DISSENTING OPINION IN ADVISORY OPINION 2004-43

of

VICE CHAIRMAN MICHAEL E. TONER AND
COMMISSIONER BRADLEY A. SMITH

The requestor in this advisory opinion request asked whether a broadcaster was legally prohibited from offering the "lowest unit charge" ("LUC") to a campaign committee that allegedly failed to comply with the "stand by your ad" disclaimer provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA").[1] The Commission concluded that because the candidate ads in question satisfied the disclaimer requirements of the Federal Election Campaign Act, the broadcaster's decision to provide the LUC, in this instance, did not result in a prohibited in-kind corporate contribution to the candidate.[2]

We dissented from the majority opinion because we believe that the question squarely before the Commission did not turn on the adequacy of the disclaimers in the ads but rather whether, under the plain meaning of the statutory provisions, broadcasters may legally offer federal candidates the LUC. We believe that the Commission could have answered the question more definitively and provided useful and meaningful guidance to other broadcasters similarly situated. Accordingly, for us, whether the candidate ads at issue here satisfied the "stand by your ad" disclaimer requirements is irrelevant because broadcasters have broad statutory discretion to provide candidates with the LUC, even for candidate ads that do not meet the disclaimer requirements.

BCRA amended 315(b) of the Communications Act to provide that a federal candidate "shall not be *entitled"* [emphasis added] to receive the LUC if any of his advertisements have failed to include the required Communications Act Statement. 47 U.S.C. 315(b). Under the plain meaning of these statutory provisions, a candidate who satisfies the Communications Act Statement requirement is guaranteed the LUC as a matter of law. It is equally plain under these statutory provisions that a candidate who

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[1] These terms are incorporated into the Communications Act. See 47 U.S.C. § 315(b).

[2] Commissioners Thomas, McDonald, Mason, and Weintraub voted to approve the advisory opinion. Commissioners Toner and Smith dissented.

fails to include the Communications Act Statement does not have a legal guarantee to receive the LUC. In this circumstance, the statutory language is permissive, making clear that broadcasters have the discretion to provide the LUC to candidates who fail to include the Communications Act Statement, but are not legally required to do so. Therefore, although a candidate may not be "entitled to" the LUC if his ad lacks an adequate disclaimer, the candidate may nevertheless receive the LUC at the discretion of the broadcaster.

This interpretation is consistent with how the FCC has construed the BCRA amendments to the Communications Act. See footnote 5, Agenda Doc. 05-08 (FCC has interpreted BCRA amendments to allow a station to offer the LUC to a candidate who fails to include an adequate Communications Act Statement, as long as the station treats all Federal candidates in a consistent, non-discriminatory manner). See also McConnell v. FEC, 540 U.S. 93, 364 (2003) (Stevens, J., dissenting) (observing that the statute "does not *require* broadcast stations to charge a candidate higher rates for unsigned ads that mention the candidate's opponent. Rather, the provision simply permits stations to charge their normal rates for such ads.") (emphasis in original).

Accordingly, we believe the law plainly permits broadcasters to provide candidates with the LUC, regardless of whether the candidates' ads satisfy the "stand by your ad" disclaimer rules, and we believe the Commission should have decided this matter on that basis.

February 17, 2005

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Michael E. Toner, Vice Chairman

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Bradley A. Smith, Commissioner