Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Revisions to Political Programming and Recordkeeping Rules	)	MB Docket No. 21-293
	)	

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

I. Introduction and Summary

The National Association of Broadcasters ("NAB")[1] generally supports the proposal to add social media and the creation of campaign websites to the existing list of activities in the rules that may demonstrate whether a write-in candidate has made the "substantial showing" required to be a "legally qualified candidate for public office."[2] We agree with the FCC that present-day candidates routinely use such digital activities for campaign-related functions.[3] However, given the substantial benefits that broadcasters must confer on candidates that meet this test,[4] including reasonable access, equal time and the lowest unit charge (LUC), NAB submits that certain conditions must apply. The FCC should codify or otherwise clarify that digital activities alone are not sufficient or determinative; a write-in candidate must also have a "boots-on-the-ground" presence in the relevant jurisdiction to meet the substantial showing threshold. In addition, only digital activities that are campaign-

[1] NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

[2] *Id*. 47 C.F.R. § 73.1940.

[3] *Revisions to Political Programming and Recordkeeping Rules*, Notice of Proposed Rulemaking, MB Docket No. 21-293, at ¶¶ 11-13 (rel. Aug. 4, 2021) (Notice);.

[4] Notice at ¶ 9.

related and targeted at eligible voters need be considered. Finally, the FCC should codify or otherwise reinforce long-standing policy that write-in candidates bear the burden of proving they are legally qualified, and that a broadcaster's reasonable, good faith determination whether a candidate is legally qualified is entitled to deference.[5]

II. Digital Activities May Be Additional Indicators of a Write-in Candidate's Legal Qualifications, But Not Dispositive

The Communications Act bestows significant privileges on a "legally qualified candidate for public office," including reasonable access to broadcast facilities,[6] opportunities to use a station equal to their opponents[7] and the LUC for political ads.[8] The FCC's rules require that write-in candidates make a "substantial showing" of their bona fides to prove they are a "legally qualified candidate" in the state or other relevant jurisdiction in question.[9] A substantial showing means evidence that a candidate has "engaged to a substantial degree in activities commonly associated with political campaigning. . . . [such as] making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee, and establishing campaign headquarters."[10]

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[5] *Id*. at ¶ 10 note 41.

[6] 47 U.S.C. § 312(a)(7).

[7] *Id*. at § 315(a).

[8] *Id*. at § 315(b).

[9] 47 C.F.R. § 73.1940(b)(2). Write-in candidates also must publicly announce their intention to run for office and be qualified to hold the office they seek. *Id*. at §§ 73.1940(a)(1)-(2).

[10] *Id*. at § 73.1940(f).

We agree with the FCC that modern candidates routinely use social media and campaign websites to share their views and solicit votes and contributions.[11] Thus, NAB supports adding these activities to the list of examples of campaign activities in the substantial showing rule. In fact, we understand that doing so would not drastically change current industry practices because, as a practical matter, broadcasters already consider digital activities when determining whether a candidate has established their legitimacy.

That said, given the simplicity of creating and running a social media account or website, certain stipulations should apply to ensure the legitimacy of candidates. Otherwise, any individual with a Facebook, Twitter or Instagram account could claim status as a legally qualified candidate who is entitled to reasonable access, equal time or the LUC. The cost and effort of using such digital outlets pale in comparison to that of the other activities listed in the FCC rule. Any candidate can easily start a social media account or use an online template service to create a website, or do so with an intern's help in a matter of minutes.[12] On the other hand, organizing and operating a campaign committee and establishing a campaign headquarters require the preparation and filing of legal forms with the Federal Election Commission and/or local elections offices and hiring campaign staff. Even drafting and distributing campaign literature and press releases require a meaningful amount of time and effort that demonstrates an earnest commitment to seeking elective office and targeting eligible voters.

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[11] Notice at ¶ 11.

[12] A campaign website can be created using a free website builder like WordPress.com plus a year of domain hosting for as little as $48, or there are services that will create and support a customized website for about $30 a month. https://wordpress.com/go/how-to/promote-business-for-free/; https://candidatebootcamp.com/blog/how-to-build-political-campaign-website/; https://poliengine.com/.

Accordingly, social media or a campaign website alone must not justify status as a "legally qualified candidate,"[13] or be the determinative factor. Broadcasters must be allowed to consider holistically a write-in candidate's validity, based on the sum and context of a candidate's activities. Digital activities should be only one of several criteria that could support a candidate's bona fides. More specifically, NAB submits that digital activities like social media and websites must be combined with consequential "boots-on-the-ground" activities in the relevant jurisdiction to substantiate a candidate's genuine interest in elective office. Such local efforts might include establishing a campaign headquarters, appearing at community events and political debates, and similar outreach targeted to eligible voters.

A boots-on-the-ground analysis is especially important in Presidential campaigns. Under Section 73.1940(e)(2) of the rules, a write-in candidate who makes a substantial showing of a bona fide candidacy for President in at least ten states is considered a legally qualified candidate in all states.[14] If a social media presence or campaign website could be the decisive reason that a candidate is bona fide, then every presidential candidate would be entitled to reasonable access to broadcasters' facilities on Day One. Such an outcome would be inconsistent with the FCC rule, which clearly intends to require write-in candidates to invest in and conduct concrete state-by-state campaign activities to qualify for the ballot. NAB submits that the FCC should take steps to prevent hobbyists, Internet influencers or fame chasers from using the political programming rules for purposes other than seeking elective office. Thus, we request that the FCC modify the substantial showing rule to clarify

[13] Notice at ¶¶ 12-13.

[14] 47 C.F.R. § 73.1940(e)(2).

that digital activities may be additional indicators of a candidate's validity, but not dispositive, and that digital activities must be combined with some on-site activities within the relevant jurisdiction to satisfy the rule.

As online campaigning continues to grow, such an approach will provide both candidates and broadcasters with a better roadmap for addressing disagreements that arise when write-in candidates request time on a station. Consider the recent California gubernatorial recall election, which had more than 45 replacement candidates,[15] and how unwieldy it would be for broadcasters to provide equal time to all legally qualified candidates if the substantial showing threshold was lowered. Indeed, broadcasters in such a predicament may have to forego selling time for a particular state or local race (in which reasonable access is not mandated), an outcome that would be unfortunate for both the candidates and the public.

Second, even if a write-in candidate has engaged in a combination of boots-on-the-ground and digital activities, NAB submits that only digital activities that are directly related to the campaign should count towards the requisite substantial showing. Digital outreach under the umbrella of a political campaign but focused on promoting a candidate's company or service may be disregarded. Or, as the Notice suggests, only digital marketing or advertising that is directed towards areas where eligible voters are located should count.[16] For example, stations should not be required to provide access to a candidate who strategically qualifies for office in one area in order to get their message out in a neighboring locale lacking eligible voters. This occurred in 2012, when a pro-life candidate qualified for

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[15] https://www.sos.ca.gov/elections/upcoming-elections/2021-ca-gov-recall,

[16] Notice at ¶ 14.

the 2012 presidential ballot (i.e., not as a write-in candidate) in West Virginia for the unmistakable purpose of demanding reasonable access to run anti-abortion ads on a television station in Washington, DC.[17] The FCC found that the station had unreasonably denied access, even though its' signal reached only three percent of West Virginia's population.

Situations like this illustrate the challenges that broadcasters face when a write-in candidate requests ad time. They must weigh the sincerity of the candidate's efforts and interest in seeking office against the effect on the station's facilities and audience of granting the candidate's request. Considerations like whether a candidate has merely posted their views on their own social media account compared to purchasing ads on an independent third-party website may be important. Broadcasters must be permitted to weigh different digital campaign efforts differently, depending on the time, expense and purpose involved. For these reasons, NAB strongly supports the FCC's characterization of social media accounts and campaign websites as merely additional factors of a candidate's legitimacy.[18]

Finally, as the Notice states, write-in candidates bear the burden of demonstrating the substantial showing required to be a legally qualified candidate,[19] and a broadcaster's reasonable, good faith determination whether a candidate has fulfilled this requirement is entitled to deference.[20] The Supreme Court has held that the FCC "mandates careful

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[17] *Complaint of Randall Terry for President and Pro-Life Candidates Against Station WUSA (TV), Washington, DC*, Memorandum Opinion and Order, 27 FCC Rcd 13418 (2012).

[18] *Id*.

[19] Notice at ¶ 10 note 41.

[20] *Id*.

consideration of, not blind assent to, candidates' desires for airtime. . . . The FCC's standards are not arbitrary and capricious, but represent a reasoned attempt to effectuate the statute's access requirement, giving broadcasters room to exercise their discretion but demanding that they act in good faith."[21] For example, this discretion has allowed broadcasters to reasonably deny access to a write-in candidate who failed to continue campaigning after being denied a place on the ballot, [22] and another who did not submit any information to support his claimed legally qualified status,[23] among presumably many other unreported situations. It is easy to imagine a day when a write-in candidate seeks office primarily through online outreach, and given the Internet's ubiquity in our daily lives, will seek treatment as a legally qualified candidate entitled to all of the benefits of that status. Many of these inquiries may be close calls, and it is critical that a broadcaster's determination receive deference, so long as the broadcaster has acted reasonably and in good faith.

Although this is existing Commission policy pursuant to a few decades-old Bureau decisions, the growing complexity of issues raised by the increasing use of digital campaigning requires more certainty around this question. NAB therefore submits that it would serve the public interest to codify in the substantial showing rule that broadcasters are entitled to deference when determining whether a write-candidate has satisfied the requirement, so long as they have acted reasonably and in good faith. Doing so would help

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[21] *CBS v. FCC*, 453 U.S. 367, 371 (1981).

[22] *Complaint by Michael Levinson Against Station WXXI-TV, Rochester, New York*, 1 FCC Rcd 1305 (MMB 1986).

[23] *Complaint of Douglas S. Kraegar Against Radio Station WTLB Utica, New York*, 87 F.C.C.2d 751, 753 (Broadcast Bureau 1980).

clarify the responsibilities of both candidates and stations, thereby reducing tensions and facilitating the process for legally qualified candidates.

III. Conclusion

Subject to the conditions described above, NAB generally supports adding certain social media and creation of campaign websites to the existing list of activities in the FCC's rules that may be considered in a determination whether a write-in candidate has made a substantial showing required to obtain the benefits afforded to a legally qualified candidate under the Communications Act and the FCC's rules.

Respectfully submitted,

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