April 3, 2015

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC  20554

Re:  Notice of Ex Parte communication in petition of Canal Partners Media, LLC
for a declaratory ruling stating that stations’ use of the Last-In-First-Out method
to preempt political candidates’ advertisements in favor of commercial
advertisers’ spots violates Sec. 315(b) of the Communications Act, MB Docket
No. 15-24

Dear Ms. Dortch:

In compliance with Sec. 1.1206(b) of the Commission’s rules, please accept this ex parte
notice relating to the above-referenced proceeding.

I am CEO of Canal Partners Media, LLC (“CPM”), a political media-buying firm. CPM
filed the request for declaratory ruling in this proceeding, as well as comments and reply
comments. On April 1, 2015, I met with representatives of the FCC listed in Attachment 1 to
discuss issues associated with this request.

I began with our overall concern that the effect of LIFO, whether intended or not, is to
steer candidates to higher-priced classes of time. This steering, and the inordinate effect on rates
charged a political candidate, the most-favored advertiser, is the primary reason for the petition.

I then addressed a common argument made by broadcasters – that the petition seeks to
obliterate the distinctions between classes, and pointed to Section 3 of our Reply Comments. At
best, this contention by broadcasters is a red herring; in reality, these repetitive arguments are a
deliberate and cynical attempt to mislead. To be clear, the petition only seeks to address LIFO
within class of time.

**LIFO is a preemption priority – not a class or category of time**

I then noted that of all the arguments presented by all parties, the most telling is
contained in the *ex parte* notice of the National Association of Broadcasters (“NAB”), filed
subsequent to its March 23, 2015, meeting: “Finally, NAB explained that, by granting the
Petition, the Media Bureau would effectively be eliminating the LIFO *category of time.*”

LIFO is not a category or class of time. Rather, LIFO is a means by which stations claim to

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1 CPM Reply Comments at 5.
2 Id. at fns. 12 and 13.
3 Notice of Ex Parte Communication, MB Docket No. 15-24, National Association of Broadcasters, March 25, 2015,
page 2 (emphasis added) (included in Handout A).
determine which spots to preempt within a class of time. When used to preempt, or not preempt, a spot, LIFO is a priority against preemption. The Commission determined 25 years ago that preemption priorities should inure to the benefit of candidates when it held, over broadcaster objections:

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 practices 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.4

In short, I reiterated that LIFO is not a category, it is not a class; rather it is a preemption priority.

**LIFO widespread? Where’s the disclosure?**

Next, I expressed bewilderment at the broadcasters’ characterization of how widespread LIFO is used to determine preemption priorities. NAB has determined that a “large number of television stations use LIFO....”5 Media General, which owns and operates 71 stations characterizes LIFO as “commonly used.” FBC Television Affiliates (Fox) repeated the phrase “commonly used.” NBC Network Affiliates references the “widely-used LIFO preemption system.” The Oregon Association of Broadcasters maintains that “most broadcasters” prefer the LIFO model.6

NAB7 and Gray8 agree with CPM that the LIFO preemption priority must be disclosed to candidates. To sum up, LIFO is widely and commonly used by a large number of stations. Its use must be disclosed under Commission rules. And yet, disclosure is rare. As pointed out in our Reply Comments, CPM reviewed written disclosures from 169 stations in 55 markets for 2014. Only 7 disclosed use of LIFO in their initial written disclosures.9

**Importance of disclosure**

In light of the general agreement on the requirement of disclosure, and the apparent lack of disclosure of LIFO, I thought it was important to discuss the significance of disclosure.

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5 NAB Comments at 8, included in Handout B.
6 Comments of Media General, Fox Broadcasting, NBC Affiliates and Oregon Broadcasters are included in Handout B.
7 NAB Comments at 18.
8 Gray Reply Comments at 2.
9 CPM Reply Comments at 4 (citing Mills Declaration at par. 6). The Mills Declaration is included as Handout C. Interestingly, 5 of the 7 stations were owned or operated by Gray.
Disclosure of LIFO as a preemption priority alerts candidates to the need to buy early. If nothing else, the Commission should review the lack of disclosure on the part of broadcasters, perhaps through an audit, at least of stations claiming to use LIFO. In her declaration, Amy Mills described how reluctant stations are to explain preemption practices. With most broadcasters, it takes persistent questioning, often resulting in delayed and conflicting answers. Disclosure should be clear and complete. The burden should not be on candidates to drag this information out of licensees.10

I did speculate as to why disclosure of LIFO is rare, and why it is so difficult to drag information regarding sales practices, including preemption priorities, out of stations. In normal times, there are a number of sales personnel, traffic managers, and other station employees involved in placing spots, and determining which spots should be preempted. The stations are bound to make an exception, even if in error, to a LIFO preemption policy. During the political season, with billions being spent, often in the form of premium rates from independent, non-candidate advertisers, sales and traffic become much tougher, and much more chaotic. And, with all the money at stake, the temptation to make exceptions to LIFO is even greater.

Given these realities, it is no wonder that very few stations disclose the use of LIFO. It is also clear as to why stations are reluctant to offer specifics as to sales and preemption practices, and why it takes persistent questioning to learn what we are able to learn.11 As part of this process of obtaining more disclosure about station practices, it is virtually impossible to get a representation (over the phone or in writing) that there has not been an exception (within the past year), to the application of the LIFO preemption priorities.12 I noted that its one thing for a

10 “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 disclosure not only were underscored in the comments but were also made clear in the Commission's 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 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.” Codification of the Commission's Political Programming Policies, 7 FCC Rcd. 678, 688 (1991).

11 Mills Declaration at pars. 11 and 13, Handout C.

12 It is important to note that one station was pretty straightforward in acknowledging exceptions to LIFO. WAFB out of Baton Rouge applies LIFO with equitable considerations. One of these considerations seems to be that the station does not want to preempt any one advertiser too much. While such exceptions may make good business practices, candidates should receive the benefit of such equitable considerations for each spot purchased. CPM Comments at 4. Mills declaration at par. 12, Handout C.
station to play fast and loose with a policy such as LIFO and dodge giving straight answers to questions; it is an entirely different matter for a station to make overtly false representations as to those practices.

**Practical and legal reasons render LIFO inherently discriminatory as applied toward candidates**

I reiterated how candidates typically make decisions late in campaigns, meaning they are late for the LIFO preemption priority pecking order. Even without the reality of late decision-making, I noted that candidates do not become legally-qualified under FCC rules and regulations until late in the process. Moreover, campaign finance laws place constraints as to when a candidate can place time.

I pointed out that in many jurisdictions, qualifying for a primary does not take place until well into the election year, depending on the date of the primary. Already, the candidate is late in line for the LIFO preemption priority, just for the primary. The candidate is not legally-qualified for the general election until the conclusion of the primary, pushing the candidate to the back of the LIFO preemption priority line for the busiest time of the year. If there is a runoff, the candidate is late for the runoff and even later for the general, since the candidate cannot get in the general LIFO preemption priority line until after the runoff.

I mentioned that broadcasters went to great lengths to assert that candidates can place early, and do not have to pay until a week in advance. This payment policy only applies to federal candidates; non-federal candidates can be required to pay before an order is accepted (meaning they have to pay in order to get into the LIFO line). More importantly, political broadcasting rules (reasonable access, equal opportunity and lowest unit charge) only apply to legally-qualified candidates. While it may be noble for broadcasters to offer to accept orders early, stations are under no obligation, and candidates have no protection, until they are legally qualified.

General election runoffs can be even more troubling. The Mills declaration points to an instance where a station serving Georgia would not provide rates for a possible general election runoff until it was determined that there was a runoff. There was no runoff in Georgia, but there was in Louisiana, and candidates were late to the LIFO line. And even if stations will

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13 CPM Comments at 8.
14 CPM Reply Comments at 8-10, emphasizing that when one party has a runoff and the other does not, as was the case in Georgia in 2014, one candidate (in this case the Democrat) gets in the LIFO preemption priority line nine weeks before the Republican could get into the LIFO preemption priority line.
15 Mills declaration at par. 6, handout C. In this case, a station was actually refusing our request to get into the LIFO preemption priority line, wanting to determine if there was actually a runoff.
accept orders before a runoff or general election, there are legal restrictions on a candidate’s ability to commit funds.\textsuperscript{16}

I mentioned that, in the context of the advance-payment policy, some broadcasters suggested candidates can cancel a week out, limiting the risk to placing early. And yet, disclosures and standard contracts provide for longer cancellation periods, often two weeks. Furthermore, broadcasters do not always disclose the one-week payment rule. While CPM and other agencies are aware of this rule, the burden is on the broadcasters to completely disclose. In at least one case, a broadcaster provided a misleading disclosure. In reviewing the reply comments by the Oregon Association of Broadcasters (“OAB”), I noted that we had failed to review several stations we had purchased earlier in the year. KPTV/KPDX, a signatory to the OAB Reply Comments, disclosed a quasi-LIFO policy: “When pre-empting an advertiser due to a higher rate advertiser, the determining factor will be the date the contract was purchased by the candidate (first in last out), and the contractual end date.” This policy would seem to suggest LIFO, but would also allow an advertiser to increase its rate, stay within class, and avoid the effects of LIFO. Also, KPTV/KPDX look at contractual end date, presumably running an advertiser at the end of the schedule, regardless of when the order was placed (this practice is fairly common among stations).

The more noteworthy item from the KPTV/KPDX disclosure is this provision:

\textit{All political time and production services must either be paid in cash or certified check, or must have credit approved prior to schedule being cleared. Schedules will not be placed in system until payment arrangements have been finalized, with credit approved or payment in hand.}

Emphasis added. Actual paragraph in red (rest of disclosure in black). According to this disclosure, a candidate (federal or non-federal) cannot get in the LIFO preemption priority line until the order is funded. Although KPTV/KPDX contain exceptions to LIFO, this pre-payment policy for federal candidates should give the NAB pause in its reliance on the one-week policy, and give the Commission yet another reason to audit disclosures of broadcasters.

**Does disclosure provide a path to a solution?**

I again emphasized that LIFO is a preemption priority, not a class or category of time. Candidates buy late for a number of reasons. The nature of campaigns is just one reason. The more troubling issue, as mentioned earlier, is that candidates are not in control of when they become legally-qualified under relevant statutes and rules. They qualify pursuant to state or local law. For these reasons, the Commission should grant our request for a declaratory ruling that use of the LIFO method to preempt political candidates in favor of commercial advertisers’

\textsuperscript{16} CPM Reply Comments at fns. 20, 21.
spots violates Sec. 315(b) of the Communications Act. If the LIFO preemption priority is used, candidates must be treated as though they are the first in.

Short of granting the petition, I raised the question of whether full, complete and accurate disclosure would accomplish the same thing. Disclosure, combined with the fact that LIFO must be applied without exception, is certainly better than the current use of LIFO. A suggested disclosure is contained in the Mills Declaration.\(^{17}\) In order to get to this solution, however, the Commission must figure out how to get around the clear language of the 1991 *Report and Order*, which concluded that the most-favored advertiser standard applies to a number of factors, including preemption priorities.\(^{18}\) I indicated that I do not see a way around that language. Perhaps the aforementioned-audit of disclosure of LIFO, and maybe even an audit of the application of LIFO and any exceptions associated with said application, could provide insight as to whether disclosure would provide a solution.

I concluded by reiterating the following:

- LIFO is a preemption priority, and candidates should receive the benefit of that priority;
- Though its use is widespread, LIFO is rarely disclosed, in violation of commission rules; and
- The timing of primary qualifying, the timing and uncertainty of becoming a legally-qualified candidate for a runoff or general election, and campaign finance laws all combine to make the application of LIFO to candidates inherently unfair, and contrary to the most-favored advertiser standard.

Respectfully submitted,

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\(^{17}\) Mills Declaration at par. 16, Handout C. CPM Reply Comments fn. 11.  
Attachment 1

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Robert Baker, Assistant Chief, Policy Division, Political Programming Unit, Media Bureau
Gary Schonman, Attorney, Policy Division, Political Programming Unit, Media Bureau
Handout A

NAB on LIFO category

Finally, NAB explained that, by granting the Petition, the Media Bureau would effectively be eliminating the LIFO category of time, which is very inexpensive option for political candidates (and all other advertisers).


1991 Report and Order, par. 63: preemption priorities within class

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 practices 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 the 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 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 that directive that candidates be charged no more than the station’s most-favored advertiser for the “same class” of time.

Handout B

NAB – LIFO widespread

Other stations may use different systems, but discussions with NAB members reveal that a large number of television stations use LIFO, rather than a more subjective method, in at least some classes to decide which spots – both commercial and candidate – to preempt.

NAB Comments at 8.

Media General – commonly used LIFO

Contrary to the statutory and regulatory requirement of parity between political and commercial advertisers, Canal Partners asks the Commission to declare it illegal for broadcasters to apply the commonly used LIFO method of preemption when dealing with advertising purchases by political candidates.

Media General Reply Comments at 2.

Fox Broadcasting – commonly used LIFO

Canal Partners Media, LLC (“Canal”) has asked the Commission to declare that it is illegal for broadcasters to apply the commonly-used Last-In-First-Out or “LIFO” method of preemption when dealing with advertising buys from political candidates.

Reply Comments of the FBC Television Affiliates Association at 1.

NBC Affiliates – widely-used LIFO

The NBC Affiliates agree with NAB that the widely-used LIFO preemption system satisfies the lowest-unit-charge requirement by offering political candidates exactly the same rates, tied to exactly the same preemption risks, as other advertisers.

Reply Comments of The NBC Television Affiliates at 3.

Oregon Broadcasters – most broadcasters prefer LIFO

While there are many systems for doing so, including “mini-auctions,” most broadcasters prefer the LIFO model because it is the simplest and most predictable. Advertisers also benefit, because they can more easily predict whether they will be preempted based on how far in advance they buy their spots.

Reply Comments of Oregon Association of Broadcasters at 4.
Handout C

Declaration of Amy Mills

Amy Mills declares as follows:

1. My name is Amy Mills. I am over 18 years of age, competent to testify to the matters contained in this declaration, and make this declaration based upon my personal knowledge.

2. I am employed as Senior Media Strategist by Canal Partners Media, LLC (CPM), a firm that specializes in political-media buying. CPM is the successor in interest to LUC Media Group, Inc. I have been employed by CPM or its predecessor since 1998. Before working for CPM and LUC, I worked in sales with several broadcast stations in Atlanta.

3. I have placed time in markets throughout the country since 1998.

4. At the beginning of every campaign, CPM requests that stations provide us with their rates and written disclosures of their sales practices. We review the disclosures very carefully, and pay particular attention to classes of time and preemption practices.

5. I understand that the National Association of Broadcasters (the NAB) has told the Commission that a large number of stations use LIFO to determine preemption priorities and apply it to preempt political candidates' advertisements in favor of commercial advertisers' spots.


7. In order to prepare this affidavit, we reviewed 169 of the written disclosures that were provided to CPM for the 2014 election cycle. This represents a large number of the stations that provided us with their written disclosures. The 169 written disclosures covered 55 media markets. Of the 169 written disclosures, only 7 mentioned that the
station would be using the Last-In-First-Out or LIFO method to determine preemption priorities within a particular class of time.

8. Using Georgia as an example, CPM purchased time for multiple candidates on 33 stations covering seven markets in 2014 (including the Chattanooga and Tallahassee media markets, which broadcast into Georgia). Only one of the stations mentioned in their written disclosures that they would use LIFO to determine preemption priorities within particular classes of time and apply LIFO to preempt political candidates' advertisements in favor of commercial advertisers' spots.

9. Anticipating that there might be one or two state-wide runoff elections after the general election, as Election Day approached, we requested several stations to provide us with their rate cards for the anticipated runoff election. It is my recollection that one station refused to provide us with its rate card for advertising for the runoff election, saying that they would only provide us with their rate card if the election returns dictated that there would be a runoff. This relates to LIFO because a candidate cannot place an order to buy airtime and get in the LIFO line without a rate card telling the candidate how much the airtime will cost.

10. CPM purchased time for one federal candidate in Louisiana on 31 stations in seven markets in 2014. Only one of the 31 stations mentioned in their written disclosures that they would use LIFO to determine preemption priorities within particular classes of time and apply LIFO to preempt political candidates' advertisements in favor of commercial advertisers' spots.

11. Through persistent questioning, we have learned that many stations use LIFO to preempt political candidates' advertisements in favor of commercial advertisers' spots.

12. One station, WAFB-TV in Baton Rouge, Louisiana, did not mention anything regarding the use of LIFO in its written disclosures. In response to persistent questioning about its practices, we were told that WAFB uses LIFO with exception and subject to "equitable considerations" to preempt political candidates' advertisements in favor of commercial advertisers' spots within classes of time. It is my understanding that the station used subjective criteria in making preemption decisions. For example, I understood that WAFB would try to
avoid preempting certain advertisers "too much," regardless of the rate
other advertisers paid or the date other advertisers placed their orders.

13. For all of the stations that either voluntarily disclosed their use of LIFO
or that we were able to ferret out their use of LIFO, the only thing that
was consistent was that there was nothing consistent about their use of
LIFO. Stations' practices were more opaque than transparent. We have
learned that many stations are using LIFO to preempt political
candidates' advertisements in favor of commercial advertisers' spots.

14. If a large number of stations are using LIFO to determine preemption
priorities and apply it to preempt political candidates' spots in favor of
commercial advertisers as the NAB represents—which I believe is true
based on my experience—then the majority of stations doing so are not
disclosing their practices.

15. The following stations are examples of stations that we ascertained used
LIFO during the 2014 election cycle to preempt political candidates' 
adsvertisements in favor of commercial advertisers' spots within a class of
time without mentioning that they would do so in their written
disclosures: WTVM-TV, WALB-TV, WFXG-TV, KARD-TV, KTVE-TV
and KTAL-TV.

16. While I believe it is a violation of the law for stations to use LIFO to
preempt political candidates' advertisements in favor of commercial
advertisers' spots within a particular class of time during the 45- and 60-
day pre-election windows, I believe a proper station disclosure of its use
of LIFO would look like this:

During the lowest-unit-charge period, the preemption
protection provided to any advertiser within a class will be
based on the date on which their ads were placed, with
later-placed ads preempted first. This policy has been in effect
for at least one year before the date of this disclosure. The
station represents that it has applied this policy without any
exceptions (including exceptions when providing make goods)
during the one-year period before the date of this disclosure.
If it is determined that an exception was made, whether
intentionally or by mistake, this policy will no longer be
applied, and candidates will be treated as though their spots
were placed first and will be the last preempted within the
class. If the station deviates from this policy after the date of this disclosure, whether intentionally or by mistake, this policy will no longer apply and candidates will be treated as though their spots were placed first and will be the last preempted within the class.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on March 17, 2015.

Amy Mills