



# Virginia Association of Broadcasters Legal Review



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## Legal Memorandum

### LUC Window for General Election Opens **September 8, 2017**

In 2017, Virginians will be casting ballots in elections for Governor, Lieutenant Governor, Attorney General, all 100 Seats of the House of Delegates, as well as certain other state executive offices and certain local representatives and officials. (Broadcasters should contact their local county board of elections for details. A complete list of county boards of election is available on the Virginia Department of Elections website at <http://www.elections.virginia.gov/>.) The general election is scheduled for November 7, 2017. As a result, **the “lowest unit charge” (“LUC”) window for the November 7 general election will open on September 8, 2017.** It is critical to remember that the LUC requirements apply to state and local candidates in the same way they apply to federal candidates (but the LUC rule does not apply to non-candidate third party political advertisers, i.e., “issue” advertisers). Broadcast station sales staff should spend the next two weeks refreshing their protocols for ensuring compliance with the FCC’s LUC requirements.

Fundamentally, under the LUC requirement, during the 60-day period preceding the date of a general or special election (and during the 45-day period preceding the date of a primary or primary run-off election), the charges made for the “use” of a broadcast station by a “legally qualified” candidate may not exceed the LUC of the station for the *same class and amount of time for the same time period*. Remember, the LUC requirement does not mean that a station must sell drive time or prime time at a non-drive or non-prime time rate. Nor does it mean that “fixed position” announcements must be sold at “run of schedule” or “preemptible” rates. The LUC requirement applies only to charges made for the same “class” and “amount” of time for the same “period.” Thus, a candidate who purchases a fixed position announcement in prime time may be charged the same rate charged other advertisers for a fixed position announcement in prime time—except the candidate is entitled to the benefit of a frequency discount even though he or she might not have purchased enough time to have “earned” it.

When determining the LUC, stations must remember that, generally, all spots, including bonus spots, must be allocated some value in a package arrangement. To minimize any adverse impact on your station’s LUC during the political windows, stations should have allocated, in good

faith, some value to bonus spots included in package arrangements through a separate writing at the time the contract was signed. On the other hand, not all types of advertising must be factored into a station's LUC analysis; for example, station trade-outs, "billboards," and program sponsorships are generally not required to be factored into LUC computations.

With many station public files now available online in the FCC's online public inspection file database (<https://publicfiles.fcc.gov/>), it is easier than ever for candidates to access political file records and compare political advertising rates provided by the station to other candidates (of course, stations are not required to place records or advertising rates for commercial advertisers in their public inspection files). And, candidates may complain if they suspect a station has not provided them with the LUC. Such a complaint may be informal (a phone call to the station or FCC, written demand, etc.) or it may involve a formal written complaint to the FCC. In order to invoke the FCC's enforcement procedure, the candidate must do more than merely accuse the station of overcharging—but not much more. In order to avoid expending the resources and energy necessary to respond to a formal FCC complaint, stations may wish to follow these guidelines:

- If a station receives a candidate's letter demanding the rebate of alleged overcharges, the station should immediately consult with its own communications counsel and consider how best to respond. (Failure to respond promptly to such a letter may provoke the candidate into filing a formal complaint with the FCC.)
- In order to respond to a written inquiry or complaint concerning overcharges, stations should evaluate the specific allegations made by the candidate. Determine if the station actually did overcharge the candidate—if so, refund the overage immediately with an explanation of how the mistake occurred.
- An ongoing review of rates charged to political candidate advertisers should be conducted by stations throughout the election period. The FCC has suggested that a weekly review would be sufficient. Such ongoing reviews will enable stations to determine if an overcharge has occurred and refund all overcharges in a timely fashion.
- In other circumstances, usually in response to a formal complaint, a station may opt to conduct an internal audit. This should not be done without advance consultation with the station's own communications counsel. Full internal audits can be time consuming and expensive. They involve a review of all advertising sold to the particular candidate and other advertisers in the time periods, and an evaluation of whether the price charged the candidate was the "lowest unit charge."

If your station has not already done so, now is a good time to review your political disclosure statement and ensure that it is up-to-date—for example, you will want to be certain that your disclosure statement contains a non-discrimination provision and the current classes of time offered by the station. For detailed information on the LUC and other political broadcasting requirements, please contact the Association for the latest version of the publication *Nuts 'n Bolts of Political Broadcasting*, which was previously distributed.

If you have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

*Stephen Hartzell, Editor*

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