

Communications

FCC Close to Decision on Disclosure Of Political Ads; Super PACs Seen Benefitting

The Federal Communications Commission may vote as early as April on new rules requiring television broadcasters to make their “political file” accessible to the public online, according to sources.

The vote will be a daunting challenge for Democratic Chairman Julius Genachowski, as two of his most recent predecessors, Republicans Michael Powell and Kevin Martin, each tried and failed to impose such a requirement on TV stations.

It could also have a big impact on local, state, and national elections.

Genachowski’s proposal to make available on the internet potentially millions of documents detailing when political commercials will air, in which markets, and how much each campaign paid to each TV station would immediately benefit, among others, Super PACs, which are not permitted by law to coordinate advertising efforts with the candidate running for office. Instead of sending a volunteer to retrieve every political file from every local TV station, so as to better coordinate media strategy, a Super PAC would be able to simply log on to the FCC’s website.

“The commission is interested in moving this forward,” one source with close knowledge of the FCC’s plans on the issue told Bloomberg BNA. “[FCC] staff is working diligently on trying to give the commission that opportunity.”

The FCC had originally opened the proceeding back in 2000, a decade before the Supreme Court ruled in *Citizens United v. Federal Election Commission*. That decision struck down decades-old restrictions on independent campaign expenditures by corporations and unions, aiding an ongoing, sharp rise in such spending (13 DER AA-1, 1/22/10).

In 2007, the agency decided to formally adopt rules, only to have them rejected by the Office of Management and Budget.

Then, in October of last year, the FCC voted once again to issue a notice of proposed rulemaking in the docket, which, as expected, met with sharp protest from the broadcasting industry.

Administrative Burdens Too Great: Broadcasters. The National Association of Broadcasters and a group of state associations argued that making the “political file” available online—on an FCC website—would substantially increase administrative costs for local TV stations, since some of the data are updated daily, even semi-daily, during campaign season.

While both groups agreed that some parts of the “public inspection file” could go online, they raised concerns about uploading the entire political file.

“The burden issue is very substantial,” Jack Goodman, former senior vice president and general counsel of the NAB who now represents individual TV broadcasters, told Bloomberg BNA in a phone interview. “We’re now talking about uploading thousands of pages of material in an election cycle. That’s quite a huge burden.”

As drafted, the FCC proposal would require broadcasters to make available online all documents included their local public-inspection file—a file historically maintained in paper form at local station offices.

Within that file is what is known as the political file, where broadcasters must keep a detailed record of every request to purchase air time for political advertising. Under FCC regulations, this file must reflect all requests “made by or on behalf of a legally qualified candidate for public office” or that “communicates messages relating to any political matter of national importance, including a legally qualified candidate, any election to federal office, or a national legislative issue of public importance.”

‘How Is That Going to Work?’ The political file must also identify how the TV station responded to such requests—if a request was granted, and if so, the schedule of the times purchased, the times that the spots actually aired, the rates charged, and the “classes” of time purchased. The file must further indicate whether a station granted any free time to a candidate.

Goodman noted with concern that under the current FCC rules, TV stations are permitted to update their political file only on a monthly basis with information on the exact time a spot airs. In lieu of daily updates, the FCC has allowed stations to insert a note in the file telling the public, essentially, to ask staff for the data.

“How is that going to work?” said Goodman. “The FCC did not even address that in the notice of proposed rulemaking.”

In an online context, the public expects the data to be updated daily and be accessible daily—not once month.

Even if the documents in the file were originally in electronic form, some are hand-delivered, faxed, or sent over proprietary ordering systems, Goodman said.

But Robert Kahn, general counsel of LUC Media group, a political media-buying firm, said broadcaster lobbyists have tried to overcomplicate the issue.

“It’s not that hard,” Kahn told Bloomberg BNA in a phone interview. “At its core, the proposal is a very simple one—take the public file, convert it to a PDF, and put it online. Perhaps broadcasters should take a look at their existing public file practices to ensure compliance with existing law. Once the broadcasters comply with existing public file standards, the next step, converting to a PDF, should be an easy one.”

Alternative Proposal Seen as ‘Sizable Shift.’ Faced with the prospect of new regulations, a group of broadcasters led by Barrington Broadcasting Co., the E.W. Scripps Co., Gannett Broadcasting, and Hearst Television Inc. have a counterproposal, which would force stations to make available online only the name of the ad buyer and aggregate amount of paid for an ad spot.

One industry lobbyist who spoke to BNA on the condition of anonymity said the proposal represents a “sizeable shift in position” for the broadcasters, which could make FCC action easier.

But public interest groups steadfastly support the FCC’s original proposal to merely say that what stations currently collect on paper should now put on the internet.

“This new proposal basically shows more clearly that it’s not really the administrative burden that is holding them back,” Corie Wright, senior policy counsel for the public interest group Free Press, told Bloomberg BNA in a phone interview. “They are worried about making this information more readily available to the public. It’s been publicly available now for decades. It’s just been difficult to access.”

According to Free Press, which has filed comments in the proceeding for a group called the Public Interest Airwaves Coalition, the information made available by broadcasters online under the “Barrington proposal” would be “statutorily insufficient.”

One key piece of information the proposal omits, Wright says, is when a TV station refuses or accepts a request to run a political ad spot.

“While broadcasters must afford equal access to candidates for elected office, that same rule doesn’t hold true for third-party groups, including PACs, which may want to purchase advertising time,” Wright said. “So people who live in a local community may be interested

to know if a broadcaster only sold political air time to liberal organizations or only sold political air time to conservative organizations. It can also include PAC advertisers about candidates that are not coming from the campaign itself. This is the type of information that people would want to have readily available via the internet.”

Super PACs Would Be Beneficiaries, Lawyer Says. The FCC may have support, but not everyone sees the push for online public-inspection files as greatly furthering the public interest.

John Hane III, a communications lawyer for Pillsbury Winthrop Shaw Pittman LLP in Washington, D.C., said the proposal could increase the “regulatory load” on broadcasters for the benefit of other interests.

The proposal is seen, above all, as advantaging political campaigns and special interest groups.

“This information would be dynamically and instantly made available on the web. A Super PAC need only make a few clicks to see what the campaign bought and buy time to fit around that and respond to the message,” Hane told Bloomberg BNA in a phone interview. “They’re all in favor of it.”

Hane admitted that at least some of the resistance from broadcasters stems from not wanting media buyers on Madison Avenue to see how much stations charge for political advertising.

Backlash Feared. Under law, broadcasters must charge a lowest-unit rate for political ads, and Hane said the fear is a backlash from private-sector advertisers who may in turn want that same low rate.

“What is the legitimate interest you’re advancing in putting broadcasters in that situation?” Hane said.

Consideration of the FCC rules comes as broadcasters are estimated to earn \$2.5 billion in political advertising in 2012—up 62.5 percent over 2008, according to a report by SNL Kagan, a media industry analyst.

According to some industry watchers, the FCC could face the same hurdles at the OMB as it did under Martin in 2007.

It is still unclear, too, whether President Obama would want the rulemaking to move quickly through the OMB process.

Industry stakeholders continue to lobby the FCC aggressively. NBCUniversal, the Walt Disney Co., CBS, ABC, and FOX have all met with commission staff in the last month alone.

BY PAUL BARBAGALLO

For filings in the proceeding, visit <http://apps.fcc.gov/ecfs/proceeding/view?name=00-168>.

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