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## *Political Speech and PEG Access*

### A LEGAL ANALYSIS

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#### Introduction

There are several requirements for broadcast licensees and cable operators under the Communications Act and Federal Communications Commission (FCC) rules related to political broadcasting aimed at ensuring fair and reasonable access by political candidates. Because of court decisions and FCC policy changes, several of the requirements are not being enforced. In any event, however, none of the requirements are applicable directly to Public, Educational and Government (PEG) access channels. To address possible First Amendment concerns and to avoid potential litigation, managers of PEG access channels should consider developing and implementing policies consistent with the principles of existing or former federal policies.

Policies that have governed political broadcasting include: (1) the fairness doctrine (which requires a reasonable opportunity for the discussion of conflicting views); (2) the personal attack rule (which allows a person whose character is attacked to receive notice and a reasonable opportunity to respond) and the editorial rule (which affords political candidates notice and an opportunity to respond to editorials

opposing them or endorsing other candidates); (3) the reasonable access requirement (which authorizes the FCC to revoke a license for willful or repeated failure to allow reasonable access by a political candidate for a federal position);<sup>2</sup> and (4) the equal opportunity requirement (which requires a licensee to make the broadcasting station available to all candidates for the same office on an equal basis).

#### Considerations for Public Access

Given that traditional political broadcast rules do not apply to public access channels, how should those managing these channels provide for their use by political candidates? A number of different approaches have been tried by access centers. Some have limited political candidates to appearing on news or debate formats. Some have limited political debates to particular times allocated for this purpose. And others have prohibited the appearance of political candidates altogether.

The safest approach is to treat political programming no differently from any other programming on the public access channel. This would comply with the reasoning in *Cable TV Access Channel Rules*, 83 F.C.C.2d 147 (1980), that the inherent opportunity for access

justifies not imposing the equal opportunity requirement on access channels. Moreover, efforts to single out political programming for particular formats and times, no matter how well intentioned, are fraught with the risk of being found by a court to constitute content-based regulation, rather than time, place and manner regulation, because they would apply to only political programming rather than to all programming. The U.S. Supreme Court has held that a content-based restriction on political speech in a public forum requires the showing of a compelling state interest. *See, e.g., McIntyre v. Ohio Elections Comm.*, 514 U.S. 344, 347 (1995) (a restriction on campaign literature can be upheld only if it is narrowly tailored to serve an overriding state interest).<sup>3</sup> Generally, very few restrictions on political speech are likely to survive the test. *But see Burson v. Freeman*, 504 U.S. 191, 198 & 208 (1992) (a state law requiring a “campaign-free zone” within 100 feet from the entrances of a polling place passes constitutional muster, even though it is a “content-based restriction on political speech in a public forum ... subject to exacting scrutiny”).

Additionally, managers of access channels need to be aware that access provided to a political candidate could be “political activity” which could cause loss of

tax exempt status of a 501(c)(3) nonprofit corporation or could represent a campaign contribution subject to federal and state campaign contribution laws.

Some public access channels prohibit campaign programming during the week before an election (or some other time period). In *Moss v. Cablevision Systems*, 22 F. Supp. 2d 1 (E.D. N.Y. 1998), the Marijuana Reform Party challenged, *inter alia*, the cable operator's policy precluding any qualified candidate for public office from broadcasting on the public access channel during the 60-day period prior to the election. The court held that, as a cable operator, Cablevision could not deny a qualified political candidate the right to appear on the public access channel, because 47 U.S.C. §531(e) forbids cable operators from exercising editorial control over access channels (except for programming containing obscenity).<sup>4</sup> Although the case does not address the situation where a manager of a public access channel that is not a cable operator limits the presentation of political programming, such approach would be suspect because it would apply to political speech and would be content-based.

It is generally considered appropriate to prohibit commercial programming on public access channels. Political advertising presents an even more complicated issue, however. Even though PEG channels can be reserved for noncommercial speech, political advertising is intended for purposes of campaigning and, therefore, can also be considered political speech. *See e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (holding that an advertisement in *The New York Times* was not a commercial advertisement for First Amendment purposes because "it communicated information, expressed opinions, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose

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existence and objectives are matters of highest public interest and concern"); *Moss v. Cablevision Systems*, 22 F.Supp. at 6 (finding the candidates were not selling a product or service and thereby rejecting the argument that the Marijuana Reform Party programming was commercial speech). Because there is a "profound national commitment to the principles that debate on public issues should be uninhibited, robust, and wide-open[.]" courts are likely to err on the side of caution and protect speech that is arguably political. *New York Times v. Sullivan*, 376 U.S. at 270.

An issue that was raised during the Jerry Brown presidential primary campaign in 1991 and 1992 is whether the common prohibition against commercial programming on PEG access channels can apply to programming in which political campaign contributions are solicited. In such a case, the arguments against such restrictions are far greater than the case in favor of them because campaign solicitations are generally considered part and parcel of the campaign. This was especially true in the case of the Jerry Brown campaign where the use of an 800 number to raise funds was part of his political "speech" against politics as usual.

Restrictions applicable to all users of public access are more likely to survive court scrutiny. Many access center rules limit the use of channels to local residents. If such is the case, limiting use to local candidates would most likely be permissible since all persons using public access would be treated the

same. If there is a concern that political candidates may monopolize the channel, a reasonable course of action would be to restrict the amount of time that could be used by any programmer. If a time restriction is reasonable (e.g. 30 minutes a week) and is applied to *all* users, not just political candidates, such restriction would likely be upheld as a neutral time, place, and manner restriction.

On the other hand, a limitation that regulates campaign broadcasting to a particular block of time is content-based because it applies to only political programming. Similarly, confining political campaign programming to candidates' forums at which all candidates are permitted to appear may be considered an impermissible content-based restriction because it prevents those wishing to convey their message in a different format from using such other method.

Another concern of access providers is whether the provision of access constitutes political activity which either (1) may cause a non-profit access corporation to lose its 501(c)(3) tax exempt status or (2) count against the permissible contributions by an individual or organization. Internal Revenue Service Publication 557, *Tax-exempt Status for Your Organization*, states (at 13):

**Political activity.** If any of the activities (whether or not substantial) of your organization consist of participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for public office, your organization will not qualify for tax-exempt status

under section 501(c)(3). Such participation or intervention includes the publishing or distributing of statements.

Whether your organization is participating or intervening, directly or indirectly, in any political campaign on behalf of (or in opposition to) any candidate for public office depends upon all of the facts and circumstances of each case. Certain voter education activities or public forums conducted in a nonpartisan manner may not be prohibited political activity under section 501(c)(3), while other so-called voter education activities may be prohibited.

Merely making channel capacity, studios or equipment available to anyone, including political candidates, should not constitute political activity. Similarly, providing staff or volunteer assistance in producing programming should not constitute political activity, if such assistance is available to all. However, if political candidates are accorded different treatment than others, there is some risk that the IRS would consider such treatment to constitute political activity for purposes of section 501(c)(3).

A related issue is whether the availability of channel capacity, production equipment and personnel to a candidate constitutes a campaign contribution under applicable federal law. *See* 2 U.S.C. 431(8). Although providing cable access is unlikely to be considered a contribution, a court could conceivably regard a public access center's provision of equipment and production personnel, as contributions. As a result, managers of access channels should be aware of federal (and possibly state) campaign contribution limits and the penalties associated with their violation. *See* 47 U.S.C. §§ 337g(d) and 441a.

In addition to federal constitutional limitations on regulations which may be imposed on political speech, there also may be

state laws which affect the candidates' access.

### **Concerns for Education and Government Access**

Because the First Amendment applies to protection of an individual's speech from the government, most of the constitutional considerations which affect public access channels do not apply to government and education channels. If an access channel is carrying only government programs and is not open to public use, the government should be able to edit its own speech without implicating the First Amendment. *But see, UMW v. Parsons*, 172 W.Va. 386, 398 (1983) (West Virginia constitution includes "fairness doctrine" applicable where there is state action).

Even though the same constitutional concerns may not apply, however, a government should be concerned that it does not exclude or appear to be excluding, non-government viewpoints or programming. Although the FCC political broadcasting rules do not apply to governmental access channels,<sup>5</sup> there are sound reasons for a city to adopt similar rules in order to avoid a legal, as well as political, challenge that government is favoring its own speech if others do not have equivalent access to the channel. One response might be to point to the ability of others to program on a public access channel (if one exists in the community) as a way to obtain fairness or equal opportunities. Various issues may be presented, however, such as whether the public access channel is watched by as many viewers, whether the time available to present programming is as desirable, and whether the format of programming on the government channel would favor certain candidates. As to the latter, for example, if a candidates' forum were held on the government channel to which only some bona fide candidates were invited, it could be shown by an excluded candidate

that the opportunity to appear in a different format on public access is a less favorable forum. An advantage of rules or practices patterned on the FCC's rules is that a city can claim that the rules are fair and impartial, because they represent an independent determination by a disinterested outside agency.

### **Notes**

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<sup>2</sup> The reasonable access requirement is sometimes referred to as the equal time requirement.

<sup>3</sup> The question of whether a public access channel is a public forum has not been definitely resolved by courts. Courts have frequently applied forum analysis, even in cases where they have not determined that the channel is a public forum. *See Horton v. Houston*, 179 F.3d 188 (5<sup>th</sup> Cir. 1999), *cert. denied*, 528 U.S. 1021 (1999), and *Rhames v. City of Biddeford*, 204 F. Supp. 2d 45 (D. Me. 2002).

<sup>4</sup> Although the explicit statutory language allows cable operators to prohibit "obscenity, indecency or nudity," the FCC has ruled that the statutory provision as it relates to "indecency and nudity," 47 U.S.C. §624(d), is unconstitutional to the extent that it would apply to programming that is not obscene. In the Matter of Implementation of Section 10 of the Cable Television Consumer Protection and Competition Act of 1992, *Indecent Programming and Other Types of Materials on Cable Access Channels*, 12 F.C.C. Rcd 6390 (1997); see also 47 C.F.R. §76.602 (1998).

<sup>5</sup> As noted previously, cable systems are not subject to the reasonable access requirement and the fairness doctrine. The personal attack, political editorial rule and equal opportunity requirement are applicable to cable operators but presumably not to managers of PEG access channels.