

JONES DAY

August 10, 2020

Dear Station Manager:

I write as counsel to America First Action (“AFA”) in response to Biden for President’s (“Biden Campaign”) letter requesting that your station cease airing AFA’s advertisement entitled “Granted.” As detailed below, the ad is accurate and supported by Mr. Biden’s own words. Therefore, your station must honor its contract with AFA and continue airing it. Your station also has an obligation to operate in the public interest, and providing your viewers with the information in AFA’s advertisement furthers that interest.

While the Biden Campaign may wish to, it cannot take back Mr. Biden’s numerous public statements during his primary campaign for the Democratic nomination in which he supported a fracking ban. For example, during a Democratic debate on July 31, 2019, moderator Dana Bash asked Mr. Biden: “Would there be *any place* for fossil fuels, *including coal and fracking*, in a Biden administration?” Mr. Biden responded: “*No*. We would work it out. *We would make sure it’s eliminated*, and no more subsidies for either one of those, period.”¹

During a Democratic debate on March 15, 2020, Senator Bernie Sanders stated: “*I’m talking about stopping fracking as soon as we possibly can*. I’m talking about telling the fossil fuel industry that they are going to stop destroying this planet.” Mr. Biden responded: “*So am I*.”² During that same debate, Mr. Biden asserted: “*No more -- no new fracking*.”³ Because fracking is a continual process, a ban on “new fracking” is functionally the same thing as a fracking ban.⁴

¹ Susan Crabtree, *Trump Campaign Spotlights Biden's Vow to Ban Fossil Fuels*, RealClearPolitics, Aug. 1, 2019, https://www.realclearpolitics.com/articles/2019/08/01/trump_campaign_spotlights_bidens_vow_to_ban_fossil_fuels_140916.html.

² Transcript of March 15, 2020 Democratic Debate, <http://transcripts.cnn.com/TRANSCRIPTS/2003/15/se.03.html>.

³ *Id.*; see also Nicholas Deluliis, *Biden's fracking ban will derail environmental and economic gains*, Apr. 10, 2020, <https://thehill.com/opinion/energy-environment/491378-bidens-fracking-ban-will-derail-environmental-and-economic-gains> (“For the second time during the Democratic debate series, Biden recently told the television audience that if he’s elected president he will move to ban fracking.”).

⁴ Mark P. Mills, *MI Responds: Biden's Call to Ban New Fracking*, Mar. 16, 2020, <https://www.manhattan-institute.org/responds-biden-calls-ban-new-fracking>; see also Chris White, *Rep. Conor Lamb Supports Biden's 'No New Fracking' Push. Here's How That Impacts Pennsylvania*, Daily Caller, Mar. 17, 2020, <https://dailycaller.com/2020/03/17/conor-lamb-joe-biden-fracking-pennsylvania/> (“‘Saying no new fracking is functionally the same as saying no fracking period,’ Steve Everley a former energy advisor to former House Speaker Newt Gingrich, told the DCNF. The fracking process takes nearly a week, meaning it’s not something that occurs for months or years.”).

Mr. Biden indicated his support for a fracking ban elsewhere on the campaign trail. For example, at a campaign event in New Hampshire, a voter asked Mr. Biden: “What about, say, stopping fracking?” Mr. Biden responded “Yes.”⁵ At other campaign events, Mr. Biden expressed his intent to eliminate fossil fuels, which include natural gas and would necessarily require a fracking ban. For example, he promised an environmental activist: “I guarantee you. We’re going to end fossil fuel.”⁶ He also told an audience he would “get rid of fossil fuels.”⁷ And he went as far as to tell the League of Conservation Voters that he would seek a “worldwide ban on fossil fuels.”⁸

Now that Mr. Biden is the presumptive Democratic nominee, and is facing a general electorate rather than a primary electorate, it is understandable that Mr. Biden would like to downplay his past unqualified statements about fracking. Indeed, numerous media outlets have recognized that Mr. Biden is currently attempting to moderate his image on fracking, yet finding that task difficult given the statements he made during the primary campaign.⁹ Mr. Biden is entitled to make his case to the public that he has changed his position or that he misspoke on numerous past occasions. But it is not this station’s responsibility to protect Mr. Biden from statements he made to secure the Democratic nomination.

Furthermore, the articles cited in the Biden Campaign’s letter do not undercut the truth of AFA’s advertisement. These media outlets credit the Biden Campaign’s explanations of Mr. Biden’s past statements and offer their own opinions as to Mr. Biden’s true feelings on fracking. They are fully within their rights to do so. But AFA also has the right to take Mr. Biden’s statements at face value. Indeed, even the articles cited by the Biden Campaign acknowledge the ambiguity of Biden’s position and statements. For example, one article states: “[I]t is true that Biden has said he wants to stop new permits for fracking.”¹⁰ As explained above, prohibiting new fracking is functionally the same thing as banning fracking. Notably, the Biden Campaign

⁵ Joe Biden Campaign Event in Claremont, NH (39:15), Jan. 24, 2020, <https://www.c-span.org/video/?468360-1/joe-biden-campaigns-claremont-hampshire>.

⁶ Steve Peoples, *In intimate moment, Biden vows to ‘end fossil fuel’*, Associated Press, Sept. 6, 2019, <https://apnews.com/9dfb1e4c381043bab6fd0fa6dece3974>.

⁷ Joe Biden Campaign Event in Somersworth, NH, Feb. 5, 2020, <https://www.youtube.com/watch?v=yAP4ily9IOs>.

⁸ Kelsey Tamborino, *Morning Energy Newsletter*, Politico, June 17, 2020, <https://www.politico.com/newsletters/morning-energy/2020/06/17/marathon-markup-ahead-for-climate-friendly-transportation-bill-788574>.

⁹ See, e.g., David Blackmon, *Joe Biden Tries To Clean Up His Fracking Mess*, Forbes, July 11, 2020, <https://www.forbes.com/sites/davidblackmon/2020/07/11/joe-biden-tries-to-clean-up-his-fracking-problem-in-pennsylvania/#683a482c6df7>.

¹⁰ Steve DeVane, *Fact Check: Joe Biden wants to eliminate new fracking permits, not all fracking*, USA Today, June 19, 2020, <https://www.usatoday.com/story/news/factcheck/2020/06/19/fact-check-joe-biden-doesnt-want-ban-all-fracking-only-new-permits/3215253001/>.

does not dispute that a fracking ban would cause substantial job losses in Pennsylvania, nor can it.¹¹

Finally, it is widely recognized that Mr. Biden swiftly discarded political positions he held for decades and moved significantly to the left during the primary campaign to appeal to progressive voters.¹² And progressive activists have noted that Mr. Biden “responds to pushing,” especially with respect to environmental issues.¹³ Based on these facts, AFA’s advertisement is accurate and is serving the public interest by warning the public of the dangers of electing Mr. Biden.

If the Biden Campaign would like to assure voters that Mr. Biden has changed his position and will not ban fracking if elected, the Biden Campaign should purchase airtime and say so. Mr. Biden assuredly wants to avoid having to run an advertisement supporting fracking, because doing so would box him in politically and make it more difficult to pursue a ban if elected. That, to say the least, is not a valid reason to silence a political opponent. As a candidate for public office, Mr. Biden has a legal right of reasonable access to explain his own record and positions on issues of public importance, and he has ample opportunity to respond to AFA’s advertisements. Indeed, AFA started running advertisements with this claim more than two months ago, which went unrefuted until now, when the American political electorate is beginning to pay attention in advance of the general election. But Mr. Biden does not have the right to silence opponents who are simply educating the public regarding statements he made on important policy matters and the potential implications of a Biden presidency.

As the Supreme Court has explained, the First Amendment embodies “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). It “has its fullest and most urgent application . . . to the conduct of campaigns for political office.” *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). And “debate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms.” *Republican Party of Minnesota v. White*, 536 U.S. 765, 781 (2002).

That is why the FCC has stated that stations best serve the public interest “by presenting contrasting views” and promoting “robust, wide-open debate,” and has rejected calls to “judge the truth or falsity of material being broadcast on either side of a currently controversial issue.”

¹¹ See U.S. Chamber of Commerce Global Energy Institute, *What If...Hydraulic Fracturing Was Banned?*, 2019, https://www.globalenergyinstitute.org/sites/default/files/2019-12/hf_ban_report_final.pdf.

¹² Charlotte Clymer, *Take heart, progressives: When the party moves left, Biden has always followed*, Washington Post, Apr. 28, 2020, <https://www.washingtonpost.com/outlook/2020/04/28/progressives-biden-moved-left/>

¹³ John Nichols, *How to Move Biden Left*, The Nation, July 27, 2020, <https://www.thenation.com/article/politics/biden-movements-climate-progressive/>.

August 10, 2020
Page 4

In re Complaint by Hon. Ronald Reagan, 38 F.C.C.2d 314 (1972). We trust this letter resolves this matter and that your station will fulfill its obligation to promote “robust, wide-open debate” and continue to air AFA’s advertisement.

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