April 28, 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 24, 2015, I met with the representatives of the FCC listed in Attachment 1 to discuss issues associated with this request. This was a joint meeting with representatives of the National Association of Broadcasters (“NAB”), also listed in Attachment 1.

During the meeting, I reiterated and expanded upon the information I provided the Commission on April 1, which was summarized in my April 3, 2015 ex parte notice (“CPM April 3 Notice”). I reminded everyone that CPM filed the petition because the effect of LIFO was to steer candidates toward higher-priced classes of time, and the effect on rates had been exacerbated by the proliferation of independent and issue advertisers, who paid significantly higher rates and drove up demand.

As it did in the written comments it filed with the Commission, the NAB claimed that the petition asked that candidates receive greater benefits than those actually conferred upon the most-favored commercial advertiser. The Commission rejected this argument in its 1991 Report and Order:

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….

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. 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. ¹

In the meeting, the NAB claimed that the 1992 *Reconsideration* limited the clear language of the 1991 *Report and Order*. I would note, however, that the language from the 1992 *Reconsideration* that the NAB claimed authorizes the use of LIFO to preempt political candidates’ advertisements in favor of commercial advertisers actually supports CPM’s petition by making clear that stations cannot discriminate between candidates and commercial advertisers, which is what LIFO does. This is the language from the 1992 *Reconsideration*:

> On our own motion, we clarify that stations remain under a duty to make advertising time available to candidates subject to the same rates, terms and conditions as it is made available to commercial advertisers. *Historically, the Commission has interpreted Section 315(b) of the Act to prohibit stations from discriminating between candidates and commercial advertisers in their sales practices.* Prior to our 1991 *Report and Order*, this prohibition was codified in Section 13.1940 of our rules as follows:

> …All discount privileges otherwise offered by a station to commercial advertisers shall be available *upon equal terms* to all candidates for public office” (emphasis added).

This former rule codified existing policies, still in effect today, that prohibit a station from developing or applying sales practices that discriminate against candidates and in favor of commercial advertisers. These longstanding policies evolved to enforce the original statutory requirement, enacted in 1952 when Congress first addressed the rates charged to political advertisers, that stations could charge candidates no more than they charge commercial advertisers making a comparable use of the station.

¹ *In the Matter of Codification of the Commission’s Political Programming Policies*, 7 FCC Rcd. 678, 689-90 (F.C.C. 1991) (parentheticals in original; emphasis added; footnotes omitted); see also CPM Reply Comments at 12–13.
The Commission’s first regulation interpreting the comparable use provision set forth in Section 315(b) was promulgated in 1963, and required stations to make available to all candidates for public office all discount privileges offered to commercial advertisers. The Commission subsequently held that all discount privileges offered to commercial advertisers must be made available “on the same basis” to candidates. Following the Court’s decision in *Hernstadt v. FCC*, which interpreted Section 315(b) as prohibiting stations from adopting policies that discriminate against candidates, this policy has evolved to require stations to make advertising time available to candidates subject to the same rates, terms and conditions applied to commercial advertisers.²

LIFO may be a facially neutral policy, but it discriminates against political candidates because they are not entitled to get in the LIFO line until they are legally qualified (often in the spring for a primary and well into the summer for a runoff or general election), while commercial advertisers can get in the LIFO line anytime, including January 1 or even the previous year.³ The essence of this section of the Reconsideration is that stations are required to make all rates and privileges available to candidates. Priority against preemption is one such privilege.

A great deal of time was spent addressing the NAB’s characterization of LIFO as a category of time. Though we have repeatedly demonstrated that LIFO is nothing more than a preemption priority, the NAB persists in asserting that LIFO is a category of time. The NAB also claims, without evidence, that some political-media buyers like LIFO. I reiterated that disclosure of LIFO is very rare – just 7 of 169 written disclosures reviewed by CPM mentioned LIFO.⁴ If LIFO is not disclosed, how can the NAB know that political-media buyers as a group prefer LIFO to be used as a preemption priority? CPM certainly does not when it is used to preempt candidates’ spots in favor of those of commercial advertisers.

Moreover, the fact that a buyer may consent to and even prefer that a station utilize an illegal preemption practice (assuming the buyer is aware of the practice), does not make the practice legal. (And what does the NAB think should happen if some candidates and their buyers in a particular election are not of the same mind when it comes to the use of LIFO?) It is well-established that the burden of compliance is on the licensee, not on the buyer.⁵

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² *In the Matter of Codification of the Commission’s Political Programming Policies*, 7 FCC Rcd. 4611, 4614 (F.C.C. 1992) (bold-italics emphasis added; other emphasis in original; parenthetical in original; footnotes omitted).

³ CPM Reply Comments at 3–5.

⁴ *Id.* at 4. Declaration of Amy Mills at par. 7.

⁵ CPM April 3 Notice at n. 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
Finally, the NAB characterized our disclosure argument as an issue of transparency. The pervasive failure to disclose is much more serious; stations are routinely violating 47 C.F.R. Sec. 73.1942(a)(1)(i). Of course, stations are failing to disclose a practice – using LIFO to preempt political candidates’ spots in favor of those from commercial advertisers – that is patently illegal.

I mentioned that disclosure is relevant because we have found that stations’ sales personnel are often unaware of the LIFO preemption priority. It often takes persistent questioning to learn the true nature of stations’ practices. I said the reason they do not disclose the use of LIFO is that a lot of station personnel are unaware of the practice. And if stations’ sales personnel are unaware of the LIFO preemption priority, it is difficult to understand how the policy is administered consistently and without exception.

Regarding the inability of candidates to get in the LIFO line until they become legally qualified under state or local law, the NAB noted that candidates can and do place early. Apparently stations may voluntarily let candidates get into the LIFO line whether or not they are legally qualified. I responded by noting that stations are under no legal requirement to sell airtime to candidates before they become legally qualified candidates. Relying on the good faith of broadcasters to sell time subject to lowest unit charge rules when they are not required to do so is a risky proposition, and in no way constitutes grounds to deny the request for a declaratory ruling.

Even though it is illegal for a station to require federal candidates to pay more than one week in advance, I noted that KPTV/KPDX, one of the signatories to the Reply Comments of the Oregon Association of Broadcasters, has such a policy:

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.

If a station utilizes such an illegal policy, the NAB’s representation that broadcasters voluntarily allow candidates to purchase before they are legally qualified is of little comfort. There are also issues of cancellation policies, where candidates risk having to pay if they cancel an order placed early and, perhaps most significantly, there are campaign-finance restrictions on committing

lengths of time and time periods.” In the Matter of Codification of the Commission’s Political Programming Policies, 7 FCC Rcd. 678, 688 (F.C.C. 1991)).

6 CPM Reply Comments at 3-5. Perhaps an audit of disclosure practices is warranted.


8 CPM April 3 Notice at 5 (emphasis added).
funds for runoff and general elections before one becomes a qualified candidate in that particular election.9

The NAB also pointed out that stations go out of their way to accommodate candidates, often preempting them last. First, it would be nice if the station would disclose such practices, and apply them on a consistent basis. Second, the fact that they are making an exception for a candidate means there is an exception to the LIFO policy, meaning all candidates must be moved to the front of the line. Finally, if a station goes out of its way to accommodate candidates, there is every reason to believe they go out of their way to accommodate year-round favored advertisers. I noted that these exceptions – whether for candidates or commercial advertisers – should be applied to candidates in every instance.

For the reasons cited herein, and in our previous filings, the Commission should grant CPM’s request for a declaratory ruling.

Respectfully submitted,

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9 CPM Comments at 9.
Attachment 1

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