Before the Federal Communications Commission  
Washington, D.C. 20554

In the matter of the petition of

Canal Partners Media, LLC

for a declaratory ruling stating that broadcast stations' use of the Last-In-First-Out method to preempt political candidates' advertisements in favor of commercial advertisers' spots violates § 315(b) of the Communications Act

Canal Partners Media, LLC’s Comments

1. It is illegal for broadcast stations to use the Last-In-First-Out or LIFO method to determine preemption priorities within a particular class of time and preempt political candidates’ advertisements in favor of commercial advertisers’ spots.

In exchange for obtaining a valuable license to operate a broadcast station using the public airwaves, each radio and television licensee is required by law to operate its station in the public interest, convenience, and necessity.1 Recognizing the particular importance of the free flow of information to the public during elections, the Communications Act and the FCC’s rules impose specific obligations on broadcasters regarding political speech. One of those obligations is that a broadcast station must treat

candidates as its most-favored commercial advertisers as far as the terms and conditions and charges for airtime are concerned.\textsuperscript{2} The purpose of this requirement is to give candidates “greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters.”\textsuperscript{3} The Commission has long held that the most-favored-advertiser standard applies to station sales practices, including preemption priorities, not just to advertising rates.\textsuperscript{4}

Wanting to blunt the effect of § 315(b), stations complain about the fact the benefits that must accrue to candidates are based on a composite picture of the most-favored commercial advertiser.\textsuperscript{5} No single advertiser, they say, would ever receive all the advantages that candidates must receive through the “cherry-picking” of benefits given to all commercial advertisers.\textsuperscript{6}

\textsuperscript{2} Codification of the Commission’s Political Programming Policies, 7 FCC Rcd. 678, 689–90 (1991) (holding that the most-favored advertiser standard applies to a station’s sales practices and other discount privileges that improve the value of the spot to the advertiser).


\textsuperscript{4} Codification of the Commission’s Political Programming Policies, 7 FCC Rcd. 678, 689–90 (1991) (holding that the most-favored advertiser standard applies to a station’s sales practices and other discount privileges that improve the value of the spot to the advertiser).

\textsuperscript{5} Id. at 689.

\textsuperscript{6} Id. at 689.
Commission, however, has rejected that complaint.\(^7\)

Just as airlines know that not everyone who has booked to travel on any specific flight will actually travel on that flight, broadcast stations know that not everyone that has placed an order for airtime will follow through and run their advertisement. This knowledge leads stations to oversell commercial airtime, usually with few problems. But when commercial time is oversold and the expected cancellations do not occur, stations must have a way to decide who to bump. Stations are increasingly using the LIFO method to determine preemption priorities within particular classes of time and are using it to preempt political candidates’ advertisements in favor of commercial advertisers spots. “LIFO” stands for Last-In, First-Out. Stations are preempting candidates’ advertisements because they claim commercial advertisers booked their spots before the candidates booked theirs.

Stations have an “affirmative duty to disclose to candidates information about rates, terms, conditions, and all value-enhancing discount privileges

\(^7\) Id. at 690 (“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.” [parenthetical in original]).

— 3 —
offered to commercial advertiser." Disclosing that a station is using LIFO to determine preemption priorities within classes of time is part of a station’s disclosure requirement. It is important for a political campaign to know how a station determines preemption priorities when it is deciding what classes of time to buy. It is this Commenter’s experience that very few stations voluntarily disclose their use of LIFO—perhaps because they know using it to preempt a political campaign’s advertisements in favor of spots from commercial advertisers is illegal. This Commenter regularly has to pull out of stations the information about how preemption priorities are determined, and stations’ sales reps often are not aware of their stations’ practices.

Even when stations disclose that they are using LIFO to determine preemption priorities and use it to preempt candidates’ advertising, their disclosures tend to be squishy, making it impossible for campaigns or outside observers to ascertain what is really going on behind the curtain. After prodding, one station disclosed to this Commenter that it applied “LIFO with equitable considerations.”

What does that mean? As best this Commenter can ascertain, it means that they try to “spread the pain” so no single advertiser is preempted “too much,”

8 47 C.F.R. § 73.1942(b).

9 See National Association of Broadcasters, Political Broadcast Catechism at 42 (18th ed. 2014) (“FCC staff has also expressed concerns about station preemption policies such as ‘last in; first out’ that may have the effect of preferring long-term commercial advertisers over candidates.”).
regardless of where the advertiser falls in the LIFO pecking order. It means that the advertisers that complain the loudest about their spots getting preempted tend not to have their spots preempted no matter when they bought them. It means that the advertisers that spend the most money on the station don’t get bumped no matter where they fall in the LIFO line because their business is more valuable to the station, just like an airline will put that Super Diamond Medallion Member on the flight when it is overbooked no matter when you bought your ticket or how much you paid for it. And it means that this is how stations hide their mistakes.¹⁰

¹⁰ The station that disclosed that they use LIFO with equitable considerations preempted one of Commenters’ candidates’ advertisements that was bought as a “preemptible-with-notice” spot without giving the required advanced notice. Perhaps the station was just sloppy. But sloppiness has consequences.

A station can be sloppy with commercial advertisers’ spots because there is no governing law that sets a code of behavior for dealing with them. But, to ensure the free flow of information to the public during elections, § 315 of the Communications Act establishes a code of conduct that stations must follow regarding political candidates’ advertising. While errors may happen on occasion and need to be accounted for and remedied, “with equitable considerations” is just another way of saying “anything goes.”

Commenters believe that LIFO with equitable considerations is the norm when a station says that it uses LIFO to establish preemption priorities because there are equitable considerations for every rule in business where money is involved. (“That’s not what we normally do, but since you’re such a good customer …”) If using LIFO didn’t require stations to treat political candidates as being the First-In advertiser regardless of when the candidate purchased his or her airtime, those “equitable considerations” would be part of the terms, conditions, and value-enhancing discount privileges that political candidates are required to receive from stations under § 315(b) of the Communications Act. See Codification of the Commission’s Political Programming Policies, 7 FCC Rcd.
Because candidates buy their airtime late when compared to commercial advertisers, LIFO is really just a method stations have developed to try to avoid their obligations under § 315(b) of the Communications Act and steer candidates toward buying airtime at the most-expensive, nonpreemptible rates within the 45- and 60-day pre-election windows.

Using LIFO to preempt political candidates’ advertisements in favor of commercial advertisers’ spots violates the lowest-unit-charge provision of the Communications Act, 47 U.S.C. § 315(b), which requires that broadcast stations treat candidates as their most-favored commercial advertisers as far as terms, conditions, and charges for airtime are concerned. Under the LIFO method of determining preemption priorities, the “First-In” advertiser within a particular class of time is the last to be preempted. That makes the First-In advertiser the station’s most-favored commercial advertiser. Under § 315(b), a political candidate is thus entitled to the same priority against preemption that the station gives the First-In advertiser even if the political candidate

10 (...continued)

678, 690 (“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.” [parenthetical in original]).

11 See Section 2, infra, pages 8–12.
was the last to book their spot.\textsuperscript{12} Put another way, if a station adopts the LIFO method of determining preemption priorities, a political candidate’s advertisements are required by law to be considered as if they were the First-In spots because that is the only way the candidate can be treated as the station’s most-favored commercial advertiser as far as terms and conditions for the airtime are concerned.\textsuperscript{13}

LIFO may sound fair, and it is in many respects. But under § 315(b) of the Communications Act, it is illegal for a station to use the LIFO method to determine preemption priorities within a particular class of time and preempt political candidates’ advertisements in favor of commercial advertisers’ spots within the 45- and 60-day pre-election windows.

The purpose of § 315(b) is to give candidates “greater access to the media so that they may better explain their stand on the issues, and thereby more

\textsuperscript{12} See Codification of the Commission’s Political Programming Policies, 7 FCC Rcd. 678, 690 (1991) (rejecting broadcaster’s argument the benefits that must accrue to candidates should not be based on a composite picture of the most-favored commercial advertiser and holding that the most-favored advertiser standard applies to the privileges that improve the value of the spot to the advertiser, including make goods, \textit{preemption priorities}, and any other factors that enhance the value of a spot).

\textsuperscript{13} Stations may argue, like they have before, that by considering a political candidate’s advertisements as the First-In spots no matter when they were bought, they would be giving candidates greater benefits than those actually conferred upon the most-favored commercial advertiser. But this Commission has expressly rejected that argument. See \textit{id}. 
fully and completely inform the voters.”14 Using LIFO to preempt political candidates’ advertisements in favor of spots purchased earlier by commercial advertisers is, by definition, treating political candidates as something less than the station’s most-favored commercial advertiser, it gives candidate less access to the media, and it violates the law.15

2. Applying LIFO to preempt political candidates’ advertisements in favor of commercial advertisers’ spots discriminates against political candidates and between political candidates themselves.

Political candidates, as an industry, buy airtime late when compared to commercial advertisers. Commercial advertisers have the benefit of time and an established budget and budgeting processes. In contrast, running a political campaign is like building an airplane while flying it. Campaigns often raise and spend money as they go. Candidates also make purchasing decisions based on targeting and the flow of the campaign, which are often subject to change and adjustment as the election approaches.


15 See Codification of the Commission’s Political Programming Policies, 7 FCC Rcd. 678, 690 (F.C.C. 1991) (rejecting broadcaster’s argument the benefits that must accrue to candidates should not be based on a composite picture of the most-favored commercial advertiser and holding that the most-favored advertiser standard applies to the privileges that improve the value of the spot to the advertiser, including make goods, preemption priorities, and any other factors that enhance the value of a spot).
Even if candidates want to implement buying decisions early in the process, campaign-finance laws limit their ability to do so. Both federal and state campaign-finance laws limit candidates’ ability to spend money raised for the general election until the candidate qualifies as a candidate for the general election by winning the party primary.16 (Money raised for the general election by a candidate that does not qualify for the general election must be returned to contributors.17) Thus, because candidates cannot get in line to establish a position in the LIFO pecking order until they become a legally qualified candidate,18 applying LIFO to preempt political candidates’ advertisements in favor of commercial advertisers’ spots discriminates against political candidates.

When one considers the recent runoff election for the U.S. Senate in Louisiana between Bill Cassidy and Mary Landrieu, one sees how broadcast stations’ use of the LIFO method of determining preemption priorities violates § 315(b) of the Communications Act when used to preempt political

---

16 11 C.F.R § 102.9(e)(3); e.g., O.C.G.A. § 21-5-43(d) (Georgia law providing that contributions accepted for an election for which the candidate does not qualify shall be returned to the contributors).

17 See n.16, 20 supra.

18 See 47 U.S.C. § 312(b) (allowing FCC to revoke a station’s license if it fails to allow reasonable access to or to permit purchase of reasonable amounts of airtime by a “legally qualified candidate” for a federal elective office); 47 C.F.R. § 73.1940 (defining “legally qualified candidate”).
candidates’ advertisements in favor of commercial advertisers’ spots.

Because no candidate received more than 50% of the vote in the general election, a runoff election was held between the top-two vote getters on December 6, 2014. Those candidates—Bill Cassidy and Mary Landrieu—had to scramble to raise money, put together strategies, and buy broadcast airtime to communicate with voters. Cassidy and Landrieu did not become legally qualified candidates for the runoff election until November 5, after the general election resulted in no candidate receiving more than 50% of the vote. And until the vote totals dictated that there would be a runoff and that they would be the candidates in it, television and radio stations were under no obligation to sell them airtime and, indeed, could legally refuse to do so.19

If using the LIFO method to determine preemption priorities and using it to preempt political candidates’ advertisements in favor of commercial advertisers’ spots were legal, stations could steer runoff candidates like Landrieu and Cassidy into buying airtime at the most-expensive, nonpreemptible rates. That is because the law does not guarantee political candidates’ ability to get in line to establish a position in the LIFO pecking order in the less-expensive preemptible rate classes until they become a

19 See 47 U.S.C. § 312(b) (allowing FCC to revoke a station’s license if it fails to allow reasonable access to or to permit purchase of reasonable amounts of airtime by a “legally qualified candidate” for a federal elective office); 47 C.F.R. § 73.1940 (defining “legally qualified candidate”).
legally qualified candidate. Because candidates cannot establish a position in the LIFO pecking order until they become a legally qualified candidate, applying LIFO to preempt political candidates’ advertisements in favor of commercial advertisers’ spots discriminates against political candidates in violation of § 315(b) of the Communications Act.

Commercial advertisers, however, can get in the LIFO line whenever they want, and they are encouraged to—and often do—buy early. There are things called upfronts, which usually take place in May, where television networks unveil their schedule of shows for the upcoming television season, which begins in the fall. Upfronts are used to allow companies to buy commercial airtime “up front,” or several months before the television season begins. In other words, commercial advertisers have the opportunity to—and regularly do—get in the LIFO line months before a general-election or a general-election-runoff media buy is even a glimmer in a candidate’s eye, let alone the candidate becoming qualified to make the purchase.

The problem that the application of LIFO poses is made even more stark in a runoff election like Louisiana’s, which took place on December 6. While

---

20 Further, both federal and state campaign-finance laws limit a candidate’s ability to spend money raised for a runoff election until the candidate qualifies as a candidate for the runoff election by being one of the top-two vote getters. See 11 C.F.R § 102.9(e)(3); see e.g., O.C.G.A. § 21-5-43(d) (Georgia law providing that contributions accepted for an election for which the candidate does not qualify shall be returned to the contributors).
the Christmas season seems to start earlier and earlier each year, holiday advertising tends to start just after Halloween and builds to a crescendo as Thanksgiving approaches (Black Friday Door-Buster Deals!!!). That advertising was planned and purchased well in advance. Stations applying LIFO to preempt political candidates’ advertisements in favor of commercial advertisers’ spots force candidates to buy airtime at the most-expensive, nonpreemptible rates in order to make sure their advertisements clear and are broadcast so that their message gets heard.

Stations that use the LIFO method to determine preemption priorities for political candidates’ advertisements not only discriminate against political candidates generally, they also are discriminating between the nominees of the two political parties when one party requires a runoff election to select its nominee and the other doesn’t. Using Georgia’s 2014 U.S. Senate election as an example, Michelle Nunn became the legally qualified candidate of the Democratic Party on May 20, 2014, when she won her party primary. David Perdue, however, became the legally qualified candidate for the Republican Party two months later, on July 22, after he won his party’s primary-runoff election. If the application of LIFO to preempt political candidates’ spots were not illegal and Nunn and Perdue wanted to get in line to establish a priority against preemption under LIFO, Nunn was able to get in the LIFO line on
May 21, while Perdue had to wait until July 23. As this example shows, when one party has a runoff and the other does not, the application of LIFO discriminates between the political candidates because one candidate can get in the LIFO line and beat out commercial advertisers before the other can.

If using LIFO to preempt political candidates’ advertisements were legal, a station could refuse to sell candidates time until they qualified for the runoff (or the primary or general election), then, once they become legally qualified candidates and place an order for airtime, preempt the candidates’ spots in favor of commercial advertisers’ spots because the candidates did not buy airtime early enough—§ 315(b) would be rendered meaningless.21

21 The games stations can play do not stop there. Stations sell multiple classes of time. Imagine a station that sells three classes of time: preemptible, preemptible with two weeks’ notice, and nonpreemptible or fixed. You are running for office but don’t get enough votes to win the general election outright. A runoff election will occur a few weeks later. On the morning after Election Day, you contact the station about buying time for the runoff.

“\textit{I would like to buy ads on your station during the next two weeks at the preemptible rate,}” you tell the station’s sales rep. “\textit{I’m sorry,}” you’re told, “\textit{those slots are essentially sold out, we use LIFO—Last-In, First-Out—to determine whose spots are going to run, and you’d be the last in, and thus the first out.}” “\textit{But I wasn’t a legally qualified candidate in the runoff until today because there wasn’t going to be a runoff until today,}” you retort. “\textit{Sorry,}” the sales rep says, “\textit{You want your ads to run because you have an election coming up, if you buy at the preemptible rate your spots will be preempted under our LIFO policy.}”

“\textit{OK,}” you reply, “\textit{I see you sell preemptible-with-two-weeks-notice spots. Put my spots in at that rate so they’ll clear.}” “\textit{Nope, can’t do that,}” says the sales rep, “\textit{I can’t sell those spots now because you want those spots to air during the next two weeks. I can’t sell you spots that are preemptible with two weeks’ notice less (continued...)}
3. A station can use LIFO to determine preemption priorities as long as it treats political candidates as being the First-In advertiser regardless of when the candidates purchased their airtime.

There is no problem with stations using LIFO to preempt a Lavitra® advertisement in favor of an ad promoting Ford®. But stations voluntarily assume public-interest obligations in exchange for the valuable license they receive to use the public airwaves, and one of those obligations is that, within the 45- and 60-day pre-election windows, broadcast stations must treat candidates as their most-favored commercial advertisers as far as the terms and conditions and charges for airtime are concerned.22 So if a station wants to use LIFO as a method for determining preemption priorities within the 45- and 60-day pre-election windows, it must treat political candidates as being

21(...continued)

than two weeks before your spots would be scheduled to air.” “But you wouldn’t sell me those spots earlier because there wasn’t going to be a runoff election until today,” you reply with a growing sense of exasperation.”Sorry,” the sales rep says.

“So what you’re telling me is this,” you ask the sales rep, “to get my spots on the air, I’m going to have to pay your most-expensive, nonpreemptible, fixed rate?” “Yep,” says the sales rep.

“Are all the car dealers you have advertising on this station paying that rate?” you ask. “Of course not,” replies the sales rep, “They bought at the preemptible rate. You could have, too, if you placed your order earlier.”

22 Codification of the Commission’s Political Programming Policies, 7 FCC Rcd. 678, 689–90 (1991) (holding that the most-favored advertiser standard applies to a station’s sales practices and other discount privileges that improve the value of the spot to the advertiser).
the First-In advertiser regardless of when the candidate purchased his or her airtime in order to be in compliance with § 315(b) of the Communications Act.23

Conclusion

LIFO is being used to steer political candidates to purchase more expensive categories of airtime, a practice the Commission has held to be illegal. Stations are attempting an end-run around § 315(b) of the Communications Act and the Commission’s 1991 Report and Order.24

The Commission should issue a declaratory ruling stating that if broadcast stations are using LIFO as a method for determining preemption priorities, they must treat political candidates as being the First-In advertiser regardless of when the candidate purchased its airtime in order to be in compliance with § 315(b) of the Communications Act.

[The remainder of this page is intentionally left blank.]

23 The only reason that this Commenter can come up with why stations don’t want do to this is because it robs stations of their ability to steer political candidates to purchase more expensive categories of airtime (a practice the Commission has held to be illegal).

Respectfully submitted this 2nd day of March 2015.

Robert S. Kahn
Georgia State Bar No. 406025
25 Whitlock Place
Suite 100
Marietta, Georgia 30064
770-427-2145
770-427-7167 (fax)
bkahn@mindspring.com

Marc B. Hershovitz
Georgia State Bar No. 349510
MARC B. HERSHOVITZ, P.C.
One Alliance Center
4th Floor
3500 Lenox Road
Atlanta, Georgia 30326
404-262-1425
404-262-1474 (fax)
marc@hershovitz.com