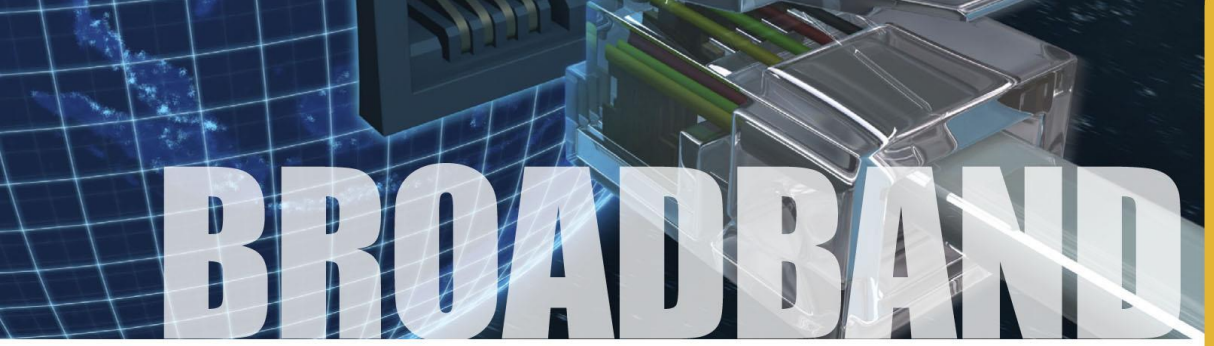

Connecting America's Public Sector
to the National Broadband Plan

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Campaign and Election Coverage: Policies You Need to Know – Legal Issues

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Campaign and Election Coverage Issues for PEG – General Considerations

- It is important to distinguish between Public Access and Government and Education Access
  - Public access channels are like designated public forums, and therefore enjoy, and are restricted by, First Amendment protections
  - Government and education access channels are not public forums, and are therefore subject to different constraints

Campaign and Election Coverage Issues for PEG – General Considerations Cont'd

- Four general doctrines have historically applied to political programming by broadcasters and cable operators
  - Equal opportunities
    - All candidates = equal access
  - Personal attack/ editorial rules
  - Reasonable access for all candidates
    - Candidates must be afforded access
  - Fairness doctrine

Campaign and Election Coverage Issues for PEG – General Considerations Cont'd

- The fairness doctrine and personal attack rules were found by the U.S. Supreme Court to violate First Amendment principles of free speech; they no longer exist as FCC rules applicable to broadcasters or cable operators
- The existing FCC cablecasting rules do not apply to PEG access, but similar requirements may be applicable to government (or education) access under state law or through court challenge

Campaign and Election Coverage Issues for Public Access

- Public access channels should be treated as a designated public forum, although the U.S. Supreme Court is divided on the question
  - *Denver Area Educational Telecommunications Consortium v. F.C.C.*, 518 U.S. 727 (1966)
    - Breyer plurality decision (joined in part on this issue by Stevens, O'Connor and Souter) held "it premature to answer the broad questions…[of] the extent to which private property can be designated as a public forum…; whether public access channels are a public forum…; [or] whether the Government's viewpoint neutral decision to limit a public forum is subject to the same scrutiny as a selective exclusion from a pre-existing public forum"
    - Kennedy concurring in part decision (joined by Ginsburg) found that "public access channels meet the definition of a [designated] public forum" which is public "property that the State has opened for expressive activity by part or all of the public" citing *International Soc. For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

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Campaign and Election Coverage Issues for Public Access Cont'd

- Thomas dissenting in part decision (joined by Rehnquist and Scalia) stated that "public access requirements, in my view, are a regulatory restriction on the exercise of cable operators' editorial discretion, not a transfer of a sufficient property interest in the channels to support a designation of that property as a public forum."
- Only 5 of the justices in *Denver Area* remain on the Supreme Court; we can only speculate on how the 4 subsequently seated justices would rule on the public forum question

Campaign and Election Coverage Issues for Public Access Cont'd

- The prudent approach is to treat political programming no differently from any other programming on the public access channel.
  - Such approach would comply with the reasoning in *Cable TV Access Channel Rules*, 83 F.C.C.2d 147 (1980), that the inherent opportunity for access justifies not imposing the equal opportunity requirement on access channels.
  - Efforts to single out political programming for particular formats and times, no matter how well intentioned, are fraught with the risk of being found by a court to constitute content-based regulation, rather than time, place, and manner regulation, because they would apply to only political programming rather than to all programming.
  - U.S. Supreme Court has held that a content-based restriction on political speech in a public forum requires the showing of a compelling state interest. *See, e.g. McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 347 (1995) (a restriction on campaign literature can be upheld only if it is narrowly tailored to serve an overriding state interest).

Campaign and Election Coverage Issues for Public Access Cont'd

- In *Moss v. Cablevision Systems*, 22 F. Supp. 2d 1 (E.D.N.Y. 1998), the Marijuana Reform Party challenged, *inter alia*, the cable operator's policy precluding any qualified candidate for public office from broadcasting on the public access channel during the 60-day period prior to the election.
  - The court held that, as a cable operator, Cablevision could not deny a qualified political candidate the right to appear on the public access channel, because 47 U.S.C. §531(e) forbids cable operators from exercising editorial control over access channels.
  - Although the case does not address the situation where a manager of a public access channel that is not a cable operator limits the presentation of a political programming, such approach would be suspect because it would apply to political speech and would be content-based.

Campaign and Election Coverage Issues for Public Access Cont'd

- Is political advertising commercial programming?
  - It is appropriate, and usually required by cable franchises, to exclude commercial programming from access channels
    - Political advertising is intended for purposes of campaigning and, therefore, can also be considered political speech. *See e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (an ad in *The New York Times* was not a commercial advertisement for First Amendment purposes because "it communicated information, expressed opinions, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of highest public interest and concern.")
    - In *Moss v. Cablevision*, the court found that candidates were not selling a product or service and thereby rejected the argument that the Marijuana Reform Party programming was commercial speech.

Campaign and Election Coverage Issues for Public Access Cont'd

- An issue that was raised during the Jerry Brown presidential primary campaign in 1991 and 1992 was whether the common prohibition against commercial programming on PEG access channels can apply to programming in which political campaign contributions are solicited.
  - The arguments against such restrictions are far greater than the case in favor of them because campaign solicitations are generally considered part and parcel of the campaign.
  - This was especially true in the case of the Jerry Brown campaign where the use of an 800 number to raise funds was part of his political "speech" against politics as usual.

Campaign and Election Coverage Issues for Public Access Cont'd

- Restrictions applicable to all users of public access are more likely to survive court scrutiny than more focused restrictions.
  - Many access center rules limit the use of channels to local residents; if this is done, limiting use to local candidates would most likely be permissible since all persons using public access would be treated the same.
  - If there is a concern that political candidates may monopolize the channel, a reasonable approach is to restrict the amount of time that could be used by any programmer. If a time restriction is reasonable and is applied to *all* users, not just political candidates, such restriction would likely be upheld as a neutral time, place, and manner restriction.
- On the other hand, a limitation that regulates campaign broadcasting to a particular block of time is content-based because it applies to only political programming.
- Similarly, confining political campaign programming to candidates' forums at which all candidates are permitted to appear may be considered an impermissible content-based restriction because it prevents those wishing to convey their message in a different format form using such other method.

Campaign and Election Coverage Issues for Public Access Cont'd

- Decisions by the U.S. Supreme Court in recent years are increasingly more protective of political "speech."
  - *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), struck down a statute that prohibited corporations and unions from using general treasury funds to make expenditures for "electioneering communications" or that express by advocates the election or defeat of a candidate because it impermissibly chilled speech.
  - In *McCutcheon v. Federal Election Commission*, 572 U.S. ___ (2014), the Supreme Court expanded *Citizens United* to strike down aggregate limits on campaign contributions by a donor to federal candidates.
  - In McCullen v. Coakley, 573 U.S. ___ (2014), the Supreme Court struck down a Massachusetts law that made it a crime to knowingly stand in a "public way or sidewalk" within 35 feet of an entrance or driveway to any "reproductive health care facility" because the buffer zones imposed serious burdens on speech and burdened substantially more speech than necessary to achieve the Commonwealth's interests.

Campaign and Election Coverage Issues for Public Access Cont'd

- Does providing access to a political candidate constitute political activity that could cause loss of 501(c)(3) tax exempt status?
  - The IRS website, in an item titled "The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations," states:

"Under the Internal Revenue code, all section 501(c)(3) organizations are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office. Contributions to political campaign funds or public statements of position (verbal or written) made on behalf of the organization in favor of or in opposition to any candidate for public office clearly violate the prohibition against political campaign activity."

  - Merely making channel capacity, studios or equipment available to anyone, including political candidates, should not constitute political campaign intervention.
  - Similarly, providing staff or volunteer assistance in producing programing should not constitute political campaign intervention, if such assistance is available to all. However, if political candidates are accorded different treatment than others, there is some risk that the IRS would consider such treatment to constitute political activity for purposes of section 501(c)(3).

Campaign and Election Coverage Issues for Public Access Cont'd

- Does making channel capacity, production equipment and personnel available to a candidate constitute a campaign contribution under applicable federal law? *See* 2 U.S.C. 431(8).
  - Although providing cable access is unlikely to be considered a contribution, a court could conceivable regard a public access center's provision of equipment and production personnel as contributions.
  - Managers of public access channels should be aware of federal (and possibly state) campaign contribution limits and the penalties associated with their violation.

Campaign and Election Coverage Issues for Government Access Channels

- Government access channels are not public forums.
  - Because the First Amendment applies to protection of an individual's speech from the government, most of the constitutional considerations which affect public access channels do not apply to government and education channels.
  - If an access channel is carrying only government programs and is not open to public use, the government should be able to edit its own speech without implicating the First Amendment. But *see*, *UMW v. Parsons*, 172 W.Va. 386, 398 (1983) (West Virginia constitution includes "fairness doctrine" applicable where there is state action).
    - Even though the same constitutional concerns may not apply, however, a government should be concerned that it does not exclude or appear to be excluding, non- government viewpoints or programming.

Campaign and Election Coverage Issues for Government Access Channels Cont'd

- Although the FCC political broadcasting and cablecasting rules do not apply to government access channels there are sound reasons for a city to adopt similar rules in order to avoid a legal, as well as political, challenge that government is favoring its own speech if others do not have equivalent access to the channel.

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Campaign and Election Coverage Issues for Government Access Channels Cont'd

- Section 76.205(a) of the FCC's rules provide: "No cable television system is required to permit the use of its facilities by any legally qualified candidate for public office, but if any system shall permit any such candidate to use its facilities, it shall afford equal opportunities to all other candidates for that office to use such facilities."
- And Section 76.205(e) adds: "In making time available to candidates for public office, no system shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage; nor shall any system make any contract or other agreement which shall have the effect of permitting any legally qualified candidate for any public office to cablecast to the exclusion of other legally qualified candidates for the same public office."

- Candidate forums are a good way for political candidates and discussions to be carried on a government access channel. But all bona fide candidates should be invited to appear.
- Any state law requirements dealing with election programing need to be followed.

Campaign and Election Coverage Issues for Government Access Channels Cont'd

- If a candidate objects to what it characterizes as unfair access to the government channel, one answer is to point to the ability to program on a public access channel (if one exists in the community) as a way to obtain fairness or equal opportunities.
  - Various issues may be presented, however, such as whether the public access channel is watched by as many viewers, whether the time available to present programming is as desirable, and whether the format of programming on the government channel would favor certain candidates, As to the latter, for example, if a candidates' forum were held on the government channel to which only some bona fide candidates were invited, it could be shown by an excluded candidate that the opportunity to appear in a different format on public access is a less favorable forum.
  - An advantage of rules of practices patterned on the FCC's rules is that a city can claim that the rules are fair and impartial, because they represent an independent determination by a disinterested outside agency.

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