

FEC Sidesteps Lowest Unit Charge Issue Raised by Broadcasters

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In an opinion issued to the Missouri Broadcasters Association on February 14, 2005, the FEC sidestepped the issue of whether a broadcaster may charge a federal candidate the Lowest Unit Charge (LUC) for an advertisement when the candidate has failed to include a proper "stand by your ad" disclaimer. In Advisory Opinion 2004-43, the FEC simply answered the question put forward by disputing a premise in the request. Without written explanation, the Commission found that, in fact, the ad in question did contain a disclaimer that qualified under the Bipartisan Campaign Reform Act of 2002 (BCRA) and therefore qualified by law for the LUC.

The underlying law, part of the Communication Act as amended by BCRA, states that a candidate is not entitled to the LUC if he or she does not comply with certain disclaimer requirements, requirements that are similar, but not exactly the same, as the disclaimer requirements in the Federal Election Campaign Act as amended by BCRA. The LUC is generally the lowest price a broadcaster has charged a commercial client for a similar type of ad over a certain time period around an election.

The Advisory Opinion Request caused much disagreement among the Commissioners and a compromise put forward by Commissioner Ellen Weintraub finally garnered four votes. The Opinion adopted by the Commission did not include, as had other versions and proposals, the idea that a broadcaster may charge a federal candidate the LUC regardless of the "stand by your ad" disclaimer, an idea defended by Vice Chairman Michael Toner and Commissioner Bradley Smith in a dissent.

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However, according to a concurrence of Commissioner David Mason, the ultimate Advisory Opinion should not be taken as an answer to the question put forward by the broadcasters as to the application of the LUC when a "stand by your ad" disclaimer is not present or is insufficient, and Commissioner Mason admonished news services that reported the opinion as such. Commissioner Mason stated that he could see some support in Senate debate about BCRA for the "you don't stand by your ad, don't get the discount" argument, but resolution of this question is left for another day, especially since the Federal Communications Commission, which has jurisdiction over the Communications Act, has not undertaken any regulatory or other action with respect to "stand by your ad" disclaimers.