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April 20, 1994

Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Attn: Lawrence E. Noble

AOR 1994-13

Re: Request for Advisory Opinion

Dear Mr. Noble:

This firm represents Voter Education Project ("VEP"), a California corporation organized for profit. Pursuant to Title 11 of the Code of Federal Regulations, §112.1, we are writing on behalf of VEP to request an Advisory Opinion from the Commission at the earliest possible opportunity. The Advisory Opinion will affect proposed activities to be undertaken by VEP with respect to the June 7, 1994 California statewide primary election ballot, which will include Federal candidates.

The pertinent facts are as follows:

1. As stated, VEP is a California profit corporation. It is engaged in the business of selling cooperative advertising to or on behalf of candidates and ballot measures. Such advertising normally takes the form of written slate mailers. VEP's customers can include federal, state, and local candidates and their committees, and state and local ballot measure committees.

2. VEP wishes to market the concept of a video slate for broadcast on various television media stations, including specifically cable television. A list of candidates and measures included on the video slate to be shown on television stations would be broadcast on a typical 30-second advertising spot. Each spot might feature approximately 10 names of candidates and measures, the desired voting preference for each, and the required disclaimer for the advertisement, as required by the Federal Communications Commission and, as applicable, by the Federal Election Commission.

3. It is contemplated that 30-second spots would be shown in each of California's 58 counties. Of the approximate 10 names of candidates and measures for each spot, approximately six would be constant in all of the counties, and four positions would be

variable depending on local county races. Further, of the approximately ten names mentioned above, it is expected that each 30-second spot in each county would contain one U.S. Senator and from one to three Congressional candidates, with the latter Congressional candidates varying depending on the various jurisdictions where each advertising spot may be shown.

4. VEP has engaged in actual discussions with potential customers regarding the desirability of participating in such advertisements. Those who have already expressed interest in paying to be part of a video slate advertising program, as described above, include Michael Huffington for U.S. Senate, Barry Hammond, Republican candidate for the State of California 70th Assembly District, and the No on Proposition 180 Committee, a California statewide committee opposed to a parks and wildlife bond measure. The foregoing three entities are expected to be voted upon at the June 7, 1994 California statewide primary election.

5. It is contemplated that each entity, candidate, and/or committee, will pay fair market value to participate in such video slate advertisements. It is not currently contemplated that free advertising space will be provided to any candidate or ballot measure committee.

6. VEP, in addition to encouraging viewers of the spots to vote for designated candidates and measures, also proposes to encourage viewers generically at the end of each spot to vote on Tuesday, June 7, 1994. For example, the message might read: "Remember to vote on Tuesday, June 7, 1994." This exhortation would probably be included, even if there were no federal candidates listed on the video slate advertisements.

7. On March 28, 1994, the undersigned had a telephone conversation with Brad Litchfield in your office regarding some of the basic facts contained herein. Mr. Litchfield advised that the Commission has not issued any Advisory Opinions previously dealing with the issue of what kind of disclaimer would be required under the circumstances described herein, where there are multiple candidate and ballot measure committees paying a commercial vendor to prepare and place on various television broadcast stations a so-called slate video. Mr. Litchfield suggested that we submit this Advisory Opinion request.

Questions Presented

1. If Federal candidates pay to participate in the video slate, what kind of disclaimer would be required to be included under regulations promulgated by the Federal Election Commission?

2. Whether or not federal candidates pay to participate in the video slate advertisements, does the exhortation by VEP in such advertisements to encourage viewers generically to vote on Tuesday, June 7, 1994 pose any legal complications or special requirements under the Federal Election Campaign Act of 1971, as amended, and regulations

promulgated thereunder, inasmuch as the entity paying for that portion of the slate mailer would be VEP, a profit corporation?

3. Would the answer to No. 2 above be any different if the exhortation were limited to encouraging viewers to vote for the candidates and measures mentioned on the video slate on June 7, 1994?

4. Are there any other proscriptions or problems that arise under the Federal Election Campaign Act of 1971, as amended, and regulations promulgated thereunder, as a result of the circumstances described herein?

Discussion

Title 11 of the Code of Federal Regulations, §110.11 contains the requirements for disclaimers for communications which expressly advocate the election or defeat of clearly identified candidate. In general, advertisements are required to indicate who paid for and, in some cases, whether a particular advertisement is authorized or not. Such disclaimers are fairly easy to include in written materials, such as letters and slate mailers. However, the disclaimer requirements become very difficult under certain circumstances.

For example, the regulations specify that the disclaimer requirements do not apply to bumper stickers, pins, buttons, pens and similar small items upon which the disclaimer cannot be conveniently printed. (11CFR §110.11(a)(2)).

Similarly, the disclaimer requirement do not apply to skywriting, water towers, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable. [emphasis added] (11CFR §110.11(a)(2)).

The rules of the Federal Communication Commission require that there be a minimum video identification of the sponsor of an advertisement with letters equal to or greater than 4% of the vertical picture height, and airing for not less than 4 seconds. Each station is required to make its own determination as to whether or not a particular disclaimer complies with these requirements. Enclosed please find a copy of the Federal Communications Commission Memorandum of Opinion and Order, dated February 14, 1992, with respect to these requirements.

In order to show approximately 10 individual sponsors, more than ten percent and perhaps up to 100% of each 30 second advertisement would be occupied by the visual disclaimers. This situation is quite difficult because the disclaimers may not, since there are so many, be able to be presented in a clear and conspicuous manner to give the observer adequate notice of the identity of the persons who paid for and who authorized the

advertisements. This would certainly be true if all disclaimers were put on the screen at once for four seconds. To put them on the screen over successive four second intervals would take up an inordinate amount of space and time, would be quite costly, and would put an excessive burden on free speech activities.

The undersigned spoke with Milton Gross at the Federal Communications Commission on March 28, 1994 regarding the general factual circumstances described above. Mr. Gross advised that the Federal Communications Commission had no hard and fast rules regarding a situation involving multiple sponsors. While he could not cite any specific authority, he expressed his belief that the FCC would not require a high number, such as 50, sponsors to be listed on a television advertisement. Mr. Gross provided some general guidance to the effect that the person who buys the time is considered to be the sponsor. He cited the example, in the case of a California ballot measure committee several years ago, of a committee which opposed a smoking prohibition measure on the ballot. In that case, the FCC determined that the use of the name of the committee paying for the advertisements was acceptable under their requirements. The idea that individual tobacco companies who contributed to the committee should be disclosed on the advertisement was rejected based on the finding that there was no editorial control by the contributing tobacco companies of the particular advertisement format.

VEP is faced with the dilemma of trying to decide, under the various applicable regulations, who is the sponsor of the advertisement and who must be disclosed on the advertisements. Under one interpretation, VEP can be considered the sponsor since it will be pay the station through media buyers for the advertising spots. VEP will control the format of the advertisements, including how they are arranged and presented on each spot.

Under another interpretation, each paying entity is the sponsor. Assuming that VEP had up to four federal candidates, along with six other state candidates and measures, on various video slate advertisements, and assuming further that VEP would have to comply with the FCC visual disclaimer requirement as to all 10 participating entities, and assuming further that the FEC regulations would require that each federal candidate be shown as paying for, and possibly not being authorized by any other federal candidate, the showing of the disclaimer (which would be rather lenthy) on television under such circumstances would be virtually impossible and certainly at the minimum impracticable. The regulatory demand for disclaimers would virtually eclipse any substantive free speech intended by the advertisements.

Under these circumstances, we would respectfully request that, like the button and skywriting exemptions, that this set of circumstances be found to involve "... an advertisement of such a nature that the inclusion of a disclaimer would be impracticable ..." under Title 11 CFR §110.11(a)(2).

Alternatively, we request that a disclaimer be permitted which allows VEP to be shown as the sponsor of the advertisement, with an indication that each of the participating candidates or measures are paying for their participation. For example, the disclaimer could state: "Furnished by Voter Education Project. Each candidate and measure shown has paid for and authorized its participation in this advertisement."

Conclusion

On behalf of our client, we respectfully request that the FEC provide an Advisory Opinion at the earliest opportunity. VEP wishes to market, develop, and present a video slate for the June 7, 1994 ballot. This will require many weeks of preparation, marketing, and development.

VEP requires guidance as to the type of disclaimer that would be required if federal candidates are included in the video slate, based on reasonable commercial market rates. VEP requests that either no FEC disclaimer be required or that a disclaimer be reasonably fashioned so that it is not burdensome on the free speech rights of the participating candidates and measures. The latter type of disclaimer would comply with the intent and spirit of the FEC and FCC requirements without excessively burdening the substantive content of the 30 second advertisements.

Your earliest response would be appreciated.

Very truly yours,

Peter A. Bagatelos

PAB:bz
Enclosure
cc: Voter Education Project
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Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 92-55
Washington, D.C. 20554 38351

In the matter of)
)
Codification of the Commission's) MM Docket No. 91-168
Political Programming Policies)

MEMORANDUM OPINION AND ORDER

Adopted: February 12, 1992; Released: February 14, 1992

By the Commission:

1. By this Order, we reconsider and revise our rules concerning compliance with the sponsorship identification requirements[1] applicable to political broadcasting advertisements. This action modifies the requirements recently adopted in our Report and Order in this docket, released December 23, 1991.[2] Due to the urgent need for clarity in this area and the immediacy of numerous primary elections in this important campaign year, we have determined that we should act promptly to adopt the modified requirements set forth herein without awaiting completion of the full comment cycle for petitions for reconsideration.[3] In taking

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1 47 U.S.C. § 317.

2 7 FCC Rcd 678 (1992).

3 We recognize that in many states the campaign season is underway, and therefore candidates have already produced political advertisements in accordance with the decisions made in our December Report and Order. Because we do not wish to impose undue burdens upon candidates or broadcasters and seek to minimize disruption of commercials already prepared, political advertisements need not comply with the specific standards adopted herein until April 1, 1992. In the interim, political advertisements will be deemed to satisfy the Commission's sponsorship identification requirements if they comply with either the standards adopted herein, or the standards applicable following the December Report and Order.

this action, however, we have fully considered the comments on this issue in the underlying proceeding.[4]

2. In our December Report and Order we imposed both an audio and video sponsorship identification requirement for televised political advertisements, but declined to adopt specific objective measurement criteria to use to assess compliance with the video obligation. In response to petitions for reconsideration addressing these particular decisions,[5] we have decided to delete the audio identification requirement and to impose specific, objective standards for video sponsorship identification.

3. Audio Identification. In the Notice of Proposed Rulemaking in this proceeding, the Commission asked for comment on the possibility of requiring both audio and visual sponsorship identification for television advertisements.[6] Most commenters did not address this specific issue, and there appeared to be little support for this requirement.[7] Nevertheless, citing our belief that providing both audio and video information would better inform persons suffering from visual impairments, as well as viewers listening to but not actually watching a program, of the sponsors of political advertisements, we adopted the proposal.[8]

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4 In addition, of course, petitioners may request reconsideration of this order, which would enable us to consider further public comment if necessary.

5 On February 3, 1992, the Commission received several Petitions for Reconsideration addressing various issues governed by the Report and Order. A complete list of these petitions is set forth as Appendix A. The Commission will consider all of the issues raised in these petitions in due course.

6 See Notice of Proposed Rulemaking, 6 FCC Rcd 5707 (1991) (NPRM) at paragraph 31.

7 The proposal was generally supported by the Federal Election Commission (FEC) and Gillett. The National Association of Broadcasters (NAB) and North Carolina Association of Broadcasters (NCAB) strongly opposed the proposal.

8 Report and Order at paragraph 47.

4. Petitions for reconsideration have been filed by both the Democratic and Republican National Committees objecting to the new audio identification requirement. According to petitioners, adoption of this additional obligation has imposed an excessive burden upon political advertising, particularly with respect to shorter advertisements, such as 10 or 15 second spots. In particular, petitioners claim that the audio identification requirement impairs a candidate's ability to deliver a campaign message in short spots because a substantial amount of time must be devoted to the voice-over identification. While we note that the Report and Order did not specify the duration of the audio portion of sponsorship identification,[9] upon further reflection we agree that requiring any additional audio component that would be of sufficient duration to ensure adequate identification to the average listener may well be unduly burdensome to candidates, particularly for short spot announcements.

5. We are statutorily obligated to ensure proper identification of any broadcast advertising, and remain committed to assisting the visually impaired. We would therefore encourage political advertisers to consider their special needs when designing their advertisements. The Commission, however, does not intend to restrict or unduly interfere with the content of political messages. Thus, upon reconsideration, we have determined that the additional audio identification requirement should not be imposed,[10] and we hereby eliminate that obligation.[11]

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9 See Report and Order at paras 46-47. In their petitions, both the Democratic and Republican National Committees appear to have assumed that we adopted a specific six second audio identification requirement for television advertisements, to which they strenuously object. In the Report and Order, however, we merely meant to suggest that sponsorship identifications would be presumptively reasonable if they met the standards originally suggested in the NPRM, including a video identification of a six second duration.

10 In addition, Multi-Media, Inc., a small cable system operator, contends that requiring an audio identification, or voice-over, to be added to information delivered on a character-generated access channel that is not accompanied by audio information or comment would be overly burdensome and possibly cost prohibitive to cable system operators. In view of our decision to delete the audio identification requirement, we need not address the specific concerns raised by Multi-Media, Inc.

11 We note, however, that FECA may require an audio

6. Visual requirements. In the NPRM we noted that there has been increased Congressional interest in more rigorous sponsorship identification requirements, and that the Commission had received proposals for adoption of specific, objective criteria governing visual identification requirements.[12] Nevertheless, in the Report and Order we decided that further objective visual requirements were unnecessary.[13] In view of our decision to delete the audio identification rule, however, we believe that the record in this proceeding indicates that certain minimal standards should be articulated with respect to video identification.[14] Specific visual identification requirements would satisfy the need for more objective guidelines cited by the majority of commenters, would ensure that the sponsor of political advertisements is readily apparent to viewers, and would not appear to be unduly burdensome from a compliance perspective.[15]

7. We have thus reevaluated our previous conclusion and have determined that it is appropriate to adopt specific sponsorship identification requirements along the lines of those originally discussed in the NPRM. We conclude that, in order to comply with the sponsorship identification requirements imposed by Section 317 of the Communications Act with respect to televised political advertisements, we will henceforth require a minimum video identification of the sponsor with letters equal to or greater

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identification for radio broadcasts of the audio portion of television programs. See comments of FEC at 5.

12 NPRM at paras 26-30.

13 Report and Order at paragraph 44.

14 We note that the majority of commenters supported adoption of objective criteria, particularly in light of the emergence of negative political advertisements. See Report and Order at paragraph 43. Commenters opposing adoption of objective visual identification criteria were NAB, NCAB, CBS and Group W. The concerns raised by these commenters are addressed infra.

15 The video sponsorship identification requirements we impose herein are more easily integrated into the candidate's political message than an audio identification requirement and, hence, are less burdensome and intrusive.

than four percent of the vertical picture height, and airing for not less than four seconds.[16]

8. We note that commenters opposing adoption of specific standards for sponsorship identification were concerned primarily that it would be too difficult to implement with precision the time duration and size requirements. In this regard, we emphasize that the reasonableness standard traditionally employed by the Commission in evaluating compliance with our regulations will apply to enforcement of these requirements. Thus, any reasonable basis for determining the size and timing used by broadcasters to comply with the objective criteria outlined above will be treated deferentially by the Commission. We accordingly believe that, rather than imposing undue burdens upon broadcasters, adoption of these standards will significantly assist stations by providing clear standards for compliance with the statutory requirement.[17]

9. Several commenters had also suggested that if the Commission imposed definitive sponsorship identification standards, broadcasters should have the right to require pre-airing submissions to ensure that advertisements met the Commission's standards.[18] In view of our decision to adopt specific standards

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16 The NPRM proposed requiring that the identification air for a minimum of six seconds. See NPRM at paragraph 28. The original petition seeking adoption of specific objective criteria for sponsorship identification limited the airing requirement to four seconds. See People for the American Way and Media Access Project (PAW/MAP) Petition at 1. Because of our desire to minimze interference with the content and design of political messages, we will limit the airing requirement to the original proposal of four seconds. Similarly, to minimize intrusion into the content and design of political messages, we decline to adopt any requirement that, in order to qualify as a "use," the candidate's image must be equal to or greater than 20% of the picture size.

17 Of course, if factors other than size or air time prevent the fact of sponsorship and identity of the sponsor from being conveyed to viewers, such as lack of picture contrast or inclusion of significant distractions, a violation of Section 317 conceivably could be found despite "technical" compliance with these requirements.

18 Moreover, we note that in their petitions for reconsideration of various decisions in the Report and Order, Capital Cities/ABC, Inc. and A.H. Belo Corporation et. al. seek clarification or reconsideration of the Commission's policy with

for visual identifications with which broadcasters must now comply, we agree that, under normal circumstances, stations should have the right to pre-screen the sponsorship identification element of a political advertisement to ensure that it meets the new standards.[19] We recognize, however, that there may be instances in which there is not sufficient time for the broadcaster to review a political advertisement and still schedule the material as requested by the candidate. In these circumstances, fairness dictates that the advertisement air in a timely fashion and not be delayed. Accordingly, where there is not enough time for a broadcaster to pre-screen the sponsorship identification in a political advertisement, we will permit the station to run the ad the first time without risking a Commission finding of a Section 317 violation.[20] Once the advertisement has aired, however, the station will be required to add the required identification for future broadcasts if the advertisement is not in compliance with our sponsorship identification requirements.[21]

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respect to station's rights to pre-screen political advertisements to ensure compliance with our sponsorship identification rules.

19 We note that in their petitions for reconsideration, CBS, Inc., NAB and Capital Cities/ABC, Inc. request clarification that a broadcaster may decline to air political announcements which lack adequate sponsorship identification. If a candidate has a statutory right of access or contingent access (i.e. pursuant to section 312(a)(7) or 315(a) for federal candidates, or section 315(a) for state and local candidates), broadcasters may not refuse to air political advertisements with inadequate sponsorship identification. Rather, the station is obligated to add its own identification. In this regard, we note that the sponsorship identification requirement is an established exception to the prohibition in section 315(a) against censorship of candidates' uses of broadcast station facilities. See Joint Agency Guidelines for Broadcast Licensees, 69 FCC 2d 1129, n.2 (1978). Accordingly, stations may alter political advertisements in order to add appropriate sponsorship identification in compliance with this rule.

20 We note that subsection (d) of Section 317 allows the Commission to waive the sponsorship identification requirement. See 47 U.S.C. §317(d).

21 In the event the station cannot add the required visual identification immediately without taking extraordinary measures, we will allow the station to add only an aural identification, as long as the proper visual information needed is added within one

10. Finally, we wish to emphasize that nothing in this ruling alters our prior policies requiring that political advertisements contain information that is sufficient to allow viewers to identify the real sponsor of the ad.[22] Particularly in light of the increasing use of negative advertising, the Commission remains committed to ensuring that the public can reasonably identify who is using broadcast facilities to promote or oppose particular political candidacies.

ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, that the Petitions for Reconsideration filed by People for the American Way and Media Access Project; CBS, Inc.; Capital Cities/ABC, Inc.; The Democratic National Committee and The Democratic Senatorial Campaign Committee and The Democratic Congressional Campaign Committee; The Republican National Committee and The National Republican Senatorial Committee and The National Republican Congressional Committee; National Association of Broadcasters; Multi-Media, Inc.; and A.H. Belo Corporation et. al. ARE GRANTED to the extent indicated herein.

12. IT IS FURTHER ORDERED that, pursuant to authority contained in Sections 317, 303(r), and 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 317, 303(r), 154(i), the Commission's Rules ARE AMENDED as set forth in Appendix B to this Order, effective April 1, 1992.[23]

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business day of its first airing. We note that licensees need not provide additional time, free of charge, in order to satisfy the sponsorship identification rules, and that they may therefore include the necessary information within the advertisement itself. Report and Order at para. 49.

22 See 47 CFR §73.1212(e) (1992); see also KOOL-TV, 26 FCC 2d 42 (1970) ("A Lot of People Who Would Like to See Sam Grossman Elected to the U.S. Senate" lacked the specificity required for compliance with Section 317).

23 See also note 3, supra.

13. Further information on this proceeding may be obtained by contacting Milton O. Gross, Robert L. Baker, Marsha J. MacBride or Maureen O'Connell, Mass Media Bureau at (202) 632-7586, or Diane Holbauer, Office of General Counsel, at (202) 632-6990.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Petitions for Reconsideration of the Report and Order in MM Docket No. 91-168 were filed by the following:

1) People for the American Way and Media Access Project;

2) Multi-Media, Inc.;

3) The Republican National Committee, The National Republican Senatorial Committee and the National Republican Congressional Committee;

4) The Democratic National Committee, The Democratic Senatorial Campaign Committee and The Democratic Congressional Campaign Committee;

5) The National Association of Broadcasters;

6) CBS, Inc.;

7) Citizens Communications Center, Institute for Public Representation and Georgetown University Law Center;

8) Capital Cities/ABC, Inc.;

9) Telecommunications Research and Action Center and the Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights;

10) A.H. Belo Corporation, Cordillera Communications, Inc., Cox Enterprises, Inc., Duchossois Communications Company, Guy Gannett Publishing Co., Multimedia, Inc., and River City License Partnership.

APPENDIX B

The last sentence of Section 73.1212(a)(2)(i) is deleted. A new Section 73.1212(a)(2)(ii) is added to read as follows:

(ii) In the case of any television political advertisement concerning candidates for public office, the sponsor shall be identified with letters equal to or greater than four percent of the vertical picture height that air for not less than four seconds.

The last sentence of Section 76.221(a) is deleted. A new last sentence to Section 76.221(a) is added to read as follows:

In the case of any political advertisement cablecast under this subsection that concerns candidates for public office, the sponsor shall be identified with letters equal to or greater than four percent of the vertical picture hieght that air for not less than four seconds.