

# 2022 Political Programming Webinar



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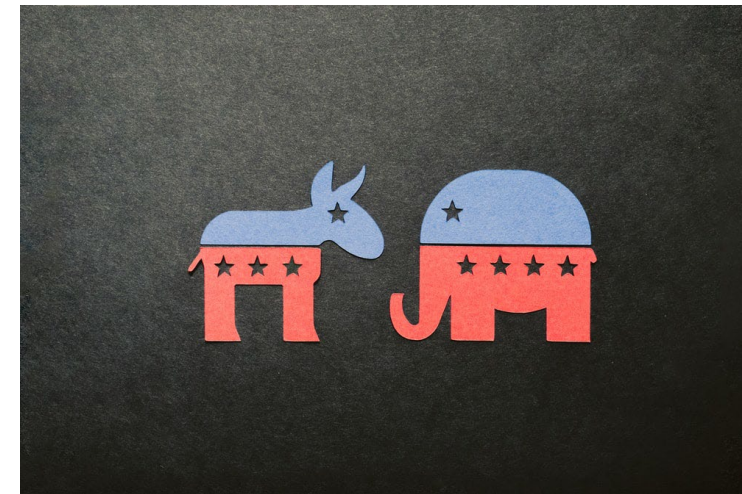
**Tim Nelson, Patrick Cross &  
Stephen Hartzell**

**Brooks, Pierce, McLendon,  
Humphrey & Leonard, LLP**


**January 19, 2022**

# Overview


- ▶ Political File Recordkeeping
- ▶ Candidate Ads
- ▶ Third-Party and Issue Ads
- ▶ Sponsorship Identification
- ▶ Digital Political Advertising




# Political Recordkeeping

 Federal Communications Commission

Licensing & Databases  
PUBLIC INSPECTION FILES


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TV STATION PROFILE 



**W** **-TV** ANYTOWN, USA

Virtual Channel **4** RF Channel **20** Facility ID **00000**

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**Political Files**

Some of the files found in these folders may contain terms, abbreviations or other language that require explanation for a full understanding of the documents. If so, these explanations should be found in the *Terms and Disclosures* folder.



**Browse → Political Files →**

# 3 “Buckets” of Political Ads

- ▶ Candidate Ads
- ▶ Third-Party Election Ads
  - ▶ Look like candidate ads (“look-alikes”)
  - ▶ Support or oppose a candidate
- ▶ “True” Issue Ads
  - ▶ Focus on issues rather than elections



# Political File Records - The Basics

- ▶ Online public inspection files
- ▶ All stations must retain political file records in online public file for 2 years
- ▶ Use current forms (e.g., NAB PB-19 form)
- ▶ Ensure records are complete and accurate
- ▶ Ensure records are **timely** uploaded
  - ▶ “Immediately, absent unusual circumstances”
  - ▶ Date/Time Stamp
  - ▶ Consent Decree at Renewal Time



# Political File Records - Types of Ads

- ▶ Licensees must upload documentation/records to online political files for requests to purchase broadcast time that:
  - ▶ Are made by or on behalf of a legally qualified candidate; and/or
  - ▶ Communicate a message relating to “any political matter of national importance”



# Political File Records - Types of Ads

- ▶ Communicate a message relating to “any political matter of national importance”
  - ▶ Federal candidate; federal election
  - ▶ National legislative issue of public importance (i.e., an issue that is the subject of federal legislation that has been introduced and is pending in Congress)
  - ▶ A political issue that is subject of controversy/discussion at national level - even if no pending federal legislation (e.g., gun control)

# Political File Records - What's Needed: Candidate Ads & Federal "Issue" Ads

- ▶ Documentation of all requests for time (candidate and federal issue ads)
- ▶ Whether request is accepted or rejected
- ▶ The rate charged
- ▶ The date(s)/time(s) when the ad aired
- ▶ The "class of time" that is purchased
  - ▶ Fixed, preemptible with notice, preemptible without notice, ROS, etc.
  - ▶ Morning drive, evening drive, midday, ROS, etc.
- ▶ NAB's PB-19 \*not\* mandatory, but designed for compliance!



# What Is a “Request for Time” that Triggers Political File Record Keeping Obligations?

The FCC has stated that stations

“are required to place in their political files any final orders by candidates for specific schedules of time or availabilities within a specific schedule of time - in other words, orders to buy particular schedules (including programs or dayparts), amounts of time (including spot or program lengths), and classes of time for particular days (such as preemptible spots, Monday-Friday rotations, runs of schedule or specific placements). Licensees are not required to place in their political files general requests by candidates for advertising time stations have available to purchase, or rates for a general array of time.”

# Political File Records - What's Needed: Candidate Ads

- ▶ If candidate ad:
  - ▶ Name of candidate
  - ▶ Office to which seeking election
  - ▶ Type of election (primary, general, special)
  - ▶ Name of authorized committee making the buy
  - ▶ Name of Treasurer of committee placing the buy
  - ▶ **Discussion Warranted:** Authorization letter if not “official” campaign committee

# Political File Records - What's Needed: Federal "Issue" Ad

- ▶ BCRA of 2002: Two score and zero years ago . . .
- ▶ **ALL** "political matters of national importance":
  - ▶ Federal candidate; federal election
  - ▶ National legislative issue of public importance
  - ▶ A political issue that is subject of controversy/discussion at national level
- ▶ Name of person/entity purchasing the time; contact information; list of chief executive officers or members of executive committee or board of directors of such person/entity

# Political File Records - What's Needed: FCC Rule 73.1212 for ALL “Issue” Ads

- ▶ NOT only federal issue spots
- ▶ List of chief executive officers/members of executive committee/board of directors requirement
  - ▶ Applies to programming discussing all “controversial issues of public importance”
  - ▶ Given incomplete or “thin” (one name) list?
  - ▶ “Single Inquiry” Policy - inform advertiser of who must be disclosed and ask advertiser to provide the info (and keep a record of your effort)

# A.C.R.O.N.Y.M.S. for P.F.R. (Political File Records)

- ▶ FCC found that “DSCC-IE” was insufficient identification of advertiser
- ▶ Held DSCC-IE was not “a commonly recognized acronym” for Democratic Senatorial Campaign Committee
- ▶ Identify all political advertisers by full name
  - ▶ Maybe even if the name has changed (e.g., “AARP” is legal name; historically known as “American Association of Retired Persons”)
- ▶ FCC says it will apply standard of “reasonableness and good faith decision-making”



# Political Disclosure Statement

Explain and/or describe:

- ▶ Each class of time
- ▶ LUC for each class
- ▶ Method of selling preemptible time
- ▶ Approximation of the likelihood of preemption
- ▶ Make-good policy
- ▶ Sales practices which affect rates
- ▶ Rotations
- ▶ Discount and value-added packages



# Consent Decrees for Record Keeping Failures

Before the Federal Communications Commission Washington, D.C. 20554	
In the Matter of Online Political Files of	) File No.: POL-[REDACTED]
[REDACTED]	) FRN: [REDACTED]
	)
Licensee of Commercial Radio Station(s)	)

**CONSENT DECREE**

1. The Media Bureau of the Federal Communications Commission and [REDACTED] LLC (hereafter "Company," as defined below), by their authorized representatives, hereby enter into this Consent Decree for the purpose of terminating the Media Bureau's investigation into the Company's compliance with section 315(e)(3) of the Communications Act of 1934, as amended,<sup>13</sup> and section 73.1943(c) of the Commission's rules,<sup>14</sup> relating to the maintenance of online political files. To resolve this matter, the Company agrees to implement a comprehensive Compliance Plan to ensure its future compliance with section 315(e)(3) and section 73.1943(c).

# Candidate Ads



# Candidate Ads - Obligations

- ▶ **Equal Opportunities** - All opposing legally qualified candidates entitled to equal opportunities to air equivalent programming (paid spots or free)
- ▶ **Lowest Unit Charge** - All legally qualified candidates entitled to lowest commercial rate during LUC/LUR windows
- ▶ **Reasonable Access** - Federal candidate ads generally may not be refused
- ▶ **No Censorship** of candidate ads
- ▶ **Sponsorship Identification** - Public must know who paid for the candidate spot (“paid for by” or “sponsored by”)

# Candidate “Uses”

- ▶ A “use” by a legally qualified candidate triggers:
  - ▶ Equal Opportunities (any time)
  - ▶ Lowest Unit Charge (during an LUC/LUR window)
  - ▶ No Censorship (any time)



# What is a “Use”?

- ▶ Positive appearance on the air by a legally qualified candidate
- ▶ Candidate’s voice or picture is identified or “readily identifiable”
- ▶ Not disparaging or negative
- ▶ Does not have to promote candidacy (careful with on-air talent!)

# Candidate Ads - Equal Opportunities

- ▶ A “use” by a candidate triggers equal opportunities
- ▶ Opposing candidates are entitled to avail themselves of the same amount of time and class of time for the same rate
  - ▶ Applies to opposing candidates in each relevant election (primary and general)
  - ▶ Covers time, use of production facilities, extension of credit, etc.
  - ▶ Request must be made within 7 days
  - ▶ No obligation to notify opponent of the “use” other than the placement of documentation in the online political file

# Candidate Ads - Equal Opportunities

- ▶ Exempt appearances - bona fide newscasts, news interview programs, documentaries, on-the-spot coverage of news events
- ▶ Candidate debates often exempt—must be appropriately structured and sponsored



# Equal Opportunities Example: Free and Political File Record

Sen. Bernie Sanders, a candidate for the Democratic nomination for President in the 2016 national election, appeared without charge on NBC's "Saturday Night Live" for a total period of 02:37 (2 minutes and 37 seconds) commencing at 11:58:09 PM ET on February 6 and ending at 01:01:00 AM ET on February 7, 2016. Station [REDACTED], is affiliated with the NBC Television Network and broadcast the February 6 episode of "Saturday Night Live," including the segments in which Sen. Sanders appeared.

# Important LUC Dates

- ▶ Primary Election: May 3, 2022
- ▶ Primary LUC Window Opens: March 19, 2022
- ▶ General Election: November 8, 2022
- ▶ General Election LUC Window Opens September 9, 2022





# Candidate Ads - Lowest Unit Charge

- ▶ The lowest commercial rate for the same class, time period, and amount of time (multiple LUCs)
- ▶ In a nutshell, the most favorable “quantity” discount
- ▶ Applies during defined windows
  - ▶ 45 days before a primary election
  - ▶ 60 days before a general or special election



# Candidate Ads - Lowest Unit Charge

- ▶ LUC applies to each class, amount, and time period, such as:
  - ▶ Preemptible vs. Fixed
  - ▶ AM drive vs. midday
  - ▶ Primetime vs. Overnight
  - ▶ PM drive vs. ROS
  - ▶ :60 vs. :30
- ▶ Check your rate cards and update weekly



# Candidate Ads - Lowest Unit Charge

- ▶ Applies only to “uses” that also:
  - ▶ Are purchased by the candidate’s campaign committee (or a political party committee that has been authorized in writing by the candidate)
  - ▶ Promote the candidate’s election, or defeat of the candidate’s opponent

# Candidate Ads - Lowest Unit Charge

- ▶ LUC does not apply to third-party spots
  - ▶ SuperPAC spots - No!
  - ▶ Not even if the third-party spot is deemed a “use” for equal opportunities purposes
  - ▶ Beware: many ads “look like” candidate spots, but they aren’t! Check sponsorship ID!

# Candidate Ads - Lowest Unit Charge

- ▶ Tricky situation: LUC and Political Party Ads
  - ▶ Is the party an authorized agent of the candidate for purposes of the advertisement?
  - ▶ Is it otherwise a “use”?
- ▶ Get documentation from agent/candidate authorizing ad buy on behalf of candidate



# Candidate Ads - Lowest Unit Charge

- ▶ How to calculate Lowest Unit Charge



- ▶ Best quantity discount and privileges
- ▶ Must assign value to all package spots
- ▶ Contemporaneously prepare written memorandum of value
- ▶ Beware of free spots (especially via contests/promotions)
- ▶ Detailed accountings and disclosures

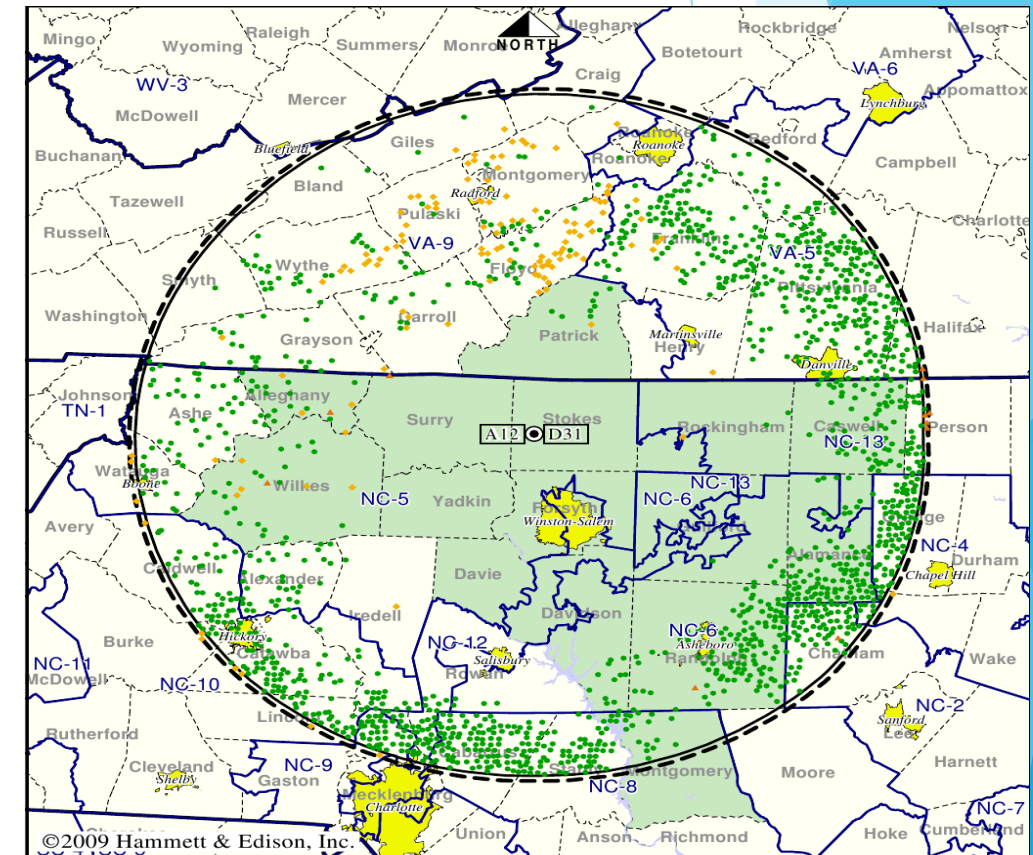
# Candidate Ads - Reasonable Access

- ▶ Federal candidates have a legal right to your inventory if they are “legally qualified”
  - ▶ Publicly announced
  - ▶ Qualified to be on the ballot
  - ▶ Qualified to hold office if elected



# Noise Limited Service Contour

- ▶ “Reasonable access” applies to a candidate if part of his or her district falls within the station’s service area



# Candidate Ads - Reasonable Access

- ▶ Reasonable access only applies to federal candidates
- ▶ Must still treat state and local candidates fairly
- ▶ Sell to one state race, must sell to all candidates in that race

# Candidate Ads - Reasonable Access

- ▶ Federal candidates may demand spot lengths not offered by station (e.g., long-form 30-minute slots, prime time spots)
- ▶ Reasonable access ≠ entitlement to particular program
- ▶ Be prepared to ~~deny~~ deflect and re-focus
- ▶ Denials must be well-reasoned:
  - ▶ Needs of candidate
  - ▶ Potential for program disruption
  - ▶ Amount of time previously provided
  - ▶ Impact on “equal opportunities” obligations
  - ▶ Amount of notice given by candidate

# Candidate Ads - No Censorship

- ▶ Stations may not censor candidate ads unless legally “obscene” or “indecent”
- ▶ Immunity - station is not liable for content of the spot, except for FCC sponsorship tags
- ▶ If simulcasting online - be careful!



# Third-Party Election Ads & Issue Ads



# Third-Party Election Ads & True Issue Ads

- ▶ **Third-party election ads**
  - ▶ SuperPACs
  - ▶ 501(c)(4) organizations
  - ▶ 527 organizations
  - ▶ Ad generally supports or opposes a candidate
- ▶ **True Issue Ads**
  - ▶ Controversial issues of public importance
  - ▶ May or may not reference candidates

# Third-Party Election Ads & True Issue Ads

- ▶ Not entitled to LUC
- ▶ Stations may be liable for content (defamation, invasion of privacy, infringement on intellectual property)
- ▶ Stations must maintain list in public file of executive officers or board members of the sponsoring entity (NAB form solicits this info)

# Sponsorship Identification



# Sponsorship Identification

- ▶ Station's responsibility: **ALL POLITICAL ADS MUST HAVE SPONSORSHIP ID**
- ▶ Applies to all spots, including issue and third-party election ads
- ▶ “Paid for” - spot must identify that it was sponsored, paid for, or furnished, and the name of the person/entity who paid for it
- ▶ TV: 4% and 4 seconds

# Sponsorship Identification

- ▶ Sponsor must be clearly identified as person or organization (not “People Who Care About America”)
- ▶ Must disclose the “true identity” of the sponsor



# “Stand By Your Ad”

- ▶ Applies to federal candidates
- ▶ Candidates must give station written certification that they will comply with special sponsorship rules if ad refers to opponents
- ▶ No “entitlement” to LUC if doesn’t comply - consult counsel

# “Stand By Your Ad”

- ▶ For radio: must include a statement by the federal candidate that identifies the candidate, office sought, and indicates that the candidate approved the ad
- ▶ For TV: must include a statement for 4 seconds at the end of the ad that includes: (1) image of the federal candidate; and (2) printed statement identifying the candidate and stating that the candidate approved the ad

# Digital Political Advertising

- ▶ What platforms are you selling? Where will the ad run?
- ▶ In the digital space, FCC rules do not apply
- ▶ No blanket immunity for candidate ads
- ▶ And election laws and other rules do apply

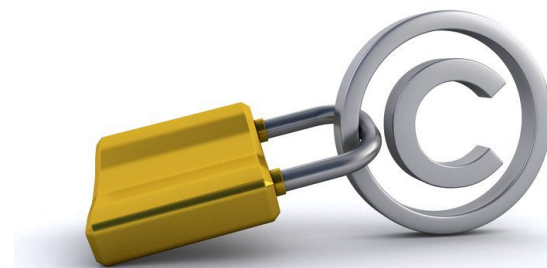
# Digital Political Ads - Protection from Defamation Claims

(Section 230, Communications Decency Act of 1996)

- ▶ Immunity for ads “created or developed” by a third party
- ▶ Immunity applies if advertiser intends for ad to run online - keep the documentation
- ▶ No immunity for ads produced by station
  - ▶ Risk: may lose immunity if station is producing, editing, or otherwise involved in creative for an online ad

# Digital Political Ads - Protection from Copyright Claims

- ▶ Registered DMCA agent for all URLs; include in website terms and conditions
- ▶ Must not allow any content the station knows or has reason to know is infringing
- ▶ Must respond to “take down” notice from copyright owner
- ▶ Repeat infringer policy
- ▶ Consult counsel



# No Protection from Trademark and Right of Publicity Claims

- ▶ False endorsement claims
- ▶ Right of publicity claims
- ▶ Trademark infringement claims
- ▶ Complaints increasing
- ▶ Report problems to counsel immediately
- ▶ Use common sense - Morgan Freeman narrating for GOP Congressional challenger?



# Election Laws Online

- ▶ Charge candidate the “normal and usual” commercial rate - no LUC
- ▶ Charge opposing candidates equal rates for similar buys
- ▶ Laws prohibit corporate “contributions” to candidates or parties - avoid discounted spots and unequal treatment

# Sponsorship ID Online

- ▶ No FCC sponsorship requirement
- ▶ **BUT**, FEC sponsorship requirement imposed on advertisers
  - ▶ Applies to candidate and third-party ads that support/oppose a candidate
  - ▶ Ads that refer to a candidate within 30/60 days from primary/general election
- ▶ Plus, it's a best practice for transparency

# Digital Ads - What To Do?

- ▶ Treat opposing candidates equally
- ▶ Be vigilant for possible infringements and violations
- ▶ Report complaints quickly
- ▶ Be sure ad is intended for Internet
- ▶ Consider policies and procedures for digital sales and package buys
- ▶ Consult counsel

# Contact Information

Tim Nelson, Patrick Cross, and Stephen Hartzell

[tnelson@brookspierce.com](mailto:tnelson@brookspierce.com)  
[pcross@brookspierce.com](mailto:pcross@brookspierce.com)  
[shartzell@brookspierce.com](mailto:shartzell@brookspierce.com)

Brooks, Pierce, McLendon,  
Humphrey & Leonard, LLP  
150 Fayetteville Street, Ste. 1700,  
Raleigh, NC 27601  
P.O. Box 1800, Raleigh, NC 27602  
(919) 839-0300  
[www.brookspierce.com](http://www.brookspierce.com)

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