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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Concurring Opinion of Chairman Scott E. Thomas
Re Advisory Opinion 2004-43

In this matter the central question was whether a broadcast station could offer "lowest unit charge" (LUC) to a candidate campaign that purportedly had not complied with the 'stand by your ad' component of the Bipartisan Campaign Reform Act.[1] In determining whether a station has made an in-kind contribution by charging too little, the FEC normally must analyze whether a station has provided its services for the "usual and normal" charge in a commercial sense. 2 U.S.C. § 431(8)(A); 11 C.F.R. § 100.52(d). Nonetheless, if the station was required to offer LUC by operation of law, there would be no basis for the FEC to find that the station had violated the in-kind contribution prohibition of 2 U.S.C. § 441b.[2] This becomes, in essence, the initial level of analysis in these circumstances.

The FEC, therefore, was placed in the awkward position of trying to divine whether the stations here involved were required by operation of law to offer LUC airtime to the Bond campaign. According to the applicable BCRA provisions, a station is only required to offer LUC if a candidate satisfies the 'stand by your ad' disclaimer rules. In theory this is a matter for the FCC to decide, but the FEC cannot expect the FCC to rule on each matter brought to the FEC's attention. In my view, if asked in an advisory opinion context, the FEC is required to do its best to assess how the FCC would apply the 'stand by your ad' rules in order to determine whether the stations in question were required to offer LUC.

After reviewing the ads of the Bond campaign that raised questions on the part of the stations, I conclude that the FCC most likely would say that the 'stand by your ad' requirements were met. In the case of the television ad, the image of the candidate is sufficient to satisfy the 'clearly identifiable image' requirement of 47 U.S.C. § 315(b)(2)(C)(i), in my view. As for the radio ad, though there is no express indication of which office is sought (*see* 47 U.S.C. § 315(b)(2)(D)), I don't see any reasonable ambiguity about which office is at stake, and I see no basis for believing the FCC would find the disclaimer inadequate when viewed in its entirety. Accordingly, my assessment is that the FCC would conclude the stations were required to offer airtime at the LUC. That means the FEC must conclude in this advisory opinion that no undercharge resulted

[1] These terms are part of the Communications Act, codified at 47 U.S.C. § 315(b).
[2] As a practical matter, for years the FEC has taken this legal posture. I am aware of no case where a station obligated to provide LUC to a campaign has been questioned about making an in-kind contribution by virtue of charging too little.

warranting a rebilling of the candidate.[3] I joined in approval of the language offered by Commissioner Weintraub because it basically follows this approach.

I do not subscribe to the view that stations would be able to offer LUC to a candidate who had not satisfied 'stand by your ad' requirements simply because some other candidates were required to be given LUC. While the FEC ruled in the pre-BCRA era that stations willing to treat all candidates the same could provide ad time for free,[4] the 'stand by your ad' provisions in BCRA signaled a significant change in Congress's approach in this area. It is very clear to me that candidates who do not comply with the new disclaimer requirements are to be prevented from getting the benefit of LUC.[5] Thus, any previous FEC rulings allowing stations great latitude to charge less than "usual and normal" commercial charges for ad time must be read in a way consistent with the strict new BCRA provisions. In my view, the only way to give all the applicable provisions meaning is to subject a candidate that has not complied with the 'stand by your ad' requirements to the "usual and normal" commercial charge analysis.[6] Since the stations in question routinely must make such calculations outside the LUC timeframes, I see little problem with placing that burden on them.[7]

A caution about deferring to the FCC's legal tilt is in order. The FCC indeed may have no concern about stations offering time at LUC to a non-complying candidate. Though I find that an untenable construction of the 'stand by your ad' provisions, I note it stems from a completely different regulatory focus: ensuring that stations offer

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[3] If the FCC were to clarify later that the stations in question had not complied with the 'stand by your ad' provisions, I presume the stations would either renew their advisory opinion request or act on their own to resolve any potential FECA problem.

[4] In Advisory Opinion 1998-17 (available at www.fec.gov) based on the 'commentary' allowance for media entities, the FEC allowed a cable station to provide free ad slots to all candidates in various federal races. This opinion was hinged on an understanding that the station would adhere to the 'equal opportunity' obligations imposed under the Communications Act and that any effort by the station to give preference to a particular candidate would negate application of the 'commentary' allowance.

[5] I cannot find any vagueness in the statutory phrasing ("shall not be entitled to receive the [LUC];" 47 U.S.C. § 315(b)(2)(B)). Even if this were vague, I doubt Congress would have enacted a statute that had absolutely no purpose or function, and I wouldn't expect the FEC to so interpret the statutory language.

[6] In my view, Advisory Opinion 1998-17 would have to be at least partly superseded. Any candidate whose ads do not meet 'stand by your ad' requirements would have to be charged "usual and normal" commercial fees even though all other candidates in a race potentially could be given free ad time. This is an area the FEC may have to rethink in light of BCRA's stand by your ad provisions.

[7] This is not to say the calculations are easy. The submissions of the requestor and commentors make clear that several different components go into any decision about what rate to charge advertisers. The main concern from the FEC's perspective is that the same components applied to non-candidate customers be applied to the non-complying candidate. It may turn out that the "usual and normal" charge here would be very close to LUC.

A separate concern raised by the requestor concerns the difficulty a broadcaster has in knowing if a particular ad meets the 'stand by your ad' specification. I gather that Congress intended to place some burden on broadcasters in this regard, though not to the point of becoming 'enforcers.' In my view, It would be plausible, absent complete absence of a disclaimer, for a broadcaster to wait for a complaint to be filed by someone before looking into the specifics regarding particular ads. Nonetheless, there will be situations where a station would like to avoid having to charge a particular candidate more than other candidates. This suggests that stations have an interest in making some effort to review ads so that 'stand by your ad' omissions don't lead to the complications presented in this request.

reasonable access and equal opportunity to candidates. Indeed, the FCC would be satisfied by stations offering ad time for absolutely no charge across-the-board to candidates.[8] That is far afield from the usual focus of the FEC: assuring that vendors don't provide services for less than the "usual and normal" commercial charge.

In sum, the facts at hand suggest the stations would be required to provide air time to the candidate at LUC. Therefore, by operation of law there is no basis for the FEC to conclude that a different rate should have been charged. While the legal assumption underlying this conclusion might prove faulty if the FCC were to rule specifically in this set of circumstances, the FEC for the time being must proceed with its own best assessment of the LUC obligations of the stations seeking guidance.

2/16/05
Date

Scott E. Thomas
Chairman

[8] In a comment submitted during the FEC's consideration of Advisory Opinion 1998-17, the FCC made clear that it construed the pre-BCRA provisions of the Communications Act in this fashion. It relied particularly on legislative history indicating Congress's desire to restrain the cost of campaigns.