

October 16, 2024

Via Email
Honorable Jessica Rosenworcel
Chairwoman
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

RE: Use of Broadcast Facilities for Political Broadcasting

Dear Chairwoman Rosenworcel:

We write to request that you publicly confirm that Federal Communications Commission (“FCC”) rules governing political advertisements, including advertising rates, apply only to ads paid for by legally qualified candidates. We request that you also confirm that a candidate must pay for at least 50% of an ad to trigger the favorable access and treatment and advertising rates under these rules.

As you know, FCC rules govern the circumstances under which legally qualified candidates may use broadcast facilities in connection with political advertisements. Under these rules, broadcast stations must provide equal opportunities, lowest-unit charges (“LUC”) and comparable rates to federal candidates who make “use” of their broadcast facilities.¹ A candidate’s “use” also means that stations are prohibited from censoring the candidate’s ad.² However, not all “uses” are treated equally by the FCC. For purposes of the equal opportunity provisions, any “‘positive’ appearance of a candidate by voice or picture,”³ if not fleeting,⁴ will qualify.

However, if an advertisement is not a use “by any person who is a legally qualified candidate” or a “use . . . by any legally qualified candidate,” it will not trigger the rate and censorship provisions,⁵ nor must a station provide reasonable access.⁶ For instance, the FCC has consistently recognized that its rules governing campaign advertising rates apply only to “ads *paid for* and sponsored by legally qualified candidates.”⁷ These rules do not apply to ads that are paid for and sponsored by non-candidate committees. Were this distinction not in place in the law, any positive depiction of a candidate, even if created and aired independently of that candidate, would qualify for LUC and protection from censorship.

¹ 47 C.F.R. §§ 73.1941, 73.1942, 73.1944.

² 47 C.F.R. § 73.1941.

³ Codification of the Commission’s Political Programming Policies, 9 FCC Rcd. 651 (1994).

⁴ *Letter to National Urban Coalition*, 23 FCC 2d 123 (1970).

⁵ 47 C.F.R. § 73.1941(a) (applying protection of censorship to “material broadcast by such candidate”); *id.* § 73.1942(a) (regulating charges for the “use of any broadcasting station by any person who is a legally qualified candidate”).

⁶ *See id.* § 73.1944.

⁷ FCC, Fact Sheet; FCC Political Programming Rules, https://www.fcc.gov/sites/default/files/political_programming_fact_sheet.pdf (last visited Oct. 15, 2024).

Around the country, a disturbing trend has arisen on the eve of the election: the National Republican Senatorial Campaign (“NRSC”) and Senate candidates have been using joint fundraising committees whereby the NRSC has been paying the LUC to fund nearly all of the costs of television ads that have no other purpose but to advocate the election or defeat of candidates. The NRSC has been doing this by advancing funds to the joint fundraising committees to cover the costs of the ads.

Under joint fundraising rules established by the Federal Election Commission (“FEC”), political committees, including a national party committee and an authorized candidate committee, may simultaneously raise contributions for multiple entities, subject to a set of procedures that “govern all joint fundraising activity.”⁸ The committees often establish a separate political committee to serve as the joint fundraising representative and enter into a written agreement that provides the formula for allocating joint fundraising proceeds and expenses.⁹ Each participant in a joint fundraising committee must cover expenses proportional to their percentage of allocated receipts.¹⁰ While the joint fundraising committee is an “authorized committee” of the candidate(s) participating, it is not the “principal campaign committee.”¹¹ And in practice, the activities of the joint fundraising committee are split between all participants, which could include candidates; political party committees; other political committees; and even other types of entities. The joint fundraising committee is not, in other words, using exclusively candidate funds. And in recent months, some joint fundraising committees have been airing television advertisements in which almost no principal candidate committee funds are used.

The following is an example of an advertisement that ran in Maryland in which the NRSC used the LUC to pay nearly all the costs of a television ad under the joint fundraising committee’s allocation formula.

Larry Hogan married my mom. He became a father to three strong independent women. Now, once again, they're attacking him as anti women. Nothing could be further from the truth. As governor dad kept his word to provide birth control at no cost and he supports choice by restoring Roe in every state. I know you can trust him too. I'm Larry Hogan and I approve this message because no one should come between a woman and her doctor, stand with Governor Hogan. Join our team by donating today.¹²

The joint fundraising committee that sponsored this ad could raise up to \$297,400 per individual donor, which would be allocated as follows:

⁸ 52 U.S.C. § 30102(e)(3)(ii); 11 C.F.R. § 102.17(a)(1)(i), (2).

⁹ 11 C.F.R. §§ 102.17(c)(1). The participants may also designate an existing committee as the fundraising representative. *Id.* § 102.17(a)(1)(i).

¹⁰ *Id.* § 102.17(c)(7).

¹¹ *See id.* § 101.1.

¹² Here is the link to the full advertisement:

<https://host2.adimpact.com/admo/viewer/39f1ced8-7840-4fe1-a2be-be52498e1292> (last visited Oct. 15, 2024).

1. Hogan for Maryland shall receive, for deposit in its general account, 20% of any single contribution or series of aggregate contributions, designated for the 2024 General Election, up to a maximum of \$3,300.
2. The NRSC, for deposit in its general account, 25% of any single contribution or series of aggregated contributions, up to a maximum of \$41,300.
3. Better Path, for deposit in its federal account, 5% of any single contribution or series of aggregated contributions, up to a maximum of \$5,000.
4. The NRSC, for deposit in its legal account, 25% of any single contribution or series of aggregated contributions, up to a maximum of \$123,900.
5. The NRSC, for deposit in its building account, 25% of any single contribution or series of aggregated contributions, up to a maximum of \$123,900.¹³

Based on this allocation formula, the NRSC will pay for at least 80% of the advertisement and possibly more if donors give more than the maximum permitted to Hogan for Maryland, the candidate's principal campaign committee, without counting any of its funds as a contribution to the participating candidate. The candidate committee – the entity given FCC protection on rates and censorship – is paying at most 20% and in practice it may pay far less if large donors give to the joint fundraising committee. And yet stations are routinely granting these advertisements LUR and the benefit of the no-censorship provision, as if they were advertisements paid for exclusively by the candidates themselves.

These rules make clear that the LUC rate is available to a candidate's use of stations broadcast facilities. In other words, the LUC charge applies to candidate paid and sponsored ads. While the FCC has never explicitly stated how much of an ad needs to be paid for by a candidate to qualify for the LUC, surely it must be more than a small fraction of the advertisement's total. To be a candidate "use" for purposes of the LUC and the no-censorship provision, we propose that the candidate's principal campaign committee should fund at least 50% of the ad. Under analogous circumstances, where a party committee and a candidate split the costs of an ad, the FEC has stated that the costs must be allocated at least 50% to the candidate in order to prevent the receipt of an excessive contribution.¹⁴ This standard should apply to the FCC's political advertising rules.

We request that you confirm that at least 50% of a broadcast advertisement would need to be paid for by the candidate's principal campaign committee for the FCC's political advertising rules, including the LUC and the no-censorship provision, to apply.

¹³ Hogan Victory Fund, https://secure.anedot.com/hogan-victory-fund/63135a7f-c32d-4f05-8d5a-a7527e6b331e?source_code=JFCAD&utm_source=anedot&utm_medium=qr_code&utm_campaign=jfcad (last visited).

¹⁴ See Advisory Opinion 2024-14 at 5-6 (DSCC and Rosen for Nevada); FEC Adv. Op. 2006-11 (Washington Democratic State Central Committee).

We thank you for your attention to this important and timely matter.

Sincerely,

End Citizens United Action Fund
Campaign Legal Center
Citizens for Responsibility and Ethics in Washington (CREW)
Public Citizen

cc: National Association of Broadcasters