April 13, 2022

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# \* POLITICAL ADVERTISING DECISION \*

# FCC Upholds Station Determination that Write-In Federal Candidate Was Not “Legally Qualified” and

# Was Not Eligible for “Reasonable Access”

As an already-busy primary elections season heats up, earlier this week, the FCC issued a [Memorandum Opinion and Order](https://docs.fcc.gov/public/attachments/DA-22-395A1.pdf) (the “Order”) regarding its political advertising rules, in which the Commission clarified a broadcast licensee’s obligations and duties with regard to a write-in candidate’s right to reasonable access to the airwaves. In contrast to the Commission’s many enforcement actions related to political advertising in recent years, in this Order the FCC demonstrated a willingness to support broadcasters in their efforts to comply with political advertising rules.

Reasonable Access for “Legally Qualified” Federal Candidates. As broadcasters are aware, Section 312 of the Communications Act establishes a limited right to “reasonable access” for “legally qualified” ***federal*** candidates that are requesting such access to advance their candidacy once they have begun a campaign.

In general, a “legally qualified candidate” is one who is seeking election, has announced an intention to run for office, is qualified to hold the office he or she is running for if elected, and has qualified for a place on the ballot. A candidate who is seeking election by write-in method can satisfy the last requirement by publicly committing to seeking election by write-in and then making a “substantial showing” that he or she is a bona fide candidate for the particular office and election at issue.

Background. In the scenario addressed in the Order, a write-in candidate (the “Candidate”) for federal office publicly announced his intention to seek office and submitted a declaration of his intent to run as a write-in candidate with the relevant Board of Elections. The Candidate was identified on the Board of Elections website as a write-in candidate for Congress.

The Candidate requested time on behalf of his candidacy from two co-owned radio stations broadcasting within the relevant electoral district (the “Stations”). After providing information in support of his qualifications, the Stations accepted his request for time, uploaded relevant records to their online political files, and began running the Candidate’s ads.

Approximately three weeks later, however, the Stations suspended their broadcast of the Candidate’s ads and requested more information from the Candidate to support his claim that he had made a substantial showing of his bona fide candidacy. Upon receiving the supplemental information, the Stations determined that the Candidate had not, in fact, made the required “substantial showing” to be considered a “legally qualified” candidate—and, therefore, he was not entitled to “reasonable access” to airtime. Subsequently, the Candidate filed a complaint with the FCC alleging that the Stations impinged upon his “reasonable access” rights as a federal candidate by ceasing to air any more of his spots.

Takeaways for Broadcasters. What lessons can broadcast stations learn from the FCC’s decision? First, it is well-established that the burden of demonstrating that a write-in candidate has made a substantial showing of bona fide candidacy falls upon the candidate. When there is a question about a candidate’s bona fides, the station is not required to “prove the negative,” i.e., the station is not required to prove that the individual is ***not*** a “legally qualified” candidate. Second, a broadcaster’s determination of whether a potential write-in candidate has met his or her burden is entitled to deference, so long as the determination is made by the station in good faith. Third, a broadcast licensee that makes an initial determination that a potential candidate is a legally qualified candidate entitled to reasonable access is not prohibited from revisiting that determination if it has a good faith reason to question the bona fides of the candidate’s ”legally qualified” status. In this case, the FCC determined that the Stations were within their rights to request more information from the Candidate and to terminate his ads once they determined that he failed to meet the necessary “legally qualified” burden. In fact, it would have also been reasonable for them to deny the Candidate’s request from the outset if Station staff had initial reservations about his candidacy. In other words, the fact that the Stations did initially broadcast the ads did not have the effect of validating the Candidate’s insufficient showing of “legally qualified” status or otherwise make him legally qualified under the Commission’s rule.

(As an aside, it bears noting that the Candidate was running for office in 2020, which means that the election was long-over by the time the FCC issued the Order. As such, the FCC observed that the situation was, to a certain degree, moot because even if the Commission disagreed with the Stations as to their analysis of whether the Candidate was “legally qualified,” there would be no way for the Candidate to currently avail himself of reasonable access to the Stations’ airwaves for the relevant election. In other words, these types of situations often take some time to wind their way through the FCC’s internal adjudicatory process and, during that period of uncertainty, a station is entitled to continue to rely on its own decision, so long it was made in good faith and no intervening developments have occurred that would cause the station to change its mind.)

Although the burden does not rest on broadcasters to establish a potential candidate’s bona fide candidacy, licensees can use this Order as an example of the circumstances to look out for when making these determinations at their own stations. Here, the Stations considered the Candidate’s supplemental showing, which included claims that he had made campaign speeches, attended events, distributed campaign literature, maintained a headquarters and website, and intended to issue press releases. While these are precisely the types of typical candidate activities that the FCC’s rule uses to measure the bona fide nature of a candidacy, the Stations found that many of the activities identified by the Candidate were held outside of the congressional district in which he was running for election, and that many were not related to his campaign at all. Moreover, the Candidate was unable to provide details about the meetings he was attending in support of his candidacy, nor could he show that he had distributed literature to any significant degree. And, of course, the “intent” to issue press releases is not equivalent to ***actually*** issuing press releases. In short, the Commission was not inclined to second-guess the Stations’ good-faith determination that the necessary burden had not been met here.

The FCC’s stance in the Order complements the recent revisions to political programming and record-keeping rules announced earlier this year. In its January 2022 [Report and Order](https://docs.fcc.gov/public/attachments/DOC-378985A1.pdf) announcing the revisions, the Commission added digital activities, such as the creation of a campaign website and the use of social media for campaign advocacy, to the list of activities identified in the rule that can be used to evaluate whether a potential candidate has made a substantial showing of their bona fide candidacy. Though the Candidate in this situation was given credit for maintaining a campaign website and appearing as an interview guest on an online streaming segment, these two factors were insufficient standing alone to establish the requisite “substantial showing.”

In addition, the Commission explained in the Order that a substantial showing of candidacy should “demonstrate a campaign presence in a substantial part of the relevant district.” This pronouncement is consistent both with prior Commission decisions and the January 2022 Report and Order, which all establish that a candidate’s activities for substantial showing purposes must be conducted across substantial portions of the geographical area in which the candidate is seeking votes.

Perhaps most comforting to broadcasters, the FCC reiterated in the Order that it has never determined that broadcast advertising is a qualifying activity to make a substantial showing of “legally qualified” status. Under this “no bootstrapping” concept, candidates seeking to show that they are making significant efforts in support of their candidacy and therefore are “legally qualified” (and, if federal candidates, entitled to reasonable access to broadcast time) cannot use that same broadcast time in an effort to meet their burden.

Conclusion. Broadcasters that find themselves in a similar situation—especially with respect to self-declared write-in candidates—should heed the guideposts laid out in this Order. In addition, broadcasters should keep in mind that it is the candidate’s duty to show that he or she is a legally qualified candidate entitled to reasonable access to airtime (or even “equal opportunities”), and that the Commission, it seems, will defer to broadcasters who have made reasonable, good faith determinations of whether the candidate has met the “legally qualified” burden. Maintaining documentation of the facts and factors the station considers in making such a determination is important; a broadcaster may wish to maintain such documentation in private business files and should not upload such information to the online political file.

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*Tim Nelson, Editor*

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