FCC overturned on lowest unit rates for politicians

Appeals court says stations must give run-of-schedule rates to nonfederal candidates

Earlier this month, broadcasters were feeling good about an FCC decision holding that nonfederal candidates seeking the "lowest unit charge" to which they are entitled under the Communications Act could not claim a right to the economical run-of-schedule rates. But the grounds for the broadcasters' good feelings have now been removed—by the U.S. Court of Appeals in Washington.

A three-judge panel of the court lost little time in reversing the commission, on an appeal by Nevada state senator William Hernstadt, a Democrat. The panel heard arguments on Friday (Oct. 17), and issued its judgment the next day.

The court's opinion will be issued later, but the judges—in their unanimous holding that Hernstadt "must be afforded run-of-schedule rates"—rejected the commission's reasoning that nonfederal candidates are not entitled even to paid access to specific classes of time during primary and general election campaigns. Indeed, the commission, in a new definition, held that ROS as well as pre-emptible spots should be viewed as classes of time, not as a "discount privilege." In the past, the commission had considered such spots as both.

At issue in the case was Hernstadt's effort to buy ROS time on Alfa Broadcasting Co.'s KTNV-TV Las Vegas in his primary campaign, in August. The station rejected the request and offered, instead, fixed-position spots, which are more expensive.

Hernstadt promptly complained to the commission. He cited a 1967 commission ruling that "ROS spots must be made available [to political candidates] on the same basis as to commercial advertisers." He cited as well a 1972 Federal Election Campaign Act amendment to Section 315 of the Communications Act which requires broadcasters to afford all candidates 45 days in advance of a primary and 60 days ahead of a general election "the lowest unit charge of the station for the same class and amount of time for the same period" and, "at any other time," the same discount privileges offered commercial advertisers.

The commission, however, rejected the complaint. It said another change in the law created by the 1972 campaign act guarantees a right of "reasonable access" to federal but not nonfederal candidates. As a result of that change, the commission in 1977 upheld a station's right to refuse to offer specific classes of time to a candidate while making other classes of time available. Since licensees are not required to sell nonfederal candidates broadcast time "in the first instance," the commission said in its Hernstadt decision, "it seems unreasonable to require licensees to make ROS and pre-emptible spots available to them," both during and outside the 45/60-day periods.

The commission's definition of ROS and pre-emptible spots as "classes of time" reinforced the intent to remove them as a category of time to which nonfederal candidates are entitled. The commission justified its redefinition on the ground of their "unique pre-emptibility and scheduling attributes." It said the rates for such spots "are lower than fixed position spots, since it is the *nature* of such spots which is determinative of their low costs."

The extent as well as the basis of the court's action in reversing the commission, "on the facts of this case," will not be known until the opinion is issued. Whether the commission seeks Supreme Court review of the decision depends on how "inhibiting" the commission regards it, according to commission attorneys.

In the meantime, Hernstadt last week was said to be buying ROS at KTNV-TV.

NAB request for stay in cable case denied by FCC

The FCC has denied requests by the National Association of Broadcasters and Field Communications Corp. for a stay of the commission's order of last July repealing the cable syndicated exclusivity and distant-signal rules. The stay was requested pending the outcome of an appeal filed by Malrite Broadcasting in the U.S. Court of Appeals in New York challenging the FCC's decisions.

Bill Johnson, who presented the FCC Cable Bureau's recommendations to the commission, said that Malrite's case was "relatively weak."

Johnson also said that allegations by the petitioners that broadcasters will suffer irreparable harm if the decision goes into effect is "greatly exaggerated." He admitted that some "private injury" may be incurred by broadcasters but that it did not justify depriving cable consumers of programing.

Johnson also said that "there would be some difficulties involved" if the commission is eventually overturned on appeal and ordered to rescind its repeal of the two cable rules.

The commission's order repealing the two will take effect on Nov. 14 unless stayed by court order. When the commission didn't act on its petition by Oct. 3, NAB petitioned the New York appeals court to stay the commission's decision.

Erwin Krasnow, senior vice president and general counsel for NAB, believes it has "a very good shot in the courts on the issue of a stay." His prediction is based on a precedent of the Richmond, Va., appeals court granting a petition for stay by Spartan Radiocasting regarding an earlier FCC decision repealing the rule that cable systems must carry "significantly viewed" distant network signals. Later, however, the commission was upheld.

The New York court will hear oral arguments on NAB's petition on Nov. 5.

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