

California Governor's Recall Election Triggers FCC-Related Political Broadcasting Obligations, Raising Unusual Equal Opportunities Problems

The California Governor's Recall election, scheduled for October 7, 2003, triggers FCC-related political obligations for stations in California and adjacent states. Because a number of candidates are actors, radio personalities, and the like, this election raises unusual issues not seen since Pat Paulson's campaign for President and the FCC decision as to whether the broadcast a movie starring Ronald Reagan was a "use" triggering equal opportunities.

Legally Qualified Candidates. Only "legally qualified" candidates are entitled to the benefits of the FCC's political broadcasting rules. As of today the California Secretary of State has found 135 candidates to be qualified for the ballot. A copy of the current list of qualified candidates published by the California Secretary of State can be found at http://www.ss.ca.gov/elections/candidate_status_report_detail.pdf. As this is election features both the question of whether to recall the Governor, and, who should replace him if recalled, Governor Gray Davis also is considered a legally qualified candidate in this election.

Equal Opportunities. Under the Communications Act and implementing FCC regulations, all legally qualified candidates are entitled to "equal opportunities." This means that any time any one of these candidates (including Governor Davis) makes a non-exempt "use" of a station, all other legally qualified candidates have the right to request and receive "equal opportunities." To be effective, a request for "equal opportunities" must be within seven days of the "appearance" by another candidate.

What type of appearance will constitute a "use" triggering "equal opportunities?" It is any positive broadcast (*e.g.* not supplied by an opponent) of a candidate's identified or identifiable voice or picture, whether or not authorized or paid for by the

candidate. Appearances by candidates in *bona fide* news programs, *bona fide* news interviews, *bona fide* news documentaries or during on the spot coverage of a *bona fide* news event are not "uses" subject to equal opportunities.

The appearance or "use" need not be in connection with the election or any issue for it to be a "use." This is a vital point to consider in this election. Should a station broadcast a Different Strokes rerun featuring Gary Coleman, it would trigger equal opportunities rights of all other legally qualified candidates, just as would the broadcast of a Schwarzenegger movie, or even a trailer for the current Terminator release featuring Mr. Schwarzenegger. Not only would a non-exempt appearance by Arianna Huffington on a talk show create equal opportunities rights, so would the appearance of Gray Davis or Cruz Bustamante in a PSA or the appearance of a candidate in a commercial for his or her private business.

Such a "use" could have tremendous adverse consequences for any involved stations. If the "use" of the station was not paid for, all opposing candidates who requested "equal opportunities" within 7 days of the appearance would be entitled to *free* airtime equal to the total amount of time that the candidate appeared in the television program, movie, etc. The station would literally have to use a stopwatch to determine the time in which a candidate was either on screen or during which his or her voice could be heard. Opponents would be entitled to the same amount of time during a broadcast period of comparable desirability – a time when the size and demographic makeup of the audience would be comparable. In other words, the station could not "bury" such equal opportunities responses in unattractive time periods.

A station's obligations to document all "uses" by legally qualified candidates in the political file section of the

station's local public inspection file extends to inadvertent "uses," such as Schwarzenegger movies, as well as time

actually purchased by a candidate. Thus, broadcasters must keep a watchful eye out as to who has qualified for the ballot, when, and whether any candidate is appearing in any programming it is airing during this election period.

Lowest Unit Rate. The California recall election is considered a general election, and the 60 day Lowest Unit Charge period for all legally qualified candidates began on Friday, August 8, 2003. The FCC has previously stated informally that election day does not fall within the LUC period.

All legally qualified candidates in the California recall election are entitled to LUC privileges, including Governor Davis. While a station is not required to sell spots to candidates in this state election, if it sells advertising to a single candidate, it must sell equal amounts of advertising to all candidates in the race, including Governor Davis.

This means that stations selling advertising to candidates in the California recall election may charge such candidates, or their official committees, the lowest rate of the station for the same class and amount of time for the same period. Candidates may “cherry pick” packages in effect at a station to purchase advertising with the benefit of all frequency and other discounts offered to the most favored commercial advertiser on the station, without regard to the frequency of use by the candidate. In effect, the rate given to a client for a \$1 million buy on the station can be used by a legally qualified candidate for the purchase of a single spot on the station.

Compliance with lowest unit rate rules can be complicated, particularly with regard to package sales and “zero dollar” spots. Rather than attempt to provide a definitive review in this bulletin, we recommend that clients review our earlier advisories and contact the firm with any specific questions.

For additional information on your political broadcasting obligations please contact any of the lawyers in the Communications Practice Group. Broadcasters may also consult **Special Advisory to Broadcasters**, “Political Broadcasting Advisory” (September 2001), which can be found on our website at the following URL <http://www.shawpittman.com/Home.nsf/practice/index.htm>.

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Shaw Pittman LLP

Editors:

Clifford M. Harrington, Esq.

Dawn M Sciarrino, Esq.

Managing Editor:

Ricky A. Pursley