more than would be charged any other advertiser for advertising or other station services.

Political Rates

- Apply to all races — federal, state & local
- Lowest unit charge applies during political “window”
 - 45 days before a primary or caucus
 - 60 days before a general or special election
- Use must be in connection with the campaign





Lowest Unit Charge
WINDOWS
2010

GENERAL ELECTION



NOVEMBER 2, 2010

LUC BEGINS

SEPTEMBER 3, 2010

Lowest Unit Charge

The **lowest price charged** for any individual **unit** of time sold in the **same class**, **in the same length and program or daypart** that runs within the Lowest Unit Charge window

Charges Inside the Political Window:

- **Maxim:** The political advertiser must be treated no worse than a station's MOST FAVORED ADVERTISER.
- Even though buying only a single spot spots, treat as your **best** and **highest volume** advertiser year in and out.

Who is entitled to LUC?

- Only “uses” authorized by legally qualified candidate’s campaign in connection with the campaign are entitled to lowest unit charge
 - If the candidate’s voice or image does not appear, the spot does not qualify
 - Commercials purchased by non-authorized 3rd parties do not qualify
 - Ballot issue ads and “issue” ads do not qualify
- ***LUC applies to ALL legally qualified candidates.***
 - State and local candidates and federal candidates.

Classes of Time:

- Each class of time carries its own LUC
- Stations may establish their own reasonable classes of time
 - Not made up for political
 - Not based solely on price or identity of the advertiser
 - Demonstrable benefit to advertiser
 - Different obligations on station

Example Classes of Time:

- **Fixed or fixed Position** - Guaranteed to run on date and time.
- **Non-preemptible** - Not subject to preemption.
- **Preemptible with Notice** - Preemptible only after notice by a specific time.
- **Immediately Preemptible w/o Notice** - Preemptible at any time.
- **Run of Schedule** - Preemptible spot can be scheduled at any time by station w/o prior notice.

Preemptible:

- Commercial advertisers may “take a significant prospective risk of nonclearance” to pay less
- Stations may treat separate levels of preemptible time as separate classes
- Stations that sell all time on an “auction” basis may have only one class of preemptible time

Special Political Classes of Time:

- Stations may offer a special “candidate fixed time”
 - Special class of non-preemptible (more valuable to political advertiser)
 - truly distinguishable from the preemptible
 - **Discounted** no more expensive than commercial preemptible with genuine risk of preemption
- **News Adjacencies**: Only when guaranteed adjacent *and* banned from inside news programming
 - No more than news program itself
 - Different than broader rotation that *happens* to butt the news

Rotations:

- Distinctly different rotations may be separate classes of time.
- Test
 - Are the separate rotations consistent with normal selling practices, and
 - based on objective criteria (audience size, demographics, etc.)

Rotations:

- Week to week variations OK
- BUT
 - Must honor the LUC during the week
 - Political advertiser pays no more than the lowest cost spot running in that week

What to Include in the LUC:

- All spots paid by commercial advertisers
- Value of packages and bonus spots
- All contracts in effect during the political window
- Paid PSAs by Commercial Advertisers
- Fire Sale Rates

What to Exclude From the LUC:

- Barter spots
- Per-inquiry spots
- Bonuses for charitable and non-profit organizations
- Billboards & Program sponsorships

What to Exclude From the LUC:

- Technical or audience-delivery make goods
- Value-added incentives
 - BUT: Must be offered on the same basis
- The Network Exception

Network Exception

- Compensation received by each station affiliate not affect own LUC
 - Network “use” will trigger equal opportunity on every affiliate
 - If network itself doesn’t offer equal opportunity, station must
-
- Softwave Media Exchange
 - Google
 - State Networks



Rate Increases or Decreases:

- During the Political Window
 - If normal practice based on Audience ratings, seasonal program changes or time sold on weekly rotation, on a weekly basis.

Agency and Rep Commissions

- Stations that price time on a commissionable basis must offer time on a “net” basis to candidates without agencies
- Reps’ commissions are paid by the station and do not affect the LUC

Specific Programs:

- Programs can differ on program by program basis
- If station treats programs this way, each program may be considered a separate rotation (or daypart)

Sold Out Time?

- Daypart or Particular Program
 - Provide access to comparable opportunities within ↑
- Preemptible Time
 - Only if all preemptible spots within a class were sold at same rate (flat or auction ceiling) & then may be bumped only by a more expensive **class**.
 - If advertiser can preempt with a higher price within same class -- Not sold out!!
 - Total Auction selling = NEVER SOLD OUT

Production Facilities:

- LUC does not apply
- Station may charge standard rates.
- **BUT**
 - Cannot discriminate between political advertisers.
 - E.g. Free production to only one

Make Goods:

Not included in LUC, BUT:

- Must run in same rotation period or may set new LUC for a more expensive period for that week
- Audience Short Fall Make Goods sold to Political:
 - Audience info may not be available
 - Provide a prompt rebate or offer make good for subsequent election

Time Sensitive Make Goods:

- In the last 12 mos. if you promise preempted make good, same class of time, within a specific time frame (*i.e.*, holiday sale). Then
- Political make good must run before the election

Three Most important Rules of Political Broadcasting

Disclose !!!

Disclose !!!

Disclose !!!

Disclosure Statement

- Should be in writing
- Should be provided to every candidate or agency requesting political time (inside or outside the political windows)
- Stations do not have to ensure that candidates read the disclosure statement
- *Will change during the political season*



Disclosure Statement Must Include:

- Time classes available to advertisers
- Anticipated LUC or comparable rate for each class
- Make good policies
- Preemptible time practices
- Any other sales practices

Political File

§73.1943

- The name of the candidate requesting time (not rate inquiries)
- The nature and disposition of the request – whether accepted or rejected
- The rate charged
- All other non-exempt uses
- Keep information for two years
- For political, do not have to respond to telephone inquiries



Contents of Political File

- Date and time aired
- Class of time purchased
- Name of candidate to which the spot refers, the office sought, or the issue to which the spot refers
- In the case of a candidate request, name of the candidate, authorized committee, and treasurer of the committee

Political File Contents, cont.

- Any other (3rd Party) political request:
 - The name of the person or entity purchasing the time,
 - The name, address and phone number of a contact person, and
 - A list of the chief executive officers, members of the executive committee or of the board of directors of such entity.

Recordkeeping

- Maintained for two years
- Covers each message relating to a political matter of national importance, including
 - A legally qualified candidate;
 - Any election to federal office; or
 - A national legislative issue of public importance.

Sponsor Identification

- All spots must have a proper sponsor ID
- Must use “paid for” or “sponsored by”
- Spots paid for by someone other than the candidate must state whether they are authorized by the candidate (FEC)
- TV — Four seconds; four percent of screen height (20 scan lines)

Bipartisan Campaign Reform Act of 2002

- *BCRA Sponsorship ID*
- Applies *only* to Federal Candidates
 - Ads refer to opponent
 - To receive LUC
- *Not a Broadcaster Requirement*

Bipartisan Campaign Reform Act of 2002

- *BCRA Sponsorship ID*
- *2-parts*
- Candidate must be identified, and the following required candidate statement must be made:
 - they authorized or approved the broadcast and that the spot was paid for by the candidate or his authorized campaign committee

Bipartisan Campaign Reform Act

Federal candidates – to qualify for LUC

- must supply stations with a **certificate** re: references to opposing candidates
- certified by the candidate or his authorized committee
- Candidates failing to comply are **not eligible** for lowest unit rates for the remainder of the election period
 - The certificate portion is curable but failure to make **stand-by-your-ad** statement is not!

Federal Candidate Certificate

- Must state that the candidate will not make direct reference to an opposing candidate in his advertising
- Unless, at the end of the spot, there is a **4 sec. +** statement
 - the spot was authorized by the candidate and
 - paid for by him or his authorized committee and
 - Statement that candidate approved the ad
 - TV spots -- clearly identifiable image of candidate and clearly readable written statement and approved the ad

BCRA ID – Radio – Campaign Act

- An audio statement by the candidate in which the candidate identifies himself and states that he approves of the broadcast

BCRA ID – Radio – Comm Act

- An audio statement of the candidate in which the candidate identifies himself, **states the office he is running for**, states that he approves of the broadcast

BCRA ID – Television – Comm Act

- Either:
 - A full-screen view of the candidate identifying himself and making the required statement, or
 - A candidate voiceover an image
 - the candidate identifies himself
 - makes the required statement
 - Identifies himself and approves message, AND
 - The candidate's authorized committee paid for the broadcast
 - A **clearly identifiable image** of the candidate (**80%** of screen height);
- and, in either case:

A clearly readable written statement of the same information (4% of height, 4 seconds, w/ reasonable color contrast)

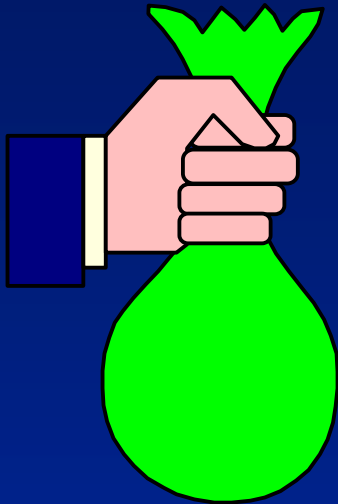
What's the Issue

- BCRA applies to the Candidate, not the broadcaster
- Consequence is loss of ***entitlement*** to LUC
- Claims against the Broadcaster – illegal campaign contribution

Third Party Issues Spots – FCC

- Where the material broadcast is:
 - political matter or
 - controversial issue of public importance, and
 - a corporation, committee, association or other unincorporated group, or other entity is paying for or furnishing the broadcast matter
- **the station shall**, in addition, require that a **list** of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, etc
- shall be made available for **public inspection** at the location specified by the licensee

ADVANCE PAYMENT



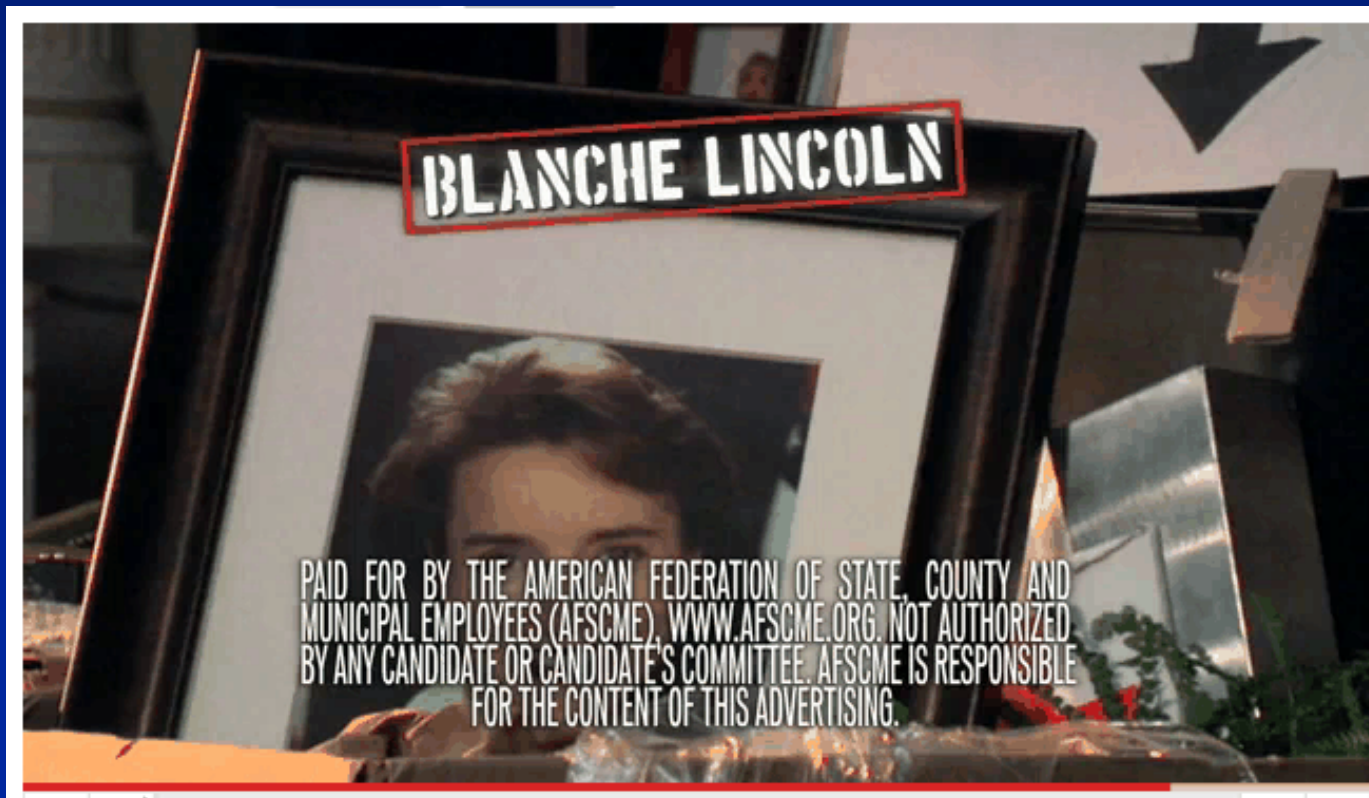
- For federal candidates, stations can require payment no more than *seven days* in advance
- For state and local races, station's commercial advance payment policies apply



After Citizens United

Corporations (including non-profits) and
Unions –

No Limits



POLITICO

- [POLITICO 44](#)
- [CLICK](#)
- [CONGRESS](#)
- [2010](#)
- [ARENA](#)
- [LOBBYING](#)
- [POLICY](#)
- [COMMUNITY](#)
- [MULTIMEDIA](#)
- [HEADLINES](#)
- [MORE INFO](#)

Navigate: [POLITICO](#) | [Ben Smith](#) | [AFSCME hits Lincoln](#)

[Grab my RSS](#)

Receive Daily Updates

[SIGN UP](#)



[+ Get Widget](#)

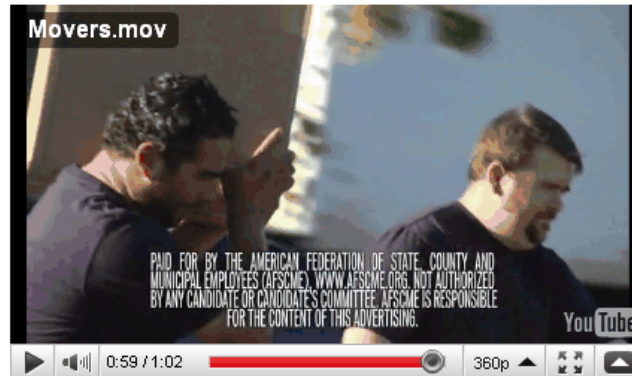
Archives

- [May 2010](#)
- [April 2010](#)
- [March 2010](#)
- [February 2010](#)
- [January 2010](#)
- [December 2009](#)
- [November 2009](#)
- [October 2009](#)
- [September 2009](#)
- [August 2009](#)
- [July 2009](#)
- [June 2009](#)
- [May 2009](#)
- [April 2009](#)



May 25, 2010
Categories: [2010](#)

AFSCME hits Lincoln



The public workers union AFSCME, heading into Arkansas with a huge media budget, attacks Blanche Lincoln as a Washington insider for moving to Virginia and selling out to the insurance companies and banks.

She gets no credit in this one for voting to advance health care legislation or for an amendment providing for particularly tough banking regulations.

(via [Sargent](#))

ADVERTISEMENT

POLITICO 44
The Obama Presidency: Minute by Minute

MULTIMEDIA

[See all video](#)



VIDEO:
POLITICO
Playback



VIDEO: Primary
results in 2
minutes



VIDEO: Obamas
picnic with
Congress

Contact Ben

Email: bsmith@politico.com
AIM: benobserver
twitter: [benpolitico](#)

SEARCH THIS BLOG

[GO](#)

Recent Stories: Ben Smith

Does Minuteman support come with a price tag?
May 26 2010 - 7:51 PM EDT

Vito joins the no-shame game
May 26 2010 - 5:04 AM EDT

The Gates-Clinton axis
May 24 2010 - 4:50 AM EDT

The education of an 'outsider'
May 21 2010 - 4:30 AM EDT

CENSORSHIP ALLOWED

- Censorship prohibitions of §315 & immunity protections only apply to candidate ads
- You are free to reject political ads which do not contain a “use”
 - i.e. Non-candidate ads
 - Even directly advocating or deriding candidate by name
- Be vigilant for problem ads!



LOOK OUT



- ✓ Libel & defamation claims allowed
- ✓ Because stations have the power of censorship in such situations, they are not immune to libel and defamation actions based on such advertising

www.wcsr.com/telecom

Telecommunications, Cable And Broadcast | Womble Carlyle Sandridge & Rice - Windows Internet Explorer provided by Womble Carlyl


http://www.wcsr.com/teams/telecommunications-cable--broadcast

File Edit View Favorites Tools Help

★ Favorites Telecommunications, Cable And Broadcast | Womble ...

PROFESSIONAL SEARCH || SITE SEARCH || SITE MAP

WOMBLE CARLYLE
INNOVATORS AT LAW



We encourage our lawyers to contribute time and energy to **pro bono** projects.

HOME || FIRM || PROFESSIONALS || PRACTICE TEAMS || LOCATIONS || NEWS & EVENTS || CAREERS || CONTACT

TELECOMMUNICATIONS, CABLE AND BROADCAST

- [Political Broadcast Manual](#)
- [2010 EEO Primer](#)

In the constantly evolving world of communications, staying ahead of the curve is crucial to remaining competitive. The Womble Carlyle Telecommunications, Cable & Broadcast Group provides innovative solutions for all of your telecommunications, cable and broadcast needs. Our team constantly updates its knowledge of both legal and technological changes in these fields in order to provide you with a full, complete range of services.

Our Group is quick, smart, and strategic. Our goal for every client is to provide customized counseling and assistance as efficiently as possible. We will share your vision for success and eliminate roadblocks that can hinder your growth and drain your time away from your core business.

We offer a complete range of services in this field covering each aspect of your communications business -- transactions, licensing, regulatory compliance, policy advocacy, and litigation -- focusing on the following areas:


- [Telecommunications](#)
- [Radio and Television](#)
- [Cable](#)
- [Privacy](#)

We serve clients ranging from well-established international telecommunications corporations to emerging entrepreneurs. Our clients include telecommunications carriers, wireless service providers, Voice over Internet Protocol service providers, cable companies; radio and television broadcasters, equipment manufacturers, and Internet Service Providers. We also assist large users of communications services with their procurement needs, as well as venture capital firms, investment banks and other investors in the telecommunications industry.

- **Telecommunications, Cable And Broadcast**
Telecommunications, Cable And Broadcast
Lawyers and Professionals
Telecommunications Memos
Device Compliance and Certification
Radio And Television
Cable Television/Broadband
International Telecommunications
Fixed and Mobile Wireless Services
Unlicensed Spectrum/Spectrum Allocations
Real Estate Telecommunications Services
Carolina Communications Forum

TELECOMM MEMOS

Read about our work in Broadcast, Radio, Cable, Television, and more.



RBR-TVBR.com
VOICE OF THE BROADCASTING INDUSTRY
Group Skull's weekly column - [click here](#)

RECENT CLIENT ALERTS

- [FCC Rejects Applicants' Attempts to Modify Funding Requests Months After Funding Window Had Closed \(8/11/10\)](#)
- [FY 2010 Regulatory Fees due by August 31 \(8/2/10\)](#)
- [EEO Program Annual Reports Due September 30, 2010 \(8/2/10\)](#)

www.wcsr.com/political


Political Law Practice | Womble Carlyle Sandridge & Rice - Windows Internet Explorer provided by Womble Carlyle Sandridge & Ric

http://www.wcsr.com/teams/political-law-practice


File Edit View Favorites Tools Help

★ Favorites Political Law Practice | Womble Carlyle Sandridge & Rice

PROFESSIONAL SEARCH || SITE SEARCH || SITE MAP



**WOMBLE
CARLYLE
INNOVATORS AT LAW**



We encourage our lawyers to contribute time and energy to **pro bono** projects.

HOME || FIRM || PROFESSIONALS || PRACTICE TEAMS || LOCATIONS || NEWS & EVENTS || CAREERS || CONTACT

POLITICAL LAW PRACTICE

Political Law Team

- [Political Law Practice - Brochure](#)
- [Key Issues for Corporations and Their Executives: Election, Lobbying and Gift Laws](#)
- [Political Broadcast Manual](#)


Womble Carlyle's political law practice guides clients through the complex and fast-changing law that governs political activity at the federal, state, and local levels. Our attorneys have extensive experience in the political arena, and include two former Governors, the two top law enforcement officials from the Federal Election Commission, and a former corporate lobbyist and PAC treasurer for a public company and a national trade association. We represent corporations, trade associations, 527 and other tax-exempt organizations, broadcast/mass media organizations, professional partnerships, candidates (incumbents and challengers), candidate committees (including Leadership PACs), and individuals. Our services include:

- Counseling on corporate and PAC compliance, including audits, development of internal compliance programs, and internal investigations
- Providing representation in connection with investigations by campaign finance regulators, ethics committees, and criminal prosecutors

- **Political Law Practice**
Political Law Practice Lawyers and Professionals

Citizens United v. FEC


Click here to read our Supreme Court Brief.



Political GPS Blog

Your Quick Route Through Law & Politics

Click Here to Access



ARTICLES & CLIENT ALERTS

- [SEC Adopts Pay-To-Play Rule for Investment Advisers](#)
- [Corporations Free to Engage in Election Spending, Says U.S. Supreme Court](#)
- [State & Local Government Contractors Beware: Political Contributions Can Put Your Business At Risk](#)

WHERE TO CALL

Gregg Skall
MBA Washington Counsel
202-857-4441
gskall@wcsr.com
1-877-4 FCC LAW
www.wcsr.com/telecom
www.wcsr.com/political

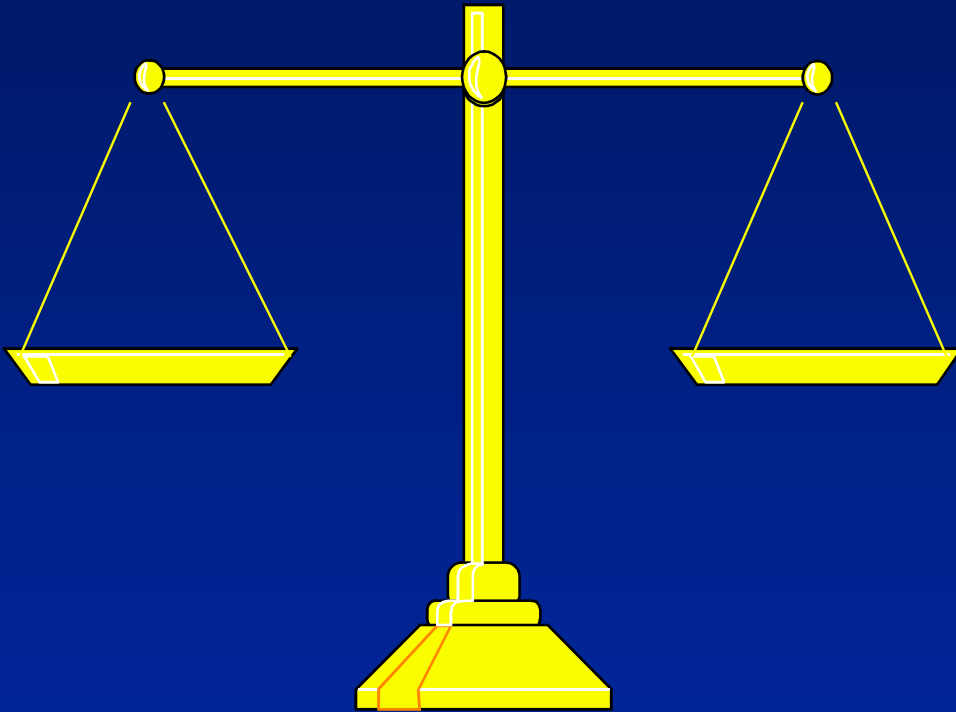


Bobby Baker
Hope Cooper —
FCC Political Programming Branch
202-418-1440
robert.baker@fcc.gov
hope.cooper@fcc.gov
www.fcc.gov/policy/political

NAB Legal Department
(NAB Member Stations Only)
202-429-5430

TIME FOR YOUR QUESTIONS





Gregg P. Skall

Womble Carlyle Sandridge & Rice LLC

Washington, D.C.

(202) 857-4441 • gskall@wcsr.com

