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DETERMINING LOWEST UNIT CHARGE: GOOD LUC!†

TERRY L. ETTER* AND RICK D. RHODES**

ABSTRACT

The Federal Communications Commission has again made sweeping changes to the rules used to determine the rates which broadcasters and cablecasters may charge for advertising by candidates for public office. Among other things, the new rules revise the definition of a candidate "use" of station facilities (which triggers lowest unit charge and other provisions), require that candidates receive full disclosure of station rates and sales practices, modify the procedures for pricing certain commercials in calculating lowest unit charge, and change the way the FCC approaches some station sales practices. The new rules contain plenty of good news and bad news for broadcasters and candidates, alike.

INTRODUCTION

Under federal law,¹ during the 45 days before a primary and the 60 days before a general election, broadcasters and cablecasters can charge political candidates no more than the lowest unit charge (LUC) of the station or cable system for the amount and class of time purchased for advertising.² Congress and the Federal Communications Commission (FCC) have changed the application of the LUC provision several times over the years.³ The most recent change occurred at the end of 1991, when the FCC issued new rules as to how broadcasters and cable operators can determine their LUC.⁴

The purpose of this article is to explain the interrelationship between the LUC provision and the customary practices of the broadcast advertising marketplace. This article will trace the history of LUC legislation and regulation, and attempt to assess the latest FCC pronouncement. The focus

† The views expressed in this article are those of the authors and do not necessarily reflect those of their employers.

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1. 47 U.S.C. § 315(b) (1947).

2. To qualify for LUC, the candidate's appearance must constitute a "use": the candidate's voice or likeness must be identified or readily identifiable; the appearance must be controlled, sponsored, or approved by the candidate; the appearance must occur after the candidate becomes legally qualified for the office sought. In addition, only appearances in connection with the candidate's campaign are eligible for LUC. See *In re* Codification of the Commission's Political Programming Policies, 70 Rad. Reg. 2d (P & F) 239, 251 (1991) (Report and Order) [hereinafter *1991 Report and Order*].

3. Communications Act Amendments of 1952, Pub. L. No. 82-554, 66 Stat. 711 (1952) (amending Communications Act of 1934); Fair Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (amending Communications Act of 1934) [hereinafter FECA].

4. *1991 Report and Order*, 70 Rad. Reg. 2d (P & F) 239.

of this article is on broadcasting because that is still the advertising medium most widely used by political candidates. Nevertheless, the principles discussed apply to cable operators as well.⁵

Determining the LUC for political advertising is a rapidly evolving area of the law. As of this writing, the FCC's 1991 decision is the subject of several petitions for reconsideration, and interpretations are being issued by the FCC almost daily.⁶

I. DEVELOPMENT OF THE LUC PROVISION

In the early days of broadcasting, no special requirements concerning the charges that stations could make for political advertising were imposed. Then section 315 of the Communications Act of 1934⁷ dealt primarily with what has come to be known as the "equal opportunities" doctrine:

Sec. 315. If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the Commission shall make rules and regulations to carry this provision into effect: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.⁸

Thus, broadcasters were completely free in setting rates for advertising by political candidates. Some broadcasters took advantage of this situation, however, by charging political candidates more than the rates charged other advertisers for similar advertising.⁹

Congress sought to deter this abuse by enacting the 1952 Amendments to the Communications Act.¹⁰ These amendments added section 315(b), requiring broadcasters to charge legally qualified candidates for any public office no more than "the charges made for comparable use of such station for other purposes." This provision put politicians on an equal basis with other

5. The political broadcast rules apply to "local origination" cable programming: programming, including commercial breaks in cable network programming, that is produced by or under the control of the cable system's operator. See 47 C.F.R. § 76.205 (1991). The FCC has yet to claim jurisdiction over programming originated by national cable networks.

6. Thus, before acting, it is advisable to contact the Political Programming Branch of the FCC's Mass Media Bureau in Washington, D.C.

7. Communications Act of 1934, Pub. L. No. 73-416, § 315, 48 Stat. 1064, 1088 (1934) (codified as amended at scattered sections of 47 U.S.C.).

8. *Id.*

9. See S. REP. NO. 96, 92d Cong., 2d Sess. 3 (1971), reprinted in 1972 U.S.C.C.A.N. 1773, 1775.

10. See *supra* note 3.

advertisers.

This was the law for twenty years, until Congress again changed the statute in 1972. The abuse Congress sought to correct this time, however, was lavish spending by politicians. Congress found that campaign costs had escalated dramatically during the 1960s, with the largest contributing factor being an increase in spending for advertising.¹¹ To check the upward spiral in campaign costs, legislation was proposed to require that broadcast stations charge candidates for public office the rate stations charge for their lowest class of advertising time, regardless of the specific time class actually purchased by the candidate.¹² As enacted, however, the Federal Elections Campaign Act (FECA) required only that during the 45 days prior to a primary and 60 days prior to a general or special election, broadcasters may charge candidates no more than the station's lowest unit rate for each class and length of time.¹³

As it developed through the years, the LUC was determined by the lowest rate offered by the station for each class and amount of time during the statutory periods. Thus, broadcasters considered not only commercial announcements (known as "spots") which aired (or "cleared") during the campaign periods, but also any contracts in effect during the period, as well as any rates which had been offered prior to the campaign periods and would be offered again after the election. These latter considerations were designed to prevent broadcasters from putting packages with extremely low rates on "hiatus" during campaign periods to avoid including those low rates in the LUC calculations.

II. THE BROADCAST ADVERTISING MARKETPLACE

At the time FECA was passed, the selling practices of most broadcast stations were fairly simple. Radio stations generally had four or five classes of time, also known as "dayparts": morning drive (usually 6 a.m. to 9 or 10 a.m.); mid-day; afternoon drive (usually 3 p.m. to 6 or 7 p.m.); evening; and run-of-schedule (ROS) meaning that the commercial could air at any time during the day, with no guarantee that it would run in any particular time period.¹⁴ Television stations generally had three classes: prime (7 p.m. to 11 p.m. in the Eastern and Pacific time zones, 6 p.m. to 10 p.m. Central and Mountain); fringe (generally the hour or two before and after prime); and

11. See S. REP. NO. 96 at 3-4, 1972 U.S.C.C.A.N. at 1775-76.

12. *Id.* at 7, 1972 U.S.C.C.A.N. at 1981. The draft legislation also proposed extending LUC requirements on non-broadcast media, particularly newspapers, magazines, and billboards. This suggestion was deleted, however, before the bill reached the Senate floor. Instead, the final measure imposed a "comparable use" limitation on newspapers and magazines, similar to that placed on broadcasters in 1952. FECA § 103(b).

13. FECA § 103(a)(1).

14. See CHARLES WARNER, BROADCAST AND CABLE SELLING 219-53 (1986).

daytime.¹⁵ Some stations also began calling their time classes "fixed," "preemptible," and "immediately preemptible"; fixed being the most expensive and immediately preemptible the least.¹⁶ The higher-priced fixed time guaranteed that the advertiser's spot would air during the program or time period sought. A preempted spot would be "made good"¹⁷ on another day or in another program or time period.¹⁸

Within each class, stations offered frequency discounts to their better advertisers—the more commercials an advertiser would buy, the lower the per-commercial cost would be. Some advertisers (mostly, the larger ones) were able to negotiate with stations for even lower rates. In theory, then, the lowest unit rate requirement allowed candidates to take advantage of rates available to a station's most favored advertiser, the advertiser who bought the most commercials during the year.

The marketplace changed dramatically during the 1980s, however, particularly in television.¹⁹ Advertisers generally had fewer dollars to spend, so they became more selective in the programming they used. Looking to get "more bang for the buck," advertisers increasingly desired to buy time during the more popular programs, with cost often being no object.²⁰ Suddenly, parts of the television advertising market were subjected to a bidding war. A similar situation occurred in radio as advertisers clamored for time during the more popular drive times and shunned the other dayparts. As a result, the broadcast advertising world turned upside down. The most-favored advertisers—those with the most money—were paying the *highest* advertising rates to be assured that their commercials would air.²¹

Stations' selling practices also changed. Most stations began to offer

15. *Id.*

16. "Fixed" spots are guaranteed placement at a particular time (e.g., 12:30 p.m. on Wednesday); "non-preemptible" spots are guaranteed placement during a broader time period (e.g., noon to 3 p.m. on Wednesday); "preemptible" may be "preemptible with notice," whereby the spot will air if not preempted by a date certain, or "immediately preemptible," whereby the spot can be preempted at any time. See, e.g., 1991 *Report and Order*, 70 Rad. Reg. 2d (P & F) at 256 nn.101-03.

17. Such spots are known in the industry as "make-goods."

18. See Public Notice, Licensees and Cable Operators Reminded of Lowest Unit Charge Obligations, 4 F.C.C.R. 3823 (1988) [hereinafter *1988 Public Notice*] [Editor's note: Citations for FCC materials conform to the fifteenth edition of *The Bluebook*, notwithstanding other citation standards.].

19. For an example of how the local television advertising marketplace now operates, see Leslie Poliak, *A Spot-Buyer's Guide*, *MARKETING & MEDIA DECISIONS*, May 1988, at 113-16.

20. On the surface this may seem illogical. The theory behind this concept, however, is that, by assuring clearance on programs that would do them the most good, advertisers could spend less elsewhere, and therefore spend less overall.

21. At the same time, there was more advertising competition as cable television became a stronger force in the communications marketplace. To make their stations more attractive to advertisers, and to fill their unused inventory in less-popular time slots, many broadcasters began giving away "bonus" spots in those time periods as an enticement to advertisers. Often there was no correlation between the number of paid spots and the number of bonus spots, so there was little guidance as to the number of bonus spots a candidate should get for a similar time buy.

more time classes and several levels of preemptibility, based on a variety of factors, such as notice before preemption, or timeliness of make-goods. Many stations offered "rotation" packages, whereby the advertiser's spots could air any time during the week in a broad time period, usually 6 a.m. to 7 p.m. There also developed the concept of a "Total Audience Package," or TAP plan, which guaranteed an advertiser a certain number of spots in each of the station's dayparts. Stations also might occasionally conduct a "fire sale," which allowed an advertiser to purchase, at the last minute, all of the station's unused commercial time in a set period (usually a weekend) at a ridiculously low rate. The result of these practices was that any individual program or time period often contained commercials billed at widely varying rates.

These changes had an effect on political candidates as well. Some stations began treating each level of preemptibility as a separate class of time, with its own lowest unit rate. But candidates were often told that to ensure clearance (i.e., that their advertisement would air at the desired time), they would have to buy time at the station's "effective selling rate," which was often a higher preemptible level. Thus, candidates often paid higher rates than did commercial advertisers buying the same daypart under essentially the same conditions.²² In addition, even station managers often experienced difficulty discerning the station's lowest unit rates because of the complexity of the rate structure and their station's selling practices.

III. THE 1988 FCC REACTION

In response to the situation, on August 4, 1988, the FCC issued a Public Notice "reminding" broadcast licensees and cable operators of their LUC obligations.²³ The Public Notice set out four basic policies:

1. The LUC for immediately preemptible time became the price of the least expensive spot to clear a given time period each week. If a candidate had purchased time at a higher rate, the station must rebate or rebill the candidate at the lower figure.²⁴
2. If a station initially sold immediately preemptible time in a particular program to a candidate at a rate higher than the least expensive spot that eventually cleared that time period in a week, the station must rebill or rebate the difference to the candidate.²⁵

22. Much of the difficulty was not entirely the fault of the station. Advertising agencies and other time buyers, eager to make sure that their candidate's commercials ran at the planned times, would opt for the higher rates. Nevertheless, as a licensee under the jurisdiction of the FCC, the broadcaster is ultimately responsible for ensuring that candidates are not charged more than the station's lowest unit rate for each amount and class of time.

23. See 1988 Public Notice, 4 F.C.C.R. 3823.

24. *Id.* at 3824.

25. *Id.*

Thus, a program that was sold by a station on both a per program and a rotation basis²⁶ could have two LUCs, depending on how the political candidate bought time.

3. If a candidate bought less expensive preemptible time, and the spot sold to the candidate was bumped, the candidate must receive a make-good before election day, if the station also offered make-goods to its regular commercial clients.²⁷ (And the FCC assumed that virtually *all* stations provided make-goods.)²⁸
4. Fixed, ROS, and preemptible with notice time classes would still be treated as separate classes of time, but the FCC would give greater scrutiny to time classes created just prior to the lowest unit rate "windows."²⁹

Thus, broadcasters could make a distinction between higher-priced "preemptible with notice" time (whereby a commercial would air as scheduled if not preempted by a certain date) and lower-priced "preemptible without notice" time (whereby a commercial could be "bumped" at any time by a higher-priced commercial).³⁰

IV. THE 1990 AUDIT

To ensure compliance with its political programming policies, the FCC conducted a surprise audit of thirty broadcast stations in six markets during July 1990,³¹ focusing on political advertising practices during the 1990 primary held a few months earlier in the station's respective states. In each market, the FCC audited three network affiliated television stations, one independent television station, one AM radio station, and one FM radio station.

The audit process involved collecting much more information than the FCC requires broadcasters to keep in their political files.³² The FCC requested copies of each station's program logs for the ten-day period prior to the primary (despite the fact that the FCC no longer requires broadcasters

26. Spots sold on a "rotation" basis are a separate class of time from spots guaranteed to air in a particular program, even though they may air in the same program.

27. *1988 Public Notice*, 4 F.C.C.R. at 3823.

28. *See* Political Programming Audit, 68 Rad. Reg. 2d (P & F) 113, 116 (1990).

29. *1988 Public Notice*, 4 F.C.C.R. at 3824.

30. There was some initial confusion as FCC staff gave verbal rulings which grouped all preemptible time into one class. The staff later clarified its position and returned to the view that there could be several classes of preemptible time.

31. The markets selected were Cincinnati, Dallas-Ft. Worth, Philadelphia, San Francisco and Portland, Oregon. These areas were chosen to provide geographic diversity and because most of the markets cover more than one state. *See FCC Conducts Political Programming Audit* (FCC News), July 16, 1990, at 1.

32. Broadcasters are required to keep a list of candidates who request broadcast time, the nature and disposition of the request, and the rates charged. *See* 47 C.F.R. § 73.1212(e) (1991).

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to maintain program logs)³³ and collected rate cards used in selling time to political candidates and commercial advertisers during that period.³⁴ Stations were given thirty days to provide the FCC with additional information, including: a description of how the station arrives at its LUCs, a description of the classes and lengths of spots the station sells for both political and commercial advertisers, its sales of preemptible versus fixed time, and the circumstances under which advertisers receive make-goods, any rates offered which were not reflected on rate cards, and copies of all commercial time invoices for time sold during the ten-day period.³⁵

The FCC released the results of the audit on September 7, 1990,³⁶ barely three weeks after receiving all the information from the stations. Although the FCC noted that most stations were attempting to comply with the rules, the audit cast broadcasters in a bad light. Eighty percent of the television stations and fifty percent of the radio stations audited had charged candidates "more for broadcast time than [they charged] commercial advertisers in virtually every daypart or program time period analyzed."³⁷ Some of the more damning findings were:

- ▶ Candidates paid an average of \$6000 for a 30-second television spot, while commercial advertisers averaged \$2713 for the same daypart.³⁸
- ▶ Half the stations did not have published commercial rate cards, merely internal guidelines for negotiations, whereas rates for political candidates were published, with no apparent negotiation available.³⁹
- ▶ In one market, all candidates paid substantially more than the lowest rates paid by commercial advertisers during twenty dayparts.⁴⁰

In addition, the FCC found that stations which barred candidates from buying

33. See *In re Deregulation of Radio*, 84 F.C.C.2d 968, *reconsid. denied in part*, 87 F.C.C.2d 797 (1981), *aff'd in part, remanded in part sub nom.*, Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983); *In re Deregulation of Television*, 98 F.C.C.2d 1076 (1984), *reconsid. denied*, 104 F.C.C.2d 357 (1986), *remanded for explanation sub nom.* Action for Children's Television v. FCC, 821 F.2d 741 (D.C. Cir. 1987).

34. See Letter from Roy J. Stewart, Chief, FCC Mass Media Bureau, to licensees of audited stations (July 16, 1990) (copy on file with the *California Western Law Review*).

35. *Id.*

36. See *Political Programming Audit*, 68 Rad. Reg. 2d (P & F) 113.

37. *Id.* at 113.

38. *Id.* at 115.

39. *Id.*

40. *Id.*

time in newscasts⁴¹ often created news adjacencies,⁴² available to candidates at rates higher than those for the newscast. The FCC also found many of the political files to be incomplete or too disorganized to be comprehended.⁴³

The stations had been caught in a regulatory vacuum. During much of the 1980s, deregulation was the watchword at the FCC. Under Mark Fowler's chairmanship, the FCC had eliminated much of the paperwork burden on broadcasters, doing away with many of the logging and financial reporting requirements.⁴⁴ The marketplace theory of regulation had been expanded under Dennis Patrick's tenure as chairman, and stations were given considerable freedom to conduct their businesses.⁴⁵

In 1989, however, Alfred Sikes became chairman. Though not necessarily more regulatory, Sikes appears more responsive to Congressional concerns than the two previous chairmen. Under his leadership, the FCC has become considerably more enforcement-minded, as evidenced by increased emphasis on equal employment opportunity, and other enforcement since he took the helm.⁴⁶ The audit came at a time when many stations had not yet been able to react to the increased enforcement posture of the FCC.

The situation uncovered by the audit was similar to that before the 1988 Public Notice. In many instances, stations would treat all levels of preemptibility as one class of time, and thus offer candidates their lowest preemptible rate. But hand-in-hand with this, many stations also offered this low rate on the same conditions as offered to commercial advertisers. The candidate's spot could be "bumped" by a commercial advertiser who paid a higher preemptible rate. Thus, many candidates chose to pay a much higher fixed rate to ensure clearance, often at a higher rate than commercial clients eventually paid to clear the same time period.⁴⁷

The problem, as the FCC saw it, was one of disclosure about station sales practices.⁴⁸ According to the FCC, stations were not providing candidates with enough information about the realities of preemptibility, make-goods, package plans, and other discount options. Also, because candidates were generally buying fixed time, they were not afforded the

41. The FCC has long held that broadcasters may preclude even federal candidates from buying time in newscasts because of the journalistic conflicts which might result.

42. News adjacencies are spots which air adjacent to news programs.

43. *Political Programming Audit*, 68 Rad. Reg. 2d (P & F) at 116.

44. See, e.g., *In re Amendment of Form 324*, Annual Financial Report of Broadcast Stations, 51 Rad. Reg. 2d (P & F) 135 (1982).

45. See, e.g., *Main Studio Location*, 3 F.C.C.R. 5024 (1988) (liberalizing main studio and local program origination rules); *Multiple Ownership Rules*, 4 F.C.C.R. 1741 (1989) (relaxing local multiple ownership criteria).

46. See Statement of Chairman Sikes before the Subcommittee on Communications, Committee on Commerce, Science, and Transportation, United States Senate, on FCC Reauthorization Legislation (Fiscal Years 1992-93), May 22, 1991, at 6-9.

47. *Political Programming Audit*, 68 Rad. Reg. 2d (P & F) at 115.

48. *Id.*

benefits of negotiation which are available to buyers of preemptible time.

Based on the results of the audit, the FCC set forth several new policies regarding stations' political sales practices. First, broadcasters could not sell fixed time to political advertisers unless it was also regularly offered to commercial advertisers.⁴⁹ "Candidate-only" classes of time which resulted in higher rates to candidates were forbidden.⁵⁰ Second, broadcasters were required to inform political advertisers of all available discount privileges, discount package options, rotations, and other special incentives offered to commercial advertisers. Political rate cards published by stations were required to show all classes of time offered commercial advertisers, including every level of preemptibility, as well as the station's policy regarding negotiated rates and make-goods.⁵¹ Third, the station's political file must contain a complete and self-explanatory record of all requests for broadcast time made by political advertisers, a schedule of the time provided, the exact charges made (if any), the class of time purchased, and whether that time was part of a package or rotation.⁵² Fourth, except for news programming, broadcasters could not establish, in advance of the campaign, any ban or limitations on the sale of time to federal candidates.⁵³

Beyond the shockwaves of concern through the industry, the audit has had a narrow but steep effect. The FCC fined two television stations \$25,000 each for lowest unit rate violations, while improper maintenance of the political file cost a Dallas-Fort Worth television station \$7500, a Dallas radio station \$3750, and a Cincinnati television station \$1500. In addition, one station was admonished and nine stations received "letters of caution." No action was taken against the fifteen other audited stations.⁵⁴

The largest impact has been in the courts, however. On the theory that stations are contractually obligated to charge candidates the lowest unit rate, class action lawsuits were filed in state courts in Georgia⁵⁵ and Alabama⁵⁶

49. *Id.* at 116.

50. *Id.* at 117.

51. *Id.* at 116.

52. *Id.*

53. *Id.* This is part of federal candidates' right of reasonable access contained in § 312(a)(7) of the Communications Act, 47 U.S.C. § 312(a)(7) (1974). Candidates for state or local office have no such right, although, until recently, stations were expected to make their facilities "effectively available" to candidates in the more important state and local races.

54. See *Five Broadcast Stations Apparently Liable for Violation of Political Programming Laws; Ten Others Cautioned or Admonished* (Report No. MM-594) (FCC News), Dec. 12, 1991.

55. *Zell Miller for Governor v. Pacific & S. Co.*, CA No. 91VS29931-G (Fulton County, Ga. filed 1991).

56. *Dickenson v. Cosmos Broadcasting Co.*, No. CV-91-67-R (Montgomery County, Ala. filed 1991). An interesting sidebar to this case is the fact that the Alabama Supreme Court is an elected body. Two of its justices were candidates in the 1990 elections and have joined the other plaintiffs in the lower court case. Should the case reach the state supreme court, judges from outside the state may have to hear the case by special designation.

and in a federal district court in California.⁵⁷ The Georgia and Alabama cases are especially disconcerting to broadcasters, because these states were not involved in the audit. The plaintiffs' claims are based on FCC findings in other states. Moreover, the plaintiffs are asking courts to interpret the Communications Act, which is generally the responsibility of the FCC. Because the contractual claims hinge on a definition of "lowest unit rate," broadcasters could face the possibility of a different definition of "lowest unit rate" from each court.

After much deliberation, the FCC preempted state determinations of the Act, at least for section 315 purposes.⁵⁸ In preempting the state actions, the FCC relied on case law stressing the need for uniform interpretation of section 315(b), the belief that inconsistent application of section 315(b) could cause diminished political dialogue as stations refuse to accept political advertising, and Congressional intent that the FCC provide a "unified and comprehensive regulatory system for broadcasting."⁵⁹ Whether the courts will recognize the FCC's preemption is yet to be learned.

V. THE FCC'S LATEST PRONOUNCEMENT

In the meantime, the FCC is revamping its political rules.⁶⁰ In a decision released in December 1991,⁶¹ the FCC set out new policies for determining lowest unit rates, as well as for some other political broadcasting issues. The key points of the FCC's action include:

- ▶ Stations must now disclose all their sales practices, time classes, and package plans to political candidates or their agents *before* the first purchase of time is made. The disclosure must include the likelihood that a spot might be preempted.⁶²
- ▶ Stations may now offer several levels of preemptible without notice or preemptible with notice time, so long as the levels are differentiated by something other than price (e.g., make-good policy).⁶³
- ▶ Stations may differentiate between fixed and non-preemptible time, so long as the difference is real (e.g., non-preemptible can

57. *Wilson v. A.H. Belo Corp.*, No. Civ. S-91-1206 LKK-GGH (E.D. Cal. filed 1991).

58. *In re Exclusive Jurisdiction with Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, as amended*, 6 F.C.C.R. 7511 (1991) (Declaratory Ruling).

59. *Id.* at 7511-12. At the same time, the FCC established a set of procedures to handle complaints of LUC violations against stations. *Id.* at 7512.

60. *In re Codification of the Commission's Political Programming Policies*, 6 F.C.C.R. 5707 (1991) (Notice of Proposed Rule Making).

61. *1991 Report and Order*, 70 Rad. Reg. 2d (P & F) 239. The report and order was made effective January 4, 1992—forty-five days before the New Hampshire primary. *Id.* at 267.

62. *Id.* at 254-55.

63. *Id.* at 258.

guarantee placement in a certain program, while fixed can guarantee placement in a particular commercial break within that program time).⁶⁴

- ▶ Stations may still bar candidates from buying time in newscasts, but candidates must then be allowed to buy an adjacency to the newscast at no more than the lowest unit rate for the newscast.⁶⁵
- ▶ Rotation packages can be separate classes of time, so long as the distinction between them and other classes reflects a benefit to the advertiser.⁶⁶
- ▶ In calculating the lowest unit rate, the station must include the value of individually negotiated packages,⁶⁷ bonus spots, and make-goods,⁶⁸ but not non-cash barter transactions and non-cash incentive programs.⁶⁹ (Make-goods used to correct for under-delivery of audience do not affect lowest unit rates unless aired in a time class better than that originally purchased.)⁷⁰ The availability of the incentive programs must be disclosed to candidates.⁷¹
- ▶ The FCC also amended its fire sale policy.⁷² Fire sale rates now affect the stations LUC only for the duration of the fire sale. However, they affect, and likely establish, the station's LUC for *all* time classes during the fire sale.⁷³ For example, a fire sale which runs from 7 p.m. Friday, October 2, through midnight Monday, October 5, would affect the LUC only for that time frame, including drive time and mid-day time classes on Monday, October 5.

64. *Id.*

65. *Id.* at 248.

66. *Id.* at 260.

67. *Id.* at 262. Previously, for candidates to receive the rate charged to the buyer of a package, the candidate was required to purchase the least common denominator of spots in the package. For example, if a package called for the commercial advertiser to buy five spots in each time class, the candidate would have to buy at least one spot in each time class. *Id.*

68. *Id.* at 262-63. This is especially important for stations. FCC staff have indicated that if the station does not place a value on individual spots within commercial packages, bonus spots and make goods, and show the value on its invoices to regular advertisers, FCC auditors will merely assume that all the spots are of equal value. Thus, the lowest unit rate for more-expensive time classes could suffer. Stations should therefore (1) place reasonable values on such spots, (2) document how the values were determined, and (3) make sure that invoices to commercial advertisers reflect those values.

69. *Id.* at 263. Some barter transactions involve cash as well as goods or services. These transactions must be included in LUC calculations, according to statements made by FCC officials during a teleconference conducted by the National Association of Broadcasters on January 30, 1992.

70. *Id.* at 265.

71. *Id.* at 263.

72. At one time, the FCC had stated that fire sale rates could affect LUC calculations for the entire 45 and 60-day periods. *See id.*

73. *Id.* at 263-64.

- ▶ In a marked departure from past policy, the FCC now says that broadcasters need not sell any time to state and local candidates. However, any time sales are made to these candidates, broadcasters must meet the disclosure, lowest unit rate, equal opportunities, and sponsor identification requirements.⁷⁴

VI. RAMIFICATIONS OF THE FCC'S ACTION

With adoption of the *1991 Report and Order*, the FCC clearly hopes to achieve a two-part regulatory goal. First, the FCC intends to clarify and standardize its policies to follow more closely the intent and requirements of section 315 of the Communications Act.⁷⁵ Moreover, in issuing considerably more detailed regulation and certain interpretive advice, the FCC has attempted to provide an element of fairness and balance among the needs of broadcasters, candidates, advertising buyers, and the general public concerning the duties required and rights accorded by section 315.⁷⁶ In addition, the FCC has attempted to address several issues concerning the political advertising responsibilities of broadcasters in light of significant recent developments in broadcast advertising sales practices which have been dictated by marketplace factors.

It is too early to predict what effect the FCC's actions may have on the advertising practices of broadcasters, political candidates and their representatives. However, with the further delineation and clarification of FCC policy in this area, broadcasters may make commercial time available to political candidates with somewhat greater assurance that a reasonable interpretation of the FCC's political advertising policies may be made and compliance with the law maintained. This is especially true since, in the interest of uniform policy directives, the FCC has not only asserted complete jurisdiction over political advertising rate disputes by preempting state courts from addressing such issues, but also vowed to make public—in written form—all oral advice from FCC staff concerning "new and significant issues."⁷⁷

While it is also too early to fully gauge the response of the broadcasting and advertising industries to the FCC's action, broadcasters generally have been concerned about other significant issues that remain unresolved. Several petitions for reconsideration or clarification or both have been filed with the FCC,⁷⁸ addressing such issues as the factors to be taken into account in establishing multiple levels of immediately preemptible time, allowing candidates to "cherry-pick" among stations' best rates, the treatment

74. *Id.* at 247.

75. *See id.* at 243.

76. *Id.*

77. *Id.* at 243 n.5.

78. *See, e.g.,* Petition for Partial Reconsideration or Clarification of the National Association of Broadcasters, *1991 Report and Order*, 70 Rad. Reg. 2d 239 (MM Docket No. 91-168) (filed on February 3, 1992).

of sponsored public service announcements, and other on-air promotional incentives in the determination of lowest unit rate, and how the FCC will recognize broadcasters' good faith efforts to comply with the rules.⁷⁹ The FCC is expected to act on these petitions by the summer of 1992.

CONCLUSION

The FCC's latest decision provides a degree of fairness for candidates and broadcasters alike. Broadcasters can continue to compute their LUCs for each time class, including the several preemptible time classes. Candidates will benefit by "cherrypicking" desirable time slots from the station's various package rates, without meeting specific requirements of the package.

Determining a station's LUCs has become highly complicated and, in some cases, nearly impossible. The process now requires a great deal of thought and effort on the part of station management and counsel, and is one which cannot be taken lightly, since the consequences can be severe. Broadcasters who make a good faith effort to comply with the law should have fewer problems with the FCC than those whose efforts are superficial. It is essential, therefore, that broadcasters document their efforts in valuing packages, bonus spots, and make-goods to demonstrate good faith.

Again, this area of the law is still somewhat in a state of flux. Several petitions for reconsideration have been filed, and the FCC is constantly fine-tuning its decision through "private letter" rulings. Nevertheless, most of the major LUC issues should be settled in time for the fall campaign period.

79. *Id.*

