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# CANDIDATE APPEARANCES, EQUAL TIME AND THE FCC'S ONLINE PUBLIC FILE DATABASE: EMPIRICAL DATA ON TV STATION COMPLIANCE DURING THE 2016 PRESIDENTIAL PRIMARY

Christopher Terry\*

## INTRODUCTION

During the 2016 presidential primary campaigns, Republican candidate Donald Trump<sup>1</sup> and Democratic candidates Hillary Clinton<sup>2</sup> and Bernie Sanders<sup>3</sup> each made brief appearances on the NBC program *Saturday Night Live*. As an entertainment program, the appearances by each of the legally qualified candidates were not covered by the Bona Fide News Exception<sup>4</sup> to the FCC's longstanding Equal Opportunities Rule.<sup>5</sup> Therefore each of the candidates' appearances provided a potential opportunity for other legally qualified candidates in the respective presidential party primary race to request equal time.<sup>6</sup>

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<sup>1</sup> *Saturday Night Live: Donald Trump*, HULU (NBC television broadcast Nov. 7, 2015) (streaming then-Republican Presidential candidate Donald Trump's appearance on Saturday Night Live).

<sup>2</sup> *Saturday Night Live: Miley Cyrus*, HULU (NBC television broadcast Oct. 3, 2015) (streaming then-Democratic Presidential candidate Hillary Clinton's appearance on Saturday Night Live).

<sup>3</sup> *Saturday Night Live: Larry David*, HULU (NBC television broadcast Feb. 6, 2016) (streaming then-Democratic Presidential candidate Bernie Sanders' appearance on Saturday Night Live).

<sup>4</sup> FCC Radio Broadcast Services Rule, 47 C.F.R. § 73.1941(a) (2016).

<sup>5</sup> *Id.*

<sup>6</sup> *See Id.* (detailing the burden of proof for a candidate requesting an equal opportuni-

Events which initially trigger equal time and the corresponding requests for access require that individual broadcast stations<sup>7</sup> make entries into the political file of a station public file.<sup>8</sup> Traditionally these files had been retained at the physical location of the station, and were accessible upon request by members of the public, but only by those who made the request while physically visiting a station's offices.<sup>9</sup> In April of 2012 the Federal Communications Commission mandated that broadcast television stations begin to upload public file documents to an online database at the agency's website.<sup>10</sup>

This paper explores the equal time rule and the bona fide news exception before conducting a compliance test on local NBC affiliate stations in the top 100 television markets, to examine if stations are uploading notifications of the candidate appearances and how the stations are handling notifications and awards of any corresponding requests for equal time.

### SECTION 315

Frequently associated with, or mistaken for, the Fairness Doctrine,<sup>11</sup> the FCC's equal time regulations require that stations treat legally qualified candidates for political office the same. This applies to opportunities to purchase advertising that reaches similar audiences at similar prices, but also includes a provision where an appearance or use by one candidate in a political campaign,

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ty).

<sup>7</sup> See *Public Inspection Files*, FCC.GOV, <https://publicfiles.fcc.gov/> (last visited Mar. 10, 2017) (detailing the public inspection file requirements that apply to a broadcaster) [hereinafter *Public Inspection Files*]; see also *Frequently Asked Questions*, FCC.GOV, <https://publicfiles.fcc.gov/faq/#broadcasters-political> (last visited Mar. 10, 2017) (explaining whether a broadcaster is exempt from political and online file requirements pursuant to Cable Syndicated Program Exclusivity: Extent of Protection Rule, 47 C.F.R. §76.101(d)). Complicating these events is the nature of the Saturday Night Live program, the relationship between the national NBC network and the local affiliate stations, and the requirement for the record keeping by the local stations. Saturday Night Live is a network program but is broadcast by the individual NBC affiliate stations at the local level. Although an affiliate station did not produce the program, by airing or to use the industry term "clearing" the program, the local station assumes the responsibility for the content, and in the current example, the online documentation of a candidate use not covered by the news exception. See also FCC, THE INFORMATION NEEDS OF COMMUNITIES 99-114 (2011), [https://transition.fcc.gov/osp/inc-report/The\\_Information\\_Needs\\_of\\_Communities.pdf](https://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf) (analyzing how the decline in newspapers has influenced the business strategies and record keeping of network news, cable news networks, and local cable news).

<sup>8</sup> 47 C.F.R. § 73.1943(d).

<sup>9</sup> *Id.*

<sup>10</sup> 47 C.F.R. 73.3526(b).

<sup>11</sup> *In re* Editorializing by Broadcast Licensees, Docket No. 8516, Report of the Commission, 13 FCC 1246, 1260 ¶6 (1949).

allows the other candidates to request “equal time.”<sup>12</sup> Regulations governing candidate access to broadcast facilities are contained in Section 315 of the 1934 Communications Act.<sup>13</sup>

“If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station.”<sup>14</sup>

Obtaining the status of a legally qualified candidate requires that an individual has publicly announced a run for office and has met the applicable qualifications to hold the office under the local, State or Federal law.<sup>15</sup> Further requirements for a candidate include that the individual must have either qualified for a place on the ballot<sup>16</sup> or publicly committed to a write in campaign with a substantial showing that he or she is a bona fide candidate for the office.<sup>17</sup>

In terms of obtaining status as a legally qualified candidate for President, an individual must meet the state requirements to appear on the ballot, but once a candidate is considered qualified in 10 states, the candidate is considered legally qualified in all 50 states.<sup>18</sup>

A candidate requesting “equal time” must make the request within a week of an opposing candidates “use” that triggered equal time.<sup>19</sup> “[T]he term ‘use’ means a candidate appearance (including by voice or picture) that is not exempt” under the bona fide news exceptions.<sup>20</sup> The requesting candidate also incurs the burden of proof, and upon request by a station, must demonstrate that he or she and their opponent each meet the requirements of a legally qualified candidate.<sup>21</sup>

A station only must grant an equal opportunity to legally qualified candidates who request it following a triggering use by another candidate.<sup>22</sup> Alt-

<sup>12</sup> Communications Act of 1934, 47 U.S.C. § 315(a) (2012).

<sup>13</sup> *Id.* at 47 USC §315.

<sup>14</sup> 47 C.F.R §73.1941(a).

<sup>15</sup> *Id.* at §73.1940(a).

<sup>16</sup> *Id.* at §73.1940(b)(2).

<sup>17</sup> The term “substantial showing” of a bona fide candidacy means evidence that the person claiming to be a candidate has engaged to a substantial degree in activities commonly associated with political campaigning. Such activities normally would include making campaign speeches, distributing campaign literature, issuing press releases, maintaining a campaign committee, and establishing campaign headquarters. *Id.* at §73.1940(f).

<sup>18</sup> *Id.* at §73.1940(e)(2).

<sup>19</sup> *Id.* at §73.1941(c).

<sup>20</sup> *Id.* at §73.1941(b).

<sup>21</sup> “A candidate requesting equal opportunities of the licensee or complaining of non-compliance to the Commission shall have the burden of proving that he or she and his or her opponent are legally qualified candidates for the same public office.” *Id.* at §73.1941(d).

<sup>22</sup> *Id.* at §73.1942(e).

though federal candidates are granted access to broadcast stations, the stations are not required to grant access to candidates in non-federal races.<sup>23</sup> Once a station permits a candidate use in a state or local race, the station is required to grant equal opportunities to other candidates in that race.<sup>24</sup>

#### BONA FIDE NEWS EXCEPTION

Traditionally, Section 315 provisions covered candidate appearances within programming as well as access to advertising opportunities.<sup>25</sup> In contemporary times, the equal opportunities provisions are most closely associated with equal advertising opportunities. Other situations and candidate appearances that trigger equal time are limited due to the wide application of the FCC's bona fide news exception to programming.

The bona fide news exception includes four situations, which in practical terms, include a wide range of informational media programming. A candidate appearance by a legally qualified candidate on any: (1) bona fide newscast, (2) bona fide news interview, (3) bona fide news documentary, or (4) on-the-spot coverage of bona fide news events does not trigger equal time.<sup>26</sup>

The exception has been interpreted to cover a wide range of informational programming. Television talk programs including those of Jerry Springer,<sup>27</sup> Sally Jesse Raphael<sup>28</sup> and Phil Donahue were designated by the agency as news programs. Even the broadcast program formerly hosted by controversial radio shock-jock Howard Stern was once designated as a news interview program by the FCC.<sup>29</sup>

Despite the wide application of the exception, candidate appearances still trigger equal time provisions. In recent times, however, this has most commonly been associated with candidates who were also actors, and starred in movies or television programs before running for office.<sup>30</sup>

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<sup>23</sup> PILLSBURY, WINTHROP, SHAW, PITTMAN, LLP, POLITICAL BROADCASTING ADVISORY 7 (2010), <https://www.pillsburylaw.com/images/content/3/0/3016.pdf> [hereinafter POLITICAL BROADCASTING ADVISORY].

<sup>24</sup> 47 C.F.R. §73.1941(e); POLITICAL BROADCASTING ADVISORY, *supra* note 23.

<sup>25</sup> Equal Time Act (Political Broadcasts), 48 Stat. 1088 (1934).

<sup>26</sup> Communications Act of 1934, 47 U.S.C. §315(a) (2012).

<sup>27</sup> *In re* Request of Infinity Broadcast Operations Inc. For Declaratory Ruling, DA Docket No. 03-2865, *Declaratory Ruling*, 9 F.C.C.R. 2811, 2812 ¶3 (2003).

<sup>28</sup> *Id.*

<sup>29</sup> "News interview segments ... qualify for the ... exemption" *Id.*

<sup>30</sup> For example, during Republican Ronald Reagan's candidacy for California Governor and later president, television stations which aired any of the movies he starred in could have triggered the provision as that programming would not have been "news". When actor Arnold Schwarzenegger ran for Governor of the state of California against more than 100 other candidates, his appearances in news programming did not trigger equal time, but if

## STATION PUBLIC FILE AND THE FCC'S ONLINE DATABASE

For more than nine years, the FCC was engaged in an ongoing rulemaking proceeding following Congressional instructions to continue to ensure the availability of station public file data. In April of 2012, the agency released the Second Report and Order, which mandated that television stations located in the top 50 media markets and who were associated or affiliated with one of the four major broadcast networks, would begin uploading public file data online.<sup>31</sup> Other television stations in the top 50 markets as well as all of the stations in smaller markets would have a two-year grace period, and begin to upload data in 2014.<sup>32</sup>

The agency's direction and intent were well founded. Public file data had been available at the physical location of broadcast stations since 1965, but with increasing interest in the types of advertising related information in a station's political file, the FCC was trying to facilitate even easier access to the material, stating: "...placing the political file online will enable candidates, as well as the public, journalists, educators, and the research community, to identify and investigate those sponsoring political advertisements."<sup>33</sup>

The FCC's Political File rule requires that individual stations: "keep and permit public inspection of a complete and orderly record (political file) of all requests for broadcast time made by or on behalf of a candidate for public office, together with annotation showing the disposition made by the licensee of such requests, and the charges made, if any, if the request is granted."<sup>34</sup>

In terms of advertising, stations must maintain a complete record of a re-

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broadcast television stations in the state had run any of his movies during the campaign cycle, the appearance could have triggered the provisions. Fred Thompson, a former U.S. Senator from Tennessee who has appeared in a variety of movies and television programs also announced his candidacy for President in 2008, but dropped out of the race before his body of dramatic work could trigger equal time requirements. Daniel Lyons, *It's time to retire the Equal-Time rules*, TECH POLICY DAILY (Sept. 17, 2015), <http://www.techpolicydaily.com/communications/retire-equal-time-rules/>.

<sup>31</sup> Press Release, FCC, FCC Modernizes Broadcast Television Public Inspection Files To Give The Public Online Access To Inform Previously Available Only At TV Stations (Apr. 27, 2012) (on file with author).

<sup>32</sup> August 3, 2012 was the starting date for the FCC's Public File Database. David Oxenford, *FCC Releases Order on Online Public Inspection File- Answering Questions about Compliance with Radio's New Obligations*, BROADCAST LAW BLOG (Feb. 2, 2016), <http://www.broadcastlawblog.com/2016/02/articles/fcc-releases-order-on-online-public-inspection-file-answering-questions-about-compliance-with-radios-new-obligations/>.

<sup>33</sup> *In re* Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, MM Docket No. 00-168, *Second Report and Order*, F.C.C. Rcd. No. 9, ¶ 16 (2012) [hereinafter Standardized Disclosure Requirements].

<sup>34</sup> Similar information is required for the content and purchase of non-candidate political advertising, (issue advertising) under the guidelines. FCC Radio Broadcast Rule 47 C.F.R. §73.1943(e)(1)(B)(iii) (2016).

quest to purchase broadcast time that is purchased by or on behalf of a candidate or that communicates a message relating to any political matter of national importance.<sup>35</sup> Matters of a national importance can include a discussion of a legally qualified candidate, elections to Federal office, or national legislative issues of public importance.<sup>36</sup>

Materials required in a station's political file record whether the request to purchase broadcast time was accepted, the rate charged, when the message aired, and must disclose the name of the candidate to which the communication refers and the name of the candidate, a description of the election, or in the case of issue advertising, the issue of national importance discussed in the advertising.<sup>37</sup> Additional disclosures include information about the makeup of a candidate's campaign organization, including the name of the treasurer, the name of the person purchasing the time, and contact information.<sup>38</sup>

Political File Rules require that stations actively maintain their public and political files. Information related to candidate advertising or appearances, "shall be placed in a political file as soon as possible and shall be retained by the licensee for a period of not less than 2 years."<sup>39</sup>

#### NON-COMPLIANCE

In 1990, the FCC conducted a surprise audit of station public inspection files, requesting access to 20 television and 10 radio stations.<sup>40</sup> The agency's intent was to test stations and assess if the Lowest Unit Charge was being applied to advertising sold to political candidates.<sup>41</sup>

In recent years, the agency has fined stations for failing to provide access to the file, failing to maintain the file properly, and even when stations self-report missing public file items during license renewal. In March of 2016, the FCC fined Peconic Public Broadcasting \$10,000 for repeated violations for failing to maintain the station's public file.<sup>42</sup> After the owners answered "no" to a cer-

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<sup>35</sup> 47 U.S.C. §315(e) (2012).

<sup>36</sup> *Id.* at §315(e)(1)(B).

<sup>37</sup> *Id.* at §315(e)(2).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at §315(e)(3).

<sup>40</sup> Milagros Rivera-Sanchez, *Political Advertising: Section 315(b)(1) and the FCC's Surprise Audit*, 15 COMM. & L. 37 (1993).

<sup>41</sup> The assessment demonstrated that in 80% of the television stations, candidates paid more than other advertisers throughout the day. In radio, half of the stations had charged candidates more than commercial advertisers. *Id.*

<sup>42</sup> Jerry Glover, *FCC Fines Public Radio Station \$10,000 For Public File Violations*, LEAVENS STRAND & GLOVER (Mar. 15, 2016), <http://lsglegal.com/fcc-fines-public-radio-station-10000-for-public-file-violations/>.

tification in FCC Form 303-S that the documentation required by Section 73.3527 has been placed in the station's public inspection file, an attached Exhibit explained that the Station's public file was missing 13 quarterly issues-programs lists, commencing when Licensee acquired the station in December of 2010.<sup>43</sup>

In March of 2013, the agency issued a NAL against a group of six noncommercial radio stations for failing to make station public files available.<sup>44</sup> A newspaper reporter had attempted to view public files, but was denied access to materials. Later, after repeated attempts to view documents in the files, the reporter noted, and then complained, that the files were incomplete.<sup>45</sup>

WPRK licensee Rollins College was fined for failing to maintain and then make available a complete station public file.<sup>46</sup> Program files were missing for a three-year period from 2008-2011. Mapleton License of San Luis Obispo failed to maintain multiple issues/programs list in the Station KXDZ(FM) public inspection file. During the inspection required issues/programs lists were missing for five quarters. The local manager stated that the periods for which the issues/programs lists were missing appeared to coincide with the departure of the station employee who had maintained the file.<sup>47</sup>

During a license renewal by Double O South Carolina Corporation for WWNQ-FM, the station's filing indicated "no" on the Form 303-S certification, reporting that the stations public file was missing reports for 10 quarters between 2005-2010, including all four reports for 2009.<sup>48</sup>

WSBH also reported "no" on form 303-S during a license renewal. The public file contained a complete listing of public service announcements run by the station, but issues-programs reports were missing. According to the station, staff in charge of the public file was unaware of the requirement that the quarterly report be prepared and placed in the file.<sup>49</sup>

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<sup>43</sup> *In re* Application of Peconic Public Broadcasting For Renewal of License for Station WPPB (FM) Southampton, New York, DA Docket No. 16-253, *Forfeiture Order*, 31 FCC Rcd 1904, 1904 ¶2 (2016).

<sup>44</sup> *In re* CSSI Non-Profit Educational Broadcasting Corporation, DA Docket No. 13-525, *Notice of Apparent Liability for Forfeiture*, 28 FCC Rcd 3087, 3087 ¶1 (2013).

<sup>45</sup> *Id.* at 3087-88 ¶2.

<sup>46</sup> *In re* Rollins College, DA Docket No. 12-1176, *Notice of Apparent Liability for Forfeiture and Order*, 27 FCC Rcd 8234, 8234 ¶1 (2012).

<sup>47</sup> *In re* Mapleton License of San Luis Obispo, LLC, DA Docket No. 12-608, *Forfeiture Order*, ¶2 (2012).

<sup>48</sup> *In re* Application of Double O South Carolina Corporation For Renewal of License for Station WWNQ (FM) Forest Acres, South Carolina, DA Docket No. 12-564, *Order and Notice*, 27 FCC Rcd 3905, 3905-06 ¶3 (2012).

<sup>49</sup> *In re* Application of WSBH FM, LLC, DA Docket No. 12-631, *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture*, 27 FCC Rcd. 4179, 4180 ¶3 (2012).

## METHODOLOGY

The author was a commercial radio producer for more than a decade, and as part of his regular duties, had extensive compliance experience in maintaining station public files. This experience has been used in previous research related to public file data.<sup>50</sup>

To use the FCC's online database, a list of the local NBC broadcast television affiliates in the top 100 media markets was assembled.<sup>51</sup> Specifically, the call letters of the stations were collected and used as the search criteria in the FCC database.<sup>52</sup>

For each station, the political file tab was searched for documents relating to the candidate appearances by Trump, Clinton or Sanders as well as for corresponding equal time requests by other candidates.<sup>53</sup> In the case of each of the 100 stations, a complete search of the political file tab was conducted.<sup>54</sup> This included database folders for both years, 2015 and 2016, as well as folders naming individual candidates, categorized as federal races, presidential or terms and conditions.<sup>55</sup>

The results of each station were entered into a database, noting specifically if documents relating to Hillary Clinton's appearances, Donald Trump's appearance and the Bernie Sanders appearance were present. Additionally, any requests for equal time were coded, noting documentation indicating the other candidate(s) who had made the request, and whether there was documentation that equal time was provided in response to the request.

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<sup>50</sup> Citations Withheld.

<sup>51</sup> See *NBC Affiliates*, NBC NEWS (Jan. 31. 2014), <http://www.nbcnews.com/news/us-news/nbc-affiliates-n19981>; See also *Top 100 Television Markets*, STATION INDEX, <http://www.stationindex.com/tv/tv-markets> (last visited Mar. 10, 2017).

<sup>52</sup> See generally *Public Inspection Files*, *supra* note 7.

<sup>53</sup> *Id.* (in each station's online public file, an icon is used as the link to a station's "political file").

<sup>54</sup> See, e.g., *Search Entities & File Names*, FCC.GOV, [https://publicfiles.fcc.gov/find/hillary%20clinton/page-offset-0/order-best-match/filter-\[\]/#files](https://publicfiles.fcc.gov/find/hillary%20clinton/page-offset-0/order-best-match/filter-[]/#files) (last visited Mar. 10, 2017) (organization within the online "political file" showed substantial variation. For completeness, all items, files, or other organization structures were coded. This proved valuable, as items relating to the appearances of the three candidates as well as documents related to requests by other candidates were found filed in a wide variety of ways).

<sup>55</sup> See generally *Demonstrations of Online Public Inspection File Interface*, FCC.GOV, <https://www.fcc.gov/events/demonstrations-online-public-inspection-file-interface-Aug-1> (last visited Mar. 10, 2017) (the FCC has a public information and a tutorial on searching the Online Public File).

## RESULTS

Of the 100 stations tested, one fifth of stations (or 20), were missing at least one document disclosing a candidate appearance by Donald Trump, Hillary Clinton or Bernie Sanders related to *Saturday Night Live*. Within this group of 20 stations, three stations were missing two notices, and another three stations were missing all three of the required notices. Five stations had an additional document related to a candidate appearance, disclosing Hillary Clinton's appearance on Jimmy Fallon's *Tonight Show* program.<sup>56</sup>

Documentation relating to equal time requests by other candidates were in the political files of 28 of the 100 stations in the sample. Of the stations that received requests for equal access, 13 stations received multiple requests while 15 received requests from only one candidate.<sup>57</sup> Documentation related to equal opportunity requests included Republican Candidates Rand Paul (19), Ted Cruz (12), James Gillmore (11), George Pataki (10), Mike Huckabee (7), John Kaisch (6) and Lindsey Graham (3).<sup>58</sup> Candidate Lawrence Lessig (1) made the only documented request for equal time on the Democratic side related to the appearances by either Hillary Clinton or Bernie Sanders.<sup>59</sup>

Additionally, one station, WAFF-Hunsville had documentation related to additional request for equal opportunities from an individual named Brenda Dawn Justice. This request was denied via letter by Margret Toby, NBC's Vice President of Regulatory Affairs, pending the ability of Justice to demonstrate a legal qualification as a candidate for office.<sup>60</sup>

Geographically, the equal time requests were heavily centered around stations that were part of television markets in states with early presidential primaries or caucuses, including Iowa, New Hampshire and South Carolina. Notably stations, like WOWT-Omaha, which is located in an adjacent state (Nebraska), but where the station's media market covers a significant part of an early voting state, (Iowa) were also represented stations that received multiple requests for candidate access.<sup>61</sup>

Inside the political files documentation was presented under several differ-

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<sup>56</sup> David D. Oxenford, *Political Broadcasting Answering Your Questions on the FCC's Rules and Policies*, DAVIS WRIGHT TREMAINE LLP 2, [http://www.dwt.com/files/Uploads/Documents/Advisories/12-07\\_PoliticalBroadcasting\(Guide\).pdf](http://www.dwt.com/files/Uploads/Documents/Advisories/12-07_PoliticalBroadcasting(Guide).pdf) (last visited Mar. 10 2017) (*The Tonight Show's* interview style format means that candidate appearances on the program are covered by the Bona Fide News Exception).

<sup>57</sup> *Top 100 TV Markets*, STATIONINDEX, <http://www.stationindex.com/tv/tv-markets> (last visited Mar. 14, 2017).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See generally *Public Inspection Files*, *supra* note 7.

<sup>61</sup> See generally *Public Inspection Files*, *supra* note 7. Similar patterns happened in media markets adjacent to, or that covered the state of New Hampshire.

ent headings with no apparent pattern. In several cases the relevant documents were logically filed in a folder for presidential, federal races or by candidate name, however, there was little consistency to the location of the documents in a station's political file. In some examples the relevant documents were filed alongside listings for purchased advertising while in others, disclosure documents related to Clinton, Trump and Sander's appearances were filed in the "Terms and Conditions" file within the station's online political file.

Stations also had documentation on Trump and Clinton's appearances filed in files labeled for 2015, 2016 and in two cases, identical copies of documents appeared in files for both years. In one, WCSH-Portland, the file which contained the documents was titled "731943", an obvious reference to the governing statute.<sup>62</sup>

Other documents related to equal time that contained in the files included a full length story from the Associated Press that explained an agreement made between the NBC network and four candidates for access on 18 local affiliate stations in Iowa, South Carolina and New Hampshire.<sup>63</sup> Multiple stations had filed a simple memo explaining the NBC network agreement with Ted Cruz granting him approximately 10 minutes of time on 35 stations.<sup>64</sup> According to other documents, the agreement with Ted Cruz took the form of advertisements rather than a single response.<sup>65</sup> A similar document was filed for Rand Paul detailing the 15 minutes he was granted by the network.<sup>66</sup> A third document collectively detailed grants of time, specifically 25 individual 30 second commercials aired on November 27 and 28 during network programming for each of John Kasich, Mike Huckabee, James Gillmore and Lindsey Graham.<sup>67</sup> George Pataki's agreement with NBC was detailed in a separate document.<sup>68</sup>

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> FCC, DISPOSITION OF EQUAL OPPORTUNITIES REQUEST OF SEN. TED CRUZ 1 (Feb. 8, 2016), [https://publicfiles.fcc.gov/find/equal%20opportunities%20request%20TED%20CRUZ/page-offset-0/order-best-match/filter-\[\]/#files](https://publicfiles.fcc.gov/find/equal%20opportunities%20request%20TED%20CRUZ/page-offset-0/order-best-match/filter-[]/#files).

<sup>66</sup> FCC, DISPOSITION OF EQUAL OPPORTUNITIES REQUEST OF SEN. RAND PAUL 1 (Feb. 16, 2016), [https://publicfiles.fcc.gov/find/equal%20opportunities%20request%20Rand%20Paul/page-offset-0/order-best-match/filter-\[\]/#files](https://publicfiles.fcc.gov/find/equal%20opportunities%20request%20Rand%20Paul/page-offset-0/order-best-match/filter-[]/#files).

<sup>67</sup> FCC, DISPOSITION OF EQUAL OPPORTUNITIES REQUEST OF GRAHAM GILMORE HUCKABEE KASICH 1 (Dec. 4, 2016), [https://publicfiles.fcc.gov/find/equal%20opportunities%20request%20John%20Kasich/page-offset-0/order-best-match/filter-\[\]/#files](https://publicfiles.fcc.gov/find/equal%20opportunities%20request%20John%20Kasich/page-offset-0/order-best-match/filter-[]/#files).

<sup>68</sup> FCC, DISPOSITION OF EQUAL OPPORTUNITIES REQUEST – GEORGE PATAKI 1 (Feb. 4, 2016), [https://publicfiles.fcc.gov/find/equal%20opportunities%20request%20george%20pataki/page-offset-0/order-best-match/filter-\[\]/#files](https://publicfiles.fcc.gov/find/equal%20opportunities%20request%20george%20pataki/page-offset-0/order-best-match/filter-[]/#files).

Notably, WSMV-Nashville's public file contained a copy of a letter requesting just over three minutes of equal time by Democratic Candidate Lawrence Lessig.<sup>69</sup> The content of the letter suggests that the request was sent to 45 NBC affiliates including 42 stations that were part of the study sample. Other than WSMV, none of the other 41 stations had the request documented in their online political file at the time of the study.<sup>70</sup>

## DISCUSSION

Collectively, this evaluation demonstrates some significant compliance issues by stations with the requirements of the FCC's online public file database. One fifth of stations did not include at least one of the required disclosures about a candidate appearance by Trump, Clinton and/or Sanders. More than 40 out of 100 stations appeared to be missing documents related to Lessig's request for equal time.

On a more practical concern, the FCC's intent of the new online system was to facilitate citizen and candidate access to materials in the public file, given the increasing interest in campaign and issue advertising after the *Citizens United v FEC* decision by the U.S. Supreme Court.<sup>72</sup> Yet the absence of basic documentation by at least 20% (and as many as 41%) of the stations in this study, all of which are from major media markets, (and half of which have been posting materials online since late 2012) has to raise some questions about the efforts that stations are actually making to upload required materials in a timely fashion. An audit, like the one the agency conducted in 1990, is overdue.

Given that the appearances of these high-profile candidates, and the potential requirement for equal time they represented was actively discussed in the media at the time, stations in this study should have easily recognized the requirement for documentation. If one out of five stations are missing obvious materials like the ones in the study sample, one must wonder if the public is getting an honest look at required political file material on more sensitive topics, like the pricing and schedules for non-candidate political issue advertising.

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<sup>69</sup> FCC EQUAL TIME REQUEST –PRESIDENTIAL CANDIDATE LARRY LESSIG 2 (Oct. 10, 2015), [https://publicfiles.fcc.gov/find/WSMV%20Nashville%20lawrence%20lessig/page-offset-0/order-best-match/filter-\[%7B%22nielsen\\_dma\\_rank%22:%22NASHVILLE%22%7D\]/#files](https://publicfiles.fcc.gov/find/WSMV%20Nashville%20lawrence%20lessig/page-offset-0/order-best-match/filter-[%7B%22nielsen_dma_rank%22:%22NASHVILLE%22%7D]/#files).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 1-3 (assuming the letter was sent to the other 41 stations, the absence of the Lessig request letter and the station's response to it is a significant finding of non-compliance).

<sup>72</sup> Standardized and Enhanced Requirements, *supra* note 33 (“...political ad spending is rapidly increasing, and often the only way to track such expenditures is through stations' political files.”).

Finally, the lack of standardization of the location or filing system for documents in the FCC's online database also makes searching for documents problematic. As just about anyone who used station public files before the online database was created would attest, this is not a new problem. The intent of the FCC's requirement that stations post public file material online was to make those materials more accessible, but the online requirement has not resolved longstanding issues with public file organization by stations, issues which predate the online database. While the agency has some suggestions for organization available to stations,<sup>73</sup> some additional guidelines to govern what documents are required, how and where documents should be filed, as well as a defined timeline for when documents must be uploaded could help to resolve some of the variations and make the database more user friendly.

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<sup>73</sup> See generally *Public Inspection Files*, *supra* note 7.