



**October 2006**

## **Political Broadcasting: Some Reminders As Election Day Nears**

*Patrick Murck  
703-812-0476  
murck@fhhlaw.com*

The Nebraska Broadcasters Association (NBA) sought and received a declaratory ruling from the FCC certifying that two NBA-produced shows are bona-fide news interviews and exempt from the FCC's equal-time requirements. This ruling allows NBA member stations to continue broadcasting these shows without having to give the political opponents of the show's namesakes (the Governor of Nebraska and one of its Senators) equal time on-the-air.

Of course, during the campaign season, when a legally qualified candidate for public office appears on a broadcast station in a way which constitutes a "use" of the station, the licensee must afford equal opportunities to that candidate's competitors. However, appearances on certain types of programs, such as "bona fide news interview programs", are exempt. The standard question, then, is whether any particular show is a "bona fide news interview program".

In the NBA decision the FCC reiterated its longstanding three-prong definition. The Commission will consider whether: (1) the program is regularly scheduled; (2) the broadcaster or independent producer controls the program; and (3) the broadcaster's or independent producer's decisions on format, content, and participants are based on newsworthiness rather than on an intention to advance or harm an individual's candidacy.

The NBA didn't have much problem meeting that test with respect to its two programs (which consist of call-ins to the Governor and a Senator). The NBA passed the first prong by showing that the Governor's show had aired on a monthly basis since 1984 and the Senator's show, on a quarterly basis, since 2005. The second prong was a lay-up as well because the NBA could demonstrate that it wields complete control over the production, format, and direction of the programs and that the candidates do not have any prior knowledge of the subjects discussed or questions asked. Finally, since the intent of the shows is to focus on current newsworthy events and issues in Nebraska, the third prong was met and qualification was a slam dunk.

While many aspects of the political broadcasting rules are by now well-established and easily recognized – like the bona fide news exemption – it is important to recall that there are some relatively recent additions to those rules. As the election season builds up to the Big Day in November, stations should be attuned to those new wrinkles as well as the old familiar ones.

For example, the recent flap over video news releases (VNRs) has focused attention on candidate-provided materials. According to the Commission, if a candidate or a campaign supplies tape or video to a bona fide news program, the station must announce that the material was supplied by the candidate/campaign. But this does *not* apply to printed materials like news releases. When the programming in question is plainly *not* bona fide news programming, then the station must adhere to the FCC's and FEC's sponsorship ID rules. This can be a complicated and confusing area of the law and any specific questions or circumstances should be referred to communications counsel.

The sponsorship ID rules require that when a political ad is run there must be a statement that the ad was “paid for” or “sponsored by” the group or person purchasing the ad time. If the advertiser did not include the statement, the station must add this language on its own accord (if necessary, it can do so over the content of the spot – no free time need be provided). For television ads, the statement must be visual and run for four seconds, occupying at least four percent of the screen.

Stations running Federal campaign ads must also meet a variety of additional requirements imposed by the Bipartisan Campaign Reform Act (BCRA, sometimes also known as the McCain-Feingold Act).

BCRA requires that political radio ads include a statement, spoken by the candidate, which identifies the candidate, asserts that he or she approves the broadcast, and that he or she, or his/her campaign committee, paid for the ad. In addition to the radio requirements, television ads must show the candidate making the statement in a full-screen (80% or more), unobstructed view, or as a voice-over while displaying a clearly identifiable image of the candidate.

If the ad is paid for or sponsored by a third-party, then the ad must clearly indicate whether it was or was not authorized by a candidate. The sponsor identification statement must include both the “paid for” or “sponsored by” language *and* “authorized by” or “not authorized by” a particular candidate or campaign committee. If it is not authorized there must be an additional audio statement that the name of the entity purchasing the ad “is responsible for the content of this advertising.” This is in addition to relevant state law, which may require more.

The BCRA also requires that the broadcaster's political file must now contain all requests for time by anyone (including non-candidates) who seeks to communicate a message that refers either to a legally qualified candidate, or to any election to federal office ("election message request"), or to a national legislative issue of public importance ("issue request"). In addition to disposition of the request and details of the order (including rate charged), the station's records must show the name of the candidate to which the advertising refers (if applicable), the office that candidate is seeking, and the election or issue to which the ad refers. It must also show the name of the person purchasing the time, the name, address and phone number of a contact person, and a list of the chief executive officers or governing board. Note that while most of BCRA's provisions refer solely to candidates for federal office, the language in the public file provisions should be read to include all candidates for any federal or non-federal public office.

And there's more. Broadcasters should be aware that electioneering communications limits are now in place. "Electioneering communications" are any paid broadcast, cable or satellite programming that refers to a federal candidate, is aired 60 days prior to a general or 30 days prior to a primary election, and reaches 50,000 or more persons. BCRA prohibits certain entities (*i.e.*, corporations and labor organizations) from making electioneering communications. Any reporting obligations regarding electioneering communications lie with the person or entity making the electioneering communication and *not* with the broadcaster or other media outlet airing the communication. However, media outlets may be asked by potential advertisers whether their communications will reach an audience of 50,000 to comply with their reporting requirements.

To assist broadcasters in responding to such queries, the Commission has created an Electioneering Communications Database. It is available on the FCC's website (<http://gullfoss2.fcc.gov/ecd/>) and enables a user to determine whether a communication sent via broadcast station, cable system and/or satellite system can or cannot reach 50,000 or more people in a particular Congressional District or State. If the database has no information regarding the audience for a particular station, the advertiser may rely on information received directly from the media outlet.

Finally, BCRA also requires that federal candidates or their authorized committees provide a broadcast station with a written certification stating whether or not the programming refers to another candidate for the same office in order to receive the benefit of a station's lowest unit charge (LUC). This certification must be provided to the broadcast station at the time the programming is purchased.

If the programming does refer to an opposing candidate, the certificate for a radio spot must state that the programming will include a message, in the candidate's voice, identifying both the candidate by name and the office being sought, and expressly stating

that the candidate approved of the broadcast.

For a television spot that refers to an opposing candidate, the certificate must state that the programming will include a clearly identifiable photographic or similar image of the sponsoring candidate simultaneously displayed with a legible printed statement which identifies the candidate and states that (a) the candidate approved the broadcast and (b) the candidate or the candidate's authorized committee paid for the broadcast. This image must appear in an unobscured full-screen view for at least four seconds at the end of the political spot.

This provision, while originally intended to reduce "attack" ads, broadly applies to any mention of an opposing candidate, regardless of the context. Since it is the obligation of the candidate (or committee) to provide the certification, broadcasters may breathe a little easier with respect to this particular provision. But heads up: a candidate who fails to provide this certification forfeits all rights to the LUC for all programming aired during the remainder of the political window. That provision opens the possibility that a broadcaster could get caught between feuding candidates, with one asserting that the other is not entitled to LUC treatment.

The bottom line here is that the political broadcasting area remains a potential minefield which must be navigated carefully.