

April 21, 2004

NOTICE AO DRAFT COMMENT PROCEDURES

The Commission has approved a revision in its advisory opinion procedures that permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2004-10 is available for public comments under this procedure. It was requested by Tom Fanning on behalf of Metro Networks Communications, Inc. The draft may be obtained from the Public Disclosure Division of the Commission.

Proposed Advisory Opinion 2004-10 will be on the Commission's agenda for its public meeting of Thursday April 29, 2004.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (DST) on April 28, 2004.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case by case basis in special circumstances.

4) All comments timely received will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Disclosure Division.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copy of draft AO 2004-10 contact Public Records Office-
Public Disclosure Division (202) 694-1120, or 800-424-9530.

For questions about comment submission procedure contact
Rosemary C. Smith, Associate General Counsel, (202) 694-1650.

ADDRESSES

Submit single copy of written comments to:

Commission Secretary
Federal Election Commission
999 E Street NW
Washington, DC 20463

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SECRETARIAT



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM

For Meeting of: 04-29-04

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkonen *JAP*
Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

James A. Kahl *JK*
Deputy General Counsel

Rosemary C. Smith *RS*
Associate General Counsel

John C. Vergelli *JCV*
Acting Assistant General Counsel

Richard Ewell *RE*
Staff Attorney

Subject: Draft AO 2004-10

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for April 29, 2004.

Attachment

1 **ADVISORY OPINION 2004-10**

2
3 **Tom Fanning**
4 **National Director of Marketing**
5 **Metro Networks Communications, Inc.**
6 **8403 Colesville Road, 15th Floor**
7 **Silver Spring, MD 20910**

DRAFT

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9 **Dear Mr. Fanning;**

10 **This responds to your letters dated January 27, 2004 and March 15, 2004,**
11 **on behalf of Metro Networks, Inc. ("Metro Networks") requesting an advisory**
12 **opinion concerning the application of the "stand by your ad" disclaimer**
13 **requirements in the Federal Election Campaign Act of 1971, as amended ("the**
14 **Act"), and Commission regulations to Metro Networks' "live read" radio**
15 **communications paid for by Federal candidates.**

16
17 ***Background***

18 **Metro Networks is a national company that provides more than 2,000**
19 **radio stations throughout the United States with live traffic, news, sports and**
20 **weather reports. In exchange for providing these live reports, Metro Networks**
21 **generates revenue by including a ten-second "live read" sponsorship message that**
22 **is sold by Metro Networks and read by a Metro Networks reporter at the end of**
23 **the traffic, news, sports, or weather report. An "opening mention" precedes the**
24 **actual report and also identifies the person purchasing the sponsorship message.**

25 **You intend to market the ten-second sponsorship messages to Federal**
26 **candidates, and you provide the following example of a sponsorship message paid**
27 **for by a Federal candidate and imbedded in a traffic report:**

1 *[Opening Mention:]*

2 *This traffic report is brought to you by the committee to elect Candidate*

3 *ABC.*

4 *[Traffic Report:]*

5 *Traffic is jammed on I-95 heading to the Wilson Bridge . . . [rest of traffic*
6 *report].*

7 *[Live read 10-Second Sponsorship Message:]*

8 *Candidate ABC has waged war on the terrorists who want to take away*
9 *America's liberties. But the job is not done. Support Candidate ABC for*
10 *re-election. Paid for by the committee to re-elect candidate ABC.]*

11 You indicate that the live broadcasting of the reports with embedded
12 sponsorship messages increases the value of the sponsorship messages to Metro
13 Networks' sponsoring clients. You assert, however, that the live nature of the
14 reports and the limitations of your broadcasting equipment would make it
15 "physically impossible" for Metro Networks to include any statement spoken by a
16 candidate himself or herself. You explain that the reports are "produced live in
17 [Metro Networks] studios and from mobile units and aircraft with [Metro
18 Networks] reporters interacting live in real time" with the "on air talent" of radio
19 stations. You indicate that a Metro Networks reporter would be able to read a
20 statement for a sponsoring candidate, but is not equipped to play a recorded voice
21 of a candidate.

22

1 ***Question Presented***

2 Under the facts and circumstances described above, may a Metro
3 Networks reporter, rather than the Federal candidate authorizing a sponsorship
4 message, read the required "stand by your ad" statement?

5
6 ***Legal Analysis and Conclusions***

7 Yes, a Metro Networks reporter may read the "stand by your ad"
8 statement for the reasons explained below.

9 BCRA expanded the Act's disclaimer requirements applicable to radio
10 advertisements authorized by Federal candidates. See 2 U.S.C. 441c(d)(1)(A);
11 BCRA, sec. 311(2), 116 Stat. at 105-06; 11 CFR 110.11. Because you request
12 guidance regarding radio messages authorized by Federal candidates, the
13 sponsorship message you describe in your request would require a disclaimer that
14 complies with the "general content requirements" of 11 CFR 110.11(b)(1), the
15 "specifications for all disclaimers" in 11 CFR 110.11(c)(1), and the "specific
16 requirements for radio and television communications authorized by candidates"
17 in 11 CFR 110.11(c)(3). Radio advertisements authorized by a candidate must
18 include "an audio statement by the candidate" that identifies the candidate and
19 states that he or she has approved the communication. 11 CFR 110.11(c)(3)(i).
20 This is colloquially known as a "stand by your ad" requirement because it directly
21 associates the candidate with the message he or she has authorized. There is no
22 requirement that the message be read live in real time by the candidate, but the
23 candidate must speak the required authorization statement. *Id.* For example, one

1 acceptable statement provided in the regulations is: "My name is {insert name of
2 candidate}. I am running for {insert Federal office sought}, and I approved this
3 message." 11 CFR 110.11(c)(3)(iv)(B).

4 The Commission, however, has long recognized that in certain
5 circumstances it is impracticable to provide a full disclosure statement in the
6 prescribed manner. An exception at 11 CFR 110.11(f)(1)(ii) covers skywriting,
7 water towers, wearing apparel, or other means of displaying an advertisement
8 when full application of the disclaimer requirement would be "impracticable."

9 In Advisory Opinion 2004-1, addressing the "stand by your ad"
10 requirement for a television communication authorized by two Federal candidates,
11 the Commission permitted one candidate to speak for both candidates so long as
12 the approval statement conveyed that both candidates approved the advertisement.
13 See also Advisory Opinion 1994-13 (pre-BCRA video slate advertisement
14 featuring 10 different candidates and ballot measures required only one disclaimer
15 indicating that the slate was "paid for by the candidates and committees identified
16 in the slate," rather than a number of separate disclaimer statements.)

17 The specific physical and technological limitations you describe do not
18 make it impracticable to include a disclaimer at all. Rather, the impracticability
19 caused by these limitations extends only to one particular aspect of the disclaimer
20 otherwise required by section 110.11, specifically that the provision requiring the
21 approving candidate himself or herself to speak the "stand-by-your-ad" statement.
22 11 CFR 110.11(c)(3). Thus, the Commission concludes that a disclaimer is
23 required, but that it would be permissible for a Metro Networks reporter to speak

1 for the candidate, or candidates, who authorized the advertisement.¹ As in
2 Advisory Opinion 2004-1, this approach is practical and as faithful as possible to
3 the "stand by your ad" statute while avoiding unnecessary burdens on political
4 speech that could result from a rigid application of all disclaimer provisions in all
5 instances.

6 For the purposes of the script you provide in your request, the statement
7 provided in the regulations as an example at 11 CFR 110.11(c)(3)(iv)(B) could be
8 adapted and, in combination with the statement required by 11 CFR 110.11(b),
9 read by the Metro Networks reporter as follows: "Paid for by the committee to re-
10 elect candidate ABC. ABC is running for Congress and she approved this
11 message."

12 This response constitutes an advisory opinion concerning the application
13 of the Act and Commission regulations to the specific transaction or activity set
14 forth in your request. See 2 U.S.C. 437f. The Commission emphasizes that, if
15 there is a change in any of the facts or assumptions presented, and such facts or
16 assumptions are material to a conclusion presented in this advisory opinion, then
17

¹ The Commission assumes for the purposes of this request that the Federal candidate would not be physically present with the reporter, and thus would not be available to read the statement.

1 the requestor may not rely on that conclusion as support for its proposed activity.

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Sincerely,

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Bradley A. Smith
Chairman

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10 Enclosures (AOs 2004-1, 1994-13)