

COMMENTS OF THE WASHINGTON STATE ASSOCIATION OF BROADCASTERS

RE: ADOPTION OF PERMANENT RULE WAC 390-18-050

SEPTEMBER 24, 2019

Introduction. The Washington State Association of Broadcasters (“WSAB”) represents more than 200 local, free, over-the-air commercial radio and television stations throughout the state of Washington. These radio and television stations are “commercial advertisers” as defined in RCW 42.17A.005 and WAC 390-18-050. The stations are also regulated by the Federal Communications Commission (“FCC”), including extensive political advertising requirements. WSAB thanks the Public Disclosure Commission (“PDC”) for the opportunity to comment on its proposed permanent rules.

Policy Position. WSAB strongly opposes the adoption of permanent rule WAC 390-18-050 “Commercial Advertisers – Public Inspection of Records” as applied to radio and television stations as proposed.

Federal Pre-Emption. The State of Washington does not have the legal authority to impose the requirements of WAC 390-18-050 on radio and television stations licensed by the FCC and such requirements would, therefore, be pre-empted and unenforceable. The provisions of WAC 390-18-050 require broadcasters to collect information far exceeding that required by the FCC’s rules, including most egregiously, retaining copies of all political advertising broadcast by a station. The Communications Act of 1934, as amended, and the rules of the FCC promulgated pursuant thereto form a comprehensive, all-inclusive framework for the regulation of radio and television stations, including detailed requirements for collecting and making available to the public information regarding political advertising broadcast by the stations. The combination of the Communications Act and the FCC’s rules substantially occupy the field of regulation of radio and television stations, which precludes regulation by the State. Moreover, the State does not have the authority to, in effect, reimpose on radio and television stations rules that have been expressly repealed by the FCC (see below).

Public File Access Compliance Concerns: Background. The combination of several actions of the FCC will make it impossible for many stations to comply with WAC 390-18-050 as proposed.

Unattended Operation. Several years ago, the FCC repealed the requirement that a station have a person present at the location of the control point of the station’s transmitter. This permitted a station to operate unattended.

Relocation of the Public Inspection File. Over the past several years, the FCC has required all radio and television stations to upload to the FCC’s web site all the materials in their Local Public Inspection File, including the Political Advertising Section. That migration is complete and there are no longer Local Public Inspection Files at stations. Each station has its own Public File section on the FCC’s website.

Main Studio Rule. Most recently, the FCC repealed its “main studio” rule. That rule required every station to maintain a business location that was staffed by at least one management and one staff level person during regular business hours. The FCC noted that the reason for the main studio rule was to provide ready access by the public to the Local Public Inspection File.

Public File Access Compliance Concerns: In-Person Access to Political Advertising Information. Proposed WAC 390-18-050(3) would require broadcasters to provide the information required to be kept regarding political advertising “in person during normal business hours.” With the removal of all Public

File materials to the FCC's web site there will be stations that have no physical location and/or no regular business hours or where there is only sporadic staffing. This requirement would impose substantial financial burdens on local broadcasters. At a minimum it would require a station to lease an office location and hire staff that would be sufficient to cover an entire business day just in the event that a member of the public wants to see the political advertising information. In fact, during the time when the FCC required a Local Public Inspection File be kept at the station, many stations never had even one person come to the station to review the File. This is a duplicative and unnecessary requirement.

Public File Access Compliance Concerns: Electronic Access to Political Advertising Information. The proposed rule permits a station to make the information available on the station's own web site or a site created for purposes of publishing the information with a direct link to that site from the station's main web page. However, the broadcaster's Public File political advertising information is not on a web site controlled by the station, but by the FCC, which would not comply with the proposed rule.

Public File Access Compliance Concerns: Archive Copies of Political Advertising Broadcast by the Station. Proposed WAC 390-18-050(6) would require broadcasters to keep a copy of every political advertisement broadcast by the station and make it available for public inspection. There is no FCC requirement that a station keep a copy of political advertisements. Therefore, copies of political advertisements broadcast by a station are not required to be uploaded to its Public File folder on the FCC's web site. This proposed rule goes beyond requirements of the political advertising rules of the FCC and would create additional, unnecessary financial burdens on broadcasters; and, would be pre-empted by federal law. For the reasons stated above, it will be impossible for some stations to provide access to broadcast political advertisements because there is neither a physical location nor the necessary equipment to facilitate the listening or viewing of the advertisements. In order to comply, broadcasters would need to locate office space and provide staff and equipment on the off-chance that someone might want to view a political advertisement.

Public File Access Compliance Concerns: Archive Copies of all Political Advertising Broadcast by the Station-Copyright. Broadcasters do not own the advertising that is broadcast on their stations. It is owned by the advertiser, whether it is a political advertisement or a regular commercial business advertiser. Without permission from the advertiser, stations do not have the legal authority to copy advertisements to their website, nor make a copy at the request of a candidate's opponent, a member of the public or the Public Disclosure Commission. The proposed requirements of WAC 390-18-050 would present stations with the decision either to comply with the rule or risk a copyright infringement violation.

Public File Access Compliance Concerns: Retention Period. The proposed permanent WAC 390-18-050 extends the retention period for the political advertising materials that a station is required to keep from three (3) years to five (5) years. Both the existing and proposed retention periods conflict with the retention period required by the FCC's political advertising rules (2 years) and would be pre-empted by federal law as applied to radio and television stations.

WSAB Recommendations. Notwithstanding the fact that the proposed permanent WAC 390-18-050 as applied to radio and television stations partially or in its entirety is pre-empted by the federal Communications Act of 1934, as amended, and the rules of the FCC, WSAB makes the following recommendations:

1. WAC 390-18-050(3)(a) should be amended to exempt radio and television stations from the requirement that the required information be made available to in-person, mail, including telephone, email, other electronic or similar requesters.
2. WAC 390-18-050 (3)(b)(ii) should be amended to include “the web site of a federal government regulatory agency that has direct regulatory authority over the commercial advertiser.” That would permit the political advertising information required to be filed by a station on the FCC’s web site to comply with the proposed rule.
3. WAC 390-18-050 (6) should be deleted in its entirety and replaced with the requirement that the sponsor of a political advertisement should maintain archived copies of advertising that it has sponsored and make such advertising available for public inspection. Candidates and ballot measure political committees already have public disclosure obligations and websites. It would be far more efficient, timely and sensible to require them to post their advertisements on their websites.
4. Alternatively, WAC 390-18-050(6)(c) should be deleted in its entirety and replace with: “For broadcast media: Compliance with the political broadcasting advertising rules of the federal communications commission that require the collection and retention of information required to be maintained in a broadcast station’s political section of its Public Inspection File contained on the website of the federal communications commission shall be considered to be in compliance with WAC 390-18-050.”

Dated September 24, 2019.

Respectfully submitted,

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