Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	**)**
	)
Complaints against ACC Licensee, LLC,	**)**
Licensee of Station WJLA-TV, Washington	**)**
D.C., and Sander Media, LLC, Licensee of	**)**
Station KGW(TV), Portland, OR	**)**

To: The Commission

JOINT REPLY TO OPPOSITIONS TO APPLICATION FOR REVIEW

The Campaign Legal Center, Common Cause, and the Sunlight Foundation, by their attorneys, the Institute for Public Representation, respectfully reply to the Oppositions filed by Sander Media, LLC ("Sander") and ACC Licensee, LLC ("ACC") (collectively "Opposing Parties" or "Oppositions") on October 17, 2014.

Opposing Parties ignore the plain language of the Communications Act and the Commission's regulations and conflate the statutory "reasonable diligence" requirement for on-air sponsor identification with separate public file obligations. The Oppositions base their arguments on dictum in *Loveday v. FCC*,[1] that has in any event been superseded by subsequent Supreme Court decisions. Sander also errs in claiming that the Commission lacks the authority to address these claims in the current adjudicatory proceeding.

I. The Oppositions ignore the plain language of the Communications Act and Commission regulations.

The Opposing Parties claim that their reasonable diligence requirement was met by providing the advertisers with the NAB Form PB-17 in compliance with public file disclosure

[1] *Loveday v. FCC*, 707 F.2d 1443 (D.C. Cir. 1983).

obligations.[2] Sander further contends that KGW's duty to exercise reasonable diligence was discharged because the American Principles Fund is a properly registered political committee and was identified on-air.[3]

Whether the stations met the political file obligations of Section 315 and whether the Super PAC advertisers met FEC registration obligations is not relevant to whether the stations exercised diligence to meet Section 317's on-air sponsor identification requirement, which is a separate legal requirement. Further, Sander and ACC's interpretation of Section 317 ignores express language in the statute. Section 317 of the Communications Act requires that *broadcast stations* "exercise reasonable diligence" to determine who has sponsored the advertisement and to announce that sponsor on-air.[4]

It is clear that neither Sander nor ACC has exercised reasonable diligence. Merely providing a form to the advertiser to fill out or passively accepting advertiser assurances does not satisfy the affirmative duty placed on the broadcasters by the plain language of the statute. Thus, Sander and ACC have failed to satisfy their reasonable diligence requirement.

II. The Oppositions rely on nonbinding and outdated dictum in *Loveday*.

The Oppositions rely extensively on *Loveday* to support their arguments. For instance, Sander claims that *Loveday* makes clear that licensees have only a "limited duty to investigate" the true sponsor of political ads.[5] Sander also quotes *Loveday* for the proposition that "Section 317 can hardly have been designed to turn broadcasters into private detectives."[6] Both Oppositions rely on *Loveday* to support their otherwise unsupported assertions that granting

[2] ACC Opp. at 6, 9; Sander Opp. at 4-6.
[3] Sander Opp. at 3.
[4] 47 USC §317(c) (2014).
[5] Sander Opp. at 5-6.
[6] Sander Opp. at 5.

relief would create an unworkable standard[7] and threaten broadcasters' First Amendment interests.[8]

The language cited by the Opposing Parties is mere dictum and does not bar the full Commission from broadly interpreting "reasonable diligence." *Loveday* was decided in 1983, one year before the Supreme Court's 1984 decision in *Chevron* determined that the proper role of a court reviewing agency action is to decide whether the agency interpreted the relevant statute in a reasonable way.[9] In *Loveday*, rather than considering the interpretation and reasoning of the Commission's decision, the court conducted an essentially *de novo* review and engaged in a lengthy discussion of the legislative history of Section 317 that was entirely unrelated to anything the Commission said in the decision under review. Therefore, any language in *Loveday* that goes beyond accepting as legitimate the Commission's interpretation of its own statutory authority and regulations is dictum. Significantly, to the extent that *Loveday* relied on the unpublished staff opinion in *VOTER*, the Commission is free to reinterpret and overrule *VOTER* to the extent that is necessary to enforce and uphold the Communications Act's sponsor identification requirement.[10] Thus, reliance on anything in *Loveday* other than its holding is unpersuasive.

Loveday should be further discounted because of the significant changes in technology since 1983. ACC and Sander each rely on the *Loveday* court's dictum that "Section 317 can hardly have been designed to turn broadcasters into private detectives."[11] In the decades

[7] ACC Opp. at 4.
[8] Sander Opp. at 6-7; ACC Opp. at 9-10.
[9] *Chevron v. NRDC*, 467 U.S. 837 (1984).
[10] The court in *Loveday* affirmed the FCC's reliance on *VOTER*, an unpublished Bureau staff decision, which defined "reasonable diligence" to mean broadcasters were not made "an insurer of a sponsor's representations." *Loveday*, 707 F.2d at 1447 (citing *VOTER*, 46 Rad.Reg.2d (P&F) 350 (1979)). *VOTER* departed from longstanding Commission policy contemporaneous to the promulgation of the sponsor identification requirement. Application for Review, Section III.A.2.
[11] ACC Opp. at 4-5; Sander Opp. at 5 (citing *Loveday v. FCC*, 707 F.2d at 1457). This

following *Loveday*, new information communication technologies and disclosure requirements have given broadcasters new tools that enable them to fulfill their obligation to investigate without having to resort to onerous investigations and research. Today, broadcasters can fulfill their duty to pierce the veil of a nominal sponsor without making public records requests, visiting government offices, observing suspected persons, or establishing research departments staffed by detectives.[12] The information required to disclose the true identity of a political advertisement's sponsor is freely and publicly available via the Internet in Federal Elections Commission disclosure reports, online databases, and news outlets.

Loveday's discussion of the First Amendment similarly offers no reason for the Commission to uphold the Bureau letter here. This discussion is not only dictum, but purely speculative. The *Loveday* court claims that reasonable diligence obligations may deter broadcasters from running political ads, which could choke-off political speech. The court offered no supporting evidence for this claim, and neither do the Oppositions. Given the large amount of money that stations receive for airing political ads, they are unlikely to be chilled from airing ads simply by an obligation to conduct reasonable diligence. Moreover, PACs are unlikely to be chilled by disclosure requirements.[13] Without evidence of a chilling effect, it would be imprudent to choke-off disclosure requirements, which have been upheld time and again against First Amendment challenge at the Supreme Court post-*Loveday* by *McConnell v. FEC*,[14] *Citizens United v. FEC*,[15] and *McCutcheon v. FEC*.[16] The Oppositions do not raise or question the authority of these cases.

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hyperbolic observation cannot override the statutory language requiring "reasonable diligence." 47 USC §317(c).

[12] *Cf. Loveday*, 707 F.2d at 1457.

[13] *See Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 41 (1st Cir. 2011) (finding disclosure provisions at issue "neither erect a barrier to political speech nor limit its quantity. Rather, they promote the dissemination of information about those who deliver and finance political speech, thereby encouraging efficient operation of the marketplace of ideas.").

[14] *McConnell v. FEC*, 540 U.S. 93, 210 201 (2003) (finding disclosure requirements that "do not

III. The Commission can and should grant the relief requested in the Application for Review.

Contrary to Sander's claim that granting relief would violate APA rulemaking requirements,[17] the Commission may address whether Sander and ACC failed to meet their "reasonable diligence" obligations and clarify the statutory and regulatory requirements of broadcasters' duty to determine the true sponsor of political advertisements in this proceeding. It is black letter law that the Commission may establish policy—and has—through adjudication. The Supreme Court most recently affirmed this principle in *FCC v. Fox Television Stations*, in which the Court found that the FCC's change to its policies regarding expletives, enacted through adjudication, was a proper exercise of its adjudicatory authority and did not violate the Administrative Procedure Act.[18] Furthermore, courts have consistently held that agencies have broad discretion in deciding whether to address an issue by adjudication or rulemaking; in more than one case, courts have noted that such agency discretion is "at its peak."[19]

Conclusion

For the foregoing reasons, the full Commission should review and reverse the Bureau's decision and clarify the statutory and regulatory requirement that broadcasters exercise reasonable diligence to determine and disclose the true sponsor of political advertisements.

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prevent anyone from speaking" and "perform an important function in informing the public" to be constitutional) (internal citations and quotation marks omitted).

[15] *Citizens United v. FEC*, 558 U.S. 310, 371 (2010) ("The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.").

[16] *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014) ("With modern technology, disclosure now offers a particularly effective means of arming the voting public with information.").

[17] Sander Opp. at 8.

[18] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 520 (2009).

[19] *See, e.g.*, *Am. Gas Ass'n v. FERC*, 912 F.2d 1496, 1519 (D.C. Cir. 1990); *Shays v. FEC*, 511 F. Supp. 2d 19, 26 (D.D.C. 2007); *see also SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947); *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 536 (D.C. Cir. 2007).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Keir Lamont, hereby certify that copies of the Reply to the Oppositions to Application for Review by Campaign Legal Center, Common Cause, and the Sunlight Foundation, through their attorneys, the Institute for Public Representation, have been served by first class mail this 30th of October, 2014, on the following persons at the addresses shown below.

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