FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CONCURRING OPINION OF COMMISSIONER DAVID MASON
RE: ADVISORY OPINION 2004-43

This request was premised on an assertion that Senator Christopher Bond had "lost his entitlement" to the Lowest Unit Charge (LUC) provision of the Communications Act due to alleged deficiencies in the "stand by your ad" disclaimer required by the Communications Act, 47 U.S.C. § 315(b)(2)(C), (D), and the Federal Election Campaign Act (FECA), 2 U.S.C. § 441d(d)(1), as amended by the Bipartisan Campaign Reform Act (BCRA), P.L. 107-155, 116 Stat. 1981 (March 27, 2002). The Commission concluded, contrary to the asserted premise, and in the absence of regulations or other guidance from the Federal Communications Commission (FCC), that the disclaimers in the subject advertisements sufficed for the LUC discount, and responded to the request on that basis.

Although individual Commissioners have expressed views about how the Communications Act and the FECA might be applied to inadequate or absent disclaimers, *see, e.g., Concurring Opinion of Chairman Scott Thomas Re: Advisory Opinion 2004-43* (Feb. 16, 2005), *Dissenting Opinion in Advisory Opinion 2004-43 of Vice Chairman Michael Toner and Comm'r Bradley Smith* (Feb. ____, 2005), Advisory Opinion 2004-43 cannot be read to mandate, and should not be read to suggest, any conclusion as to that hypothetical circumstance, which the Commission concluded was not properly before it.[1] The absence to this date of FCC interpretation of the Communications Act provisions at issue, and their implications for broadcast license holders, provides further caution against drawing broad conclusions from this pinion.

Put even more generally, addressing this request on specific factual grounds does not provide guidance for applying the law in materially different circumstances. Thus, it is incorrect to describe this Opinion as a vote "to deny broadcasters [a] broad waiver." Kenneth Doyle, *FEC Votes 4-2 to Deny Broadcasters Broad Waiver From BCRA Requirement,* BNA MONEY & POLITICS REPORT, Feb. 15, 2005 (headline). Answering an Advisory Opinion Request on one ground does not suggest any conclusion about different circumstances. Put specifically, the conclusion that disclaimers in two particular ads are sufficient under the "stand by your ad" provisions of the FECA, 2 U.S.C. § 441d(d)(1), has no bearing on the obligations of broadcasters under the

[1] FECA provides that a Commission Advisory Opinion rendered under 2 U.S.C. § 437f(a) may be relied upon by "any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered ... ." 2 U.S.C. § 437(f)(c)(1)(A).

Communications Act (or the FECA) in relation to ads with inadequate (or no) disclaimers.

Individual Views

Because discussion of this request in the Commission's Open Meeting did include speculation about what rules might apply to inadequate or absent disclaimers (and indeed two draft opinions accepted the premise that disclaimers in the subject ads were inadequate), I will add some individual comments on factors bearing on whether broadcasters must charge candidates a rate higher than the LUC when candidates are not entitled to the LUC under the Communications Act or by virtue of their advertising purchases on the same basis as any other advertiser.

First, I note that any such discussion must begin with the Communications Act, regarding which this Commission has neither jurisdiction nor expertise. Whether a broadcaster must charge a higher rate to an advertiser who is not entitled to a discount mandated by the Communications Act is a question the FCC may be best equipped to answer. (Certain FECA conclusions, however, might follow from Communications Act interpretations the FCC may make.) The FCC may, in addition, have its own views on what qualifies as sufficient compliance with the Communications Act disclaimer requirements, which are similar to, but not identical to those in the FECA. *Compare* 47 U.S.C. § 315(b)(2)(C), (D) *with* 2 U.S.C. § 441d(d)(1). Apparently other Communications Act provisions or FCC regulations, including those requiring equal access for candidates, 47 U.S.C. § 315(a), public interest requirements, *id.* §§ 307(a), 309(a), and perhaps those bearing on the responsibilities of licensees more generally may interact with and affect broadcasters' responsibilities under the "stand by your ad" provisions.

Some have argued, *see Letter of Democracy 21, Campaign Legal Center, and Center for Responsive Politics to Lawrence Norton* (Feb. 11, 2005); *Letter of Democracy 21, Campaign Legal Center, and Center for Responsive Politics to Lawrence Norton* (Dec. 15, 2004); *Concurring Opinion of Chairman Scott Thomas Re: Advisory Opinion 2004-43* (Feb. 16, 2005), that failure to qualify for the LUC discount to which certain candidates are entitled under the Communications Act should lead axiomatically to a conclusion that the LUC is not the "usual and normal charge," 11 C.F.R. § 100.52(d)(2) (definition); *id.* § 100.111(e)(2) (definition), for purposes of the FECA. This simple calculus, however, combines concepts from different statutes, the interaction of which may not be simple or straightforward. In addition, both legal schemes have other provisions, *see* 47 U.S.C. § 315(a) (equal access); *Memorandum of the Office of General Counsel to the Commission,* Agenda Doc. No. 05-08 at 5 (Feb. 8, 2005) (revised blue draft of AO 2004-43) (noting that the Commission has held "that discounts that are less than the usual and normal charge are not contributions if such discounts are offered in the ordinary course of business" (citing AO 2004-18, 1996-2, 1989-14)), which may mandate or permit discounts. The interaction of multiple provisions of these separate legal schemes combined with the variety and complexity of commercial advertising sales practices, *see Letter of National Ass'n of Broadcasters to Mary Dove* (Feb. 11, 2005),

may make it impossible to derive a single, simple proposition to address the variety of circumstances which may occur. Senate debate on this provision does, however, provide some support for a "don't stand by your ad, don't get the discount" interpretation, which should not be ignored in formulating policy or rendering individual decisions relative to these disclaimer requirements.

I am sympathetic to pleas by the requestors and other broadcasters, *see id.; Letter of Missouri Broadcasters Ass'n to Lawrence Norton* (Nov. 19, 2004), not to be enlisted as enforcement agents for campaign finance law. In this request the broadcasters apparently came to a good faith conclusion that Senator Bond's ads did not qualify for the mandatory LUC discount. This Commission came to a different conclusion. Had the broadcasters sought to charge Senator Bond's committee a rate higher than LUC, they would, in this Commission's interpretation, have violated Section 315 of the Communications Act. I see no reason why this agency or our sister commission should cede to, much less thrust upon, broadcasters authority both to interpret our governing statutes and to exercise enforcement authority (through differential rate charging) under both Acts. Indeed, such delegation is arguably contrary to the FECA. *See* 2 U.S.C. § 437c(b)(1) (providing that the Commission "shall have exclusive jurisdiction with respect to civil enforcement" of FECA). The variety of interpretations which might be reached by thousands of broadcasters in hundreds of federal campaigns could hardly be expected to produce a clear and consistent policy.

Discussion of this variety of factors does not lead me to conclude that it is impossible to craft a clear and effective policy regarding the obligations of broadcasters under the "stand by your ad" provisions, and the interaction of those obligations with the FECA. However, such a policy cannot be crafted by this Commission independently of the Federal Communications Commission or without regard to the several statutory and regulatory provisions involved as well as to appropriate adjudicatory and remedial procedures. While the FCC has responsibility for interpretation and enforcement of the Communications Act, it may well be that some cooperative efforts between this agency and the FCC in interpreting parallel statutory requirements and in assessing interactions between the statutory schemes would be helpful.

Nor should our critics hasten to declare that our reticence to opine on obligations of broadcasters under the Communications Act means that we are abdicating our responsibility or failing to enforce the law. The "stand by your ad" disclaimer requirements are incorporated in the FECA, 2 U.S.C. § 441d(d)(1), and campaigns that fail to comply with them are subject to normal FECA enforcement remedies. The Commission certainly can, and in my view should, consider the value of any LUC discount which a campaign received but may not have been entitled to by virtue of a failure to "stand by your ad" in seeking a penalty for any violation. As suggested above, resolution of allegations of violations through the statutory processes outlined in 2 U.S.C.

§ 437c(b)(1) is preferable to (and arguably exclusive of) a system in which individual broadcasters attempt to interpret and enforce the combination of FECA and Communications Act requirements either *sua sponte* or in response to charges from competing campaigns.

2/17/05
Date

David Mason
Commissioner