

Federal Communications Commission

In the Matter of Codification of the Commission's Political Programming Policies.

Separate Statement of Commissioner James H. Quello, dissenting in part.

I fully support the Commission's efforts to codify and clarify our political broadcasting rules. This *Memorandum Opinion and Order* is a necessary fine-tuning of our policies, based, in large part, on practical concerns.

Given the law in question and the complexity of modern advertising sales practices, it is not possible for the Commission to make these rules simple. But we have a duty to make our requirements clear.

In most respects, I believe this *Order* helps achieve the clarity we seek. But on one issue — the treatment of all package plans as bulk discounts — I believe the new approach articulated in the *Report and Order* and affirmed here, does not represent an improvement. In fact, it needlessly complicates most calculations of the lowest unit charge.

Our new approach to package plans is not required by the Communications Act. Instead, it conflicts with the law's intent to give candidates "the same rates [broadcasters give] their most favored commercial time buyers."¹ Our new approach allows candidates to dissect package plans and buy commercial time in ways that are available to no commercial advertiser. Accordingly, after considering the problems raised by the commenters, our past practices as well as the legislative history, I believe our previous policy on package plans is more consistent with the law's intent and its practical enforcement.

Background

Because the Commission's treatment of package plans is perhaps the most difficult aspect of lowest unit charge calculations, it is important to describe the context that led to our change in policy.

Before the December *Report and Order*, the Commission had a rather straightforward policy regarding package plans: "If a station offers its advertisers a special package plan for buying spot

announcements, it must make a similar plan available to political candidates and charge them proportionately." *The Law of Political Broadcasting and Cablecasting: A Political Primer*, 100 F.C.C.2d 1476, 1515 (1984). This policy did not require candidates to buy the same volume as a commercial advertiser in order to qualify for the "package" rate. Rather, the candidate was allowed to buy a portion of the package and receive a proportional rate.

In other words, each package was treated as a separate class of time, to which all candidates had a right of access. But candidates received the package discount rate without having to buy time in the same volume as commercial advertisers.² To qualify for the class discount, however, the candidate had to buy time "in all of the time periods specified in the package plan" (e.g., the defining characteristics of the class). *Id.* at 1515-16.

This approach to package plans and volume discounts worked well for almost two decades without question or complaint. Then, in 1990, a Mass Media Bureau analysis suggested that the existence of "discount package combinations provided [to] commercial advertisers" may undermine the ability of candidates to obtain the lowest unit charge. See Mass Media Bureau, *Political Programming Audit Report* at 5 (September 7, 1990). This pronouncement generated confusion about the Commission's treatment of package plans, and several licensees sought clarification in the course of our overhaul of the political broadcasting rules.³

In response, the Commission "reevaluat[ed] . . . the statutory lowest unit charge requirements [so as to] discontinue our policy permitting stations to treat 'packages' as a separate class of time."⁴ This new interpretation was based on the notion that "packages are, in effect, volume discounts," and that "Section 315(b) expressly entitles candidates to the lowest unit charge."⁵ Accordingly, the Commission concluded that a change in policy was necessary to better effectuate congressional intent.

The practical effect of this decision is to require stations to create hypothetical values for all the spots contained in package plans and to apply these values to all lowest unit charge calculations. Previously, licensees only had to make all packages available to candidates — in whatever proportion they chose to buy — but not

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to impose the "package rate" on other classes of time.

Upon reflection, I am uncertain exactly why the Commission chose to alter its statutory interpretation of approximately twenty years' duration. The essential terms of the statute and the legislative history are unchanged, and there had been no suggestion that our previous policy was being circumvented. And, as the reconsideration comments make clear, our new interpretation needlessly complicates all lowest unit charge calculations.

Legislative History

The Commission's new package plan policy is based on the basic proposition that Congress intended that candidates receive the benefit of volume discounts. There is no question that this was the intent. But this does not mean that all package plans are the same as the bulk discounts Congress had in mind when it adopted Section 315(b). It is instructive that neither the *December Report and Order* nor the *Memorandum Opinion and Order* on reconsideration states that Section 315(b) requires treating all package plans as volume discounts.⁶ Any such conclusion would be strange indeed, for it would suggest that the Commission had misread the law for two decades.

Moreover, examination of the relevant legislative history provides no indication of any such mistake. If anything, our decision on package plan goes far beyond congressional intent to "place the candidate on par with a broadcast station's most favored commercial advertiser," by giving the candidate "the same rates [as the station's] most favored commercial time buyers."⁷ Under the new policy, candidates receive more favorable treatment than any commercial advertiser because they can "cherry pick" rates from different packages that contain different classes of time.

The legislative history contains only limited discussion of package plans. The few references that exist uniformly describe packages as simple "volume discounts" or "bulk sales." In one of the most complete discussions, the Senate Report concluded:

[O]ther practices followed in the sale of broadcast time for advertising purposes involve volume or long-term purchases

and the sale of time in packages, sometimes referred to as flight plans or sales on a run-of-schedule basis. The significant factor in any such arrangement is that the broadcaster (within the limits established in the sales contract) may select the times when the purchaser's advertisements will actually be presented, thereby permitting the broadcaster to fill time spots which might otherwise be unsold. As might be expected, time sold under such an arrangement is relatively inexpensive.⁸

Thus, the legislative history contains no indication that packages made up of different classes of time are the equivalent of simple volume discounts. Indeed, the only comprehensive judicial analysis of the legislative history suggests just the opposite.

In *Hernstadt v. FCC*, the U.S. Court of Appeals for the D.C. Circuit held that Section 315(b) requires broadcasters to make preemptible and run-of-schedule (ROS) spots available to candidates.⁹ In doing so, it affirmed the Commission's long held view that "ROS and preemptible spots were both classes of time and discount privileges."¹⁰ The court considered such spots and packages to be classes of time because of their "unique preemptibility and scheduling attributes." Consequently, it held "that the lowest unit charge provision entitles candidates to ROS and preemptible terms when those terms are offered to others making similar use of broadcast facilities."¹¹

Thus, contrary to the Commission's new reading of the statute, concluding that package plans are a discount privilege does not mean that they cannot be treated as a class of time that can be offered separately to candidates. Where a package plan has "unique . . . scheduling attributes," (e.g., where it contains more than one class of time), it more appropriately should be treated as a separate class, and not as a simple volume discount. In this way, candidates "making similar use of broadcast facilities" would obtain the lowest unit charge, as guaranteed by the statute.¹²

This analysis — which the Commission espoused for two decades — is more consistent with the legislative history.

Applying the Package Plan Policy

Not only is the change in policy unnecessary, since it is not required by Section 315(b) or the legislative history, it also undermines the Commission's purpose in codifying the political broadcasting rules. We sought to clarify the rules, and thereby encourage the provision of broadcast time to political candidates. But our new package plan policy will have the opposite effect.

As noted above, treating all package plans as simple volume discounts needlessly complicates the calculation of lowest unit charge in every case. The National Association of Broadcasters noted in their comments seeking reconsideration, "[t]he new policy . . . has created widespread confusion among broadcasters, with little if any benefit to candidates."¹³ Another group of broadcasters informed the Commission that "[n]o issue has created more questions or confusion than the question of how to calculate the lowest unit charge for spots which are sold as part of package or promotional plans."¹⁴ They described corrective action as a "pressing need."

Despite these concerns, the Commission reaffirmed its new package plan policy. But in a more troubling turn of events, the Commission declined to provide any meaningful guidance to help broadcasters comply with the policy.

Commenters presented the Commission with several examples of package plans, drawn from real world experience, and asked how to calculate the lowest unit charge in those situations. They asked, for instance, how to determine the lowest unit charge where:

An advertiser includes the station's logo on all advertising for a particular event; offers the opportunity for station personnel to participate in the performance; places a cash schedule on the station; provides free tickets for the station's use; accepts the cost of the discount for the station's night at the event; provides tickets in the station's name for a charity in connection with a station promotion; and permits winners of a station promotion to attend the event. The station runs the paid schedule and also runs the promotional schedules.¹⁵

The Commission refused to shed any light on how to handle such a scenario. In fact, the *Order* steadfastly avoided any substantive response and offered instead the following evasion:

It is impractical to address every possible scenario posed in the . . . petition, especially when such questions are raised outside the framework of an actual fact pattern involving a particular station's sales practices. The discussion herein should provide sufficient clarification and guidance for stations to ascertain what procedures to follow in particular circumstances in order to comply with our rules and policies.¹⁶

This is "clarification and guidance?" Since when do we clarify an issue by avoiding the question? And why, exactly, is it "impractical to address every possible scenario" when the commenters presented a limited number of clearly articulated fact patterns?

The reason, I suspect, is not that it is "impractical" to answer hypothetical questions. It is that the Commission has adopted such a contrived and confusing policy that it cannot be applied in the real world. However, I doubt this fact will deter the Commission from levying fines on broadcasters that cannot guess our unstated intentions.

I was concerned about the difficulty of applying our package plan policy when the Commission voted on this item in May. So I sought out the person best equipped to provide an answer — Milt Gross, Chief of the Political Broadcasting Branch. As Commissioner Duggan noted at that meeting, Milt has spent 24 years "mastering this arcane area of the law." If anyone can describe how the policy works, it is he. But even Milt was unable to provide a specific answer, as the following transcript of our exchange at the May meeting demonstrates:

Quello: The one part that is a little difficult is package plans. [You] can come up with two or three different variations, and how do you figure it? What if you buy a certain amount of spots and then there is a free bonus? What if you sell spots and [along with the purchase price receive] ten percent of

the gate receipts of a concert? How do we handle that?

Gross: Well, those would be handled on a case by case basis.

Quello: I'm merely picking, but nevertheless, it is possible . . .

Gross: If these things are possible, we have to look at them in light of what our rules are going to be. With the possibility of the station receiving an additional ten percent, it depends on how speculative that is. We have some instances where the price is speculative. That doesn't affect lowest unit charge like per inquiry spots, but we would take a look definitely at such situations like this to determine how our rules affect it.

Quello: Didn't our old rules say that [candidates] qualify for the lowest unit charge if they just bought a portion of a package plan? If candidates purchased any portion of the package they would get the lowest rate. Wouldn't that be the easiest thing to do?

Gross: Well, it all depends. Some package plans consist of the same type of spots. Other package plans consist of various kinds of spots. Where previously the various kinds of spots were in the package plan, the candidate could get an advantage only if he bought a proportionate share. However, upon reflection it appears that many, if not most package plans, are nothing more than volume discounts. And the statute and legislative history require that the lowest unit charge be offered in that context.

Quello: The old plan we had wasn't too bad. I am wondering if we're going to complicate it with this.

I doubt that broadcasters will get much guidance from the revelation that the Commission will address these questions case by case. And if the nation's leading expert on these issues has a hard time describing how such package plans should be valued, one can sympathize with

the hapless station manager who has not devoted his professional life to studying these rules.¹⁷

Irreconcilable Differences

Perhaps the most striking thing about the Commission's new package plan policy is that it is so out of touch with the rest of this proceeding. The Commission initiated its inquiry into the political rules to codify and clarify them, and, for the most part, I believe we achieved this objective. For example, the *Report and Order* clarified that licensees could establish multiple classes of preemptible time so long as the classes were based on a demonstrable business purpose. Thus, much of the clarification was achieved by the Commission recognizing, and conforming our rules to account for, real world practices.¹⁸

This approach continued on reconsideration, and we were able to make some corrections. For example, the Commission held that billboards and program sponsorship need not be offered to candidates and do not affect lowest unit charge because such promotional spots generally are not appropriate for political advertisements. *Memorandum Opinion and Order* at ¶¶ 62-64. Similarly, the Commission eliminated the "fire sale" policy because it would be difficult to apply and because it would have very little effect on rates "as a practical matter." *Id.* at ¶ 75.

We would be better off if we had applied the same reasoning to the issue of package plans. Many of the types of packages that exist (*e.g.*, cross promotions between the station and an event; basing compensation on a percentage of event proceeds) simply are inapplicable to political advertising. By trying to make all package plans fit into our lowest unit charge analysis, the Commission only confuses the issue. And in the end, there is little practical benefit for candidates.

Conclusion

Viewed in the context of the Section 315(b) legislative history, the Commission's new package plan policy is unnecessary. Viewed in the context of the Commission's overall objectives and reasoning in this proceeding, it is inexplicable. Accordingly, I dissent to that portion of the *Memorandum Opinion and Order*.

¹S. Rep. No. 92-96, 92nd Cong. 1st Sess. (May 6, 1971) (emphasis added).

²In this connection, the Commission historically distinguished between package plans and simple volume discounts. Packages involved combinations of spots in different dayparts or, perhaps, different classes (e.g., five run of schedule spots plus five fixed time spots), while volume discounts involved a price cut for a given number of spots of the same type (e.g., 20% discount for 20 fixed time spots). According to the Commission, packages that contain spots of a single type "are in reality volume discount plans." *The Law of Political Broadcasting and Cablecasting: A Political Primer*, 100 F.C.C.2d at 1515-16.

³*Codification of the Commission's Political Programming Policies*, 7 FCC Rcd. 678, 694 ¶ 93-94 (1992), *Erratum*, 7 FCC Rcd. 920 (1992).

⁴*Id.* at ¶ 95.

⁵*Id.* at 694 ¶ 96 (emphasis in original). Ironically, the Commission rejected a similar focus on the significance of the lowest unit charge by commenters who argued "there is only one class, and Section 315(b) requires that the lowest unit rate of the station for each daypart be provided to candidates." Comments of Barnes, Browning, Tanksley & Casurella, *et al.* (filed August 9, 1991) at 15. See *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd. at 690, ¶¶ 64-75.

⁶See *Codification of the Commission's Political Programming Policies*, FCC 92-210 at ¶ 53 (released June 11, 1992) ("We believe that the change in policy enunciated in the Report and Order more fully effectuates Congress' intent . . .") (emphasis added).

⁷S. Rep. No. 92-96 (May 6, 1971).

⁸*Id.*

⁹677 F.2d 893 (D.C. Cir. 1980).

¹⁰*Id.* at 905 (emphasis in original). It is instructive to note that the court did not suggest that the rates charged for ROS or preemptible spots affect lowest unit charge calculations for spots outside their designated classes even though it deemed the sales practices to be "discount privileges."

¹¹*Id.* at 907 (emphasis added).

¹²Candidates still get the benefit of volume discounts when they purchase package plans that are considered a separate class. Rather than buying the entire package, candidates (but not commercial advertisers) have the option of buying only a portion of the package and paying the proportional rate. See *The Law of Political Broadcasting and Cablecasting: A Political Primer*, 100 F.C.C.2d at 1515.

¹³See *Petition for Partial Reconsideration or Clarification of the National Association of Broadcasters*, MM Docket No. 91-168 (filed February 3, 1992) at 7. NAB further noted that the Commission's prior package plan policy, "which in essence treated each particular package arrangement as a separate class of time and permitted political candidates to purchase its elements proportionately, was fully consistent with the requirements of § 315(b)." *Id.*

¹⁴*Joint Petition for Reconsideration and Clarification filed by A.H. Belo Corp., Cordillera Communications, Inc., Cox Enterprises, Inc., Duchossois Communications Co., Guy Gannett Publishing Co., Multimedia, Inc., River City License Partnership*, MM Docket No. 91-168 (filed Feb. 3, 1992) at 12.

¹⁵*Id.* at 13.

¹⁶*Memorandum Opinion and Order* at ¶ 52 n.95.

¹⁷I cite this exchange from the Agenda Meeting not to imply criticism of Milt Gross or the Mass Media Bureau. The fault lies in the policy, not in the staff.

¹⁸For example, the Commission determined that noncash promotional incentives (e.g., coffee mugs, bumper stickers and trips) need not be included in lowest unit charge calculations. *Report and Order*, 7 FCC Rcd. at 695 ¶ 101. See also the redefinition of "use" by candidates, *id.* at 685 ¶ 33, and the continuing exemption from access requirements for bona fide newscasts, *id.* at ¶¶ 15-17.