FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: OFFICE OF THE COMMISSION SECRETARY

DATE: October 12, 2006

SUBJECT: COMMENTS ON DRAFT AO 2006-31

Transmitted herewith are timely submitted comments from Messrs. Fred Wertheimer, J. Gerald Hebert, Paul S. Ryan, and Donald J. Simon on behalf of the Campaign Legal Center and Democracy 21 regarding the above-captioned matter.

The proposed draft advisory opinion is being considered under an expedited process.

Attachment

By Electronic Mail

October 12, 2006

Lawrence M. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comment on Draft Ad Op. 2006-31

Dear Mr. Norton:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 in regard to alternative draft Advisory Opinions 2006-31, released by the Commission's Office of General Counsel (OGC) on Oct. 11, 2006, and scheduled for circulation as a tally-vote item on Oct. 12, 2006.

These alternative draft opinions respond to a request (AOR 2006-31) filed by the Bob Casey for Pennsylvania Committee ("Committee") for permission to receive the "lowest unit charge" (LUC) broadcast advertising rate despite its planned refusal to comply with the disclaimer requirements of 47 U.S.C. § 315(b)(2), "without accepting an illegal in-kind contribution from a corporation in the amount of the difference between that rate and the corporation's usual and normal charge for the time sold[.]" AOR 2006-31 at 6.

We strongly oppose "Draft A," which reaches the incorrect conclusion that the Committee *may* receive the LUC advertising discount regardless of whether the Committee complies with the disclaimer requirement established by section 305 of the Bipartisan Campaign Reform Act of 2002 (BCRA). "Draft A" reaches this conclusion by finding that, so long as the LUC is offered *to all federal candidates*, the LUC is a "discount offered in the ordinary course of business and therefore would not be an in-kind contribution" to the Committee. Draft A at 1 (emphasis added).

The Campaign Legal Center and Democracy 21 filed comments in response to AOR 2006-31 on Oct. 2, 2006 (attached for the Commission's convenience), detailing the Congressional history of the BCRA § 305 disclaimer requirement – which makes clear that Congress intended compliance with the disclaimer requirement to be a mandatory condition for receiving the LUC. "Draft A" flies in the face of this Congressional intent and renders the BCRA disclaimer requirement functionally meaningless. Under the reasoning of this draft, a candidate could receive the LUC whether or not the candidate includes the required disclaimer in his/her campaign ad, so long as any other candidate has received it. This Draft would essentially make the disclaimer little more than a nice option. There is no reason to think that was what Congress had in mind.

"Draft B," by contrast, appears to say that a candidate who fails to include the disclaimer in his/her ad would be in the same position as any other time buyer – and the broadcaster would be making an illegal corporate contribution unless it charged that candidate whatever rate it would charge to any commercial entity for the same volume and type of airtime purchased. In other words, the candidate who fails to include the disclaimer would not be "entitled," 47 U.S.C. § 315(b)(2)(B), to the LUC. That candidate would be subject to the normal FECA rules on commercial transactions, which permit discounts, but only to the extent that such discounts are offered in the normal course of business to commercial purchasers. The candidate would *not* be able to receive the LUC (or any other discount rate) unless any other purchaser of a similar amount and type of airtime would receive the same rate under the broadcaster's normal commercial policies.

We think the Commission should clarify the language of "Draft B" to make clear this meaning – for instance by stating on the top of page 7 that "similarly situated advertisers" would include not just any other federal candidate, but any other commercial advertiser who is purchasing not just the same volume, but also the same type (e.g., preemptible or non-preemptible) of airtime.

We appreciate the opportunity to comment on this matter.

Sincerely,

/s/ Fred Wertheimer

Fred Wertheimer
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/s/ J. Gerald Hebert

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Copy to: Each Commissioner
Commission Secretary

By Electronic Mail

October 2, 2006

Lawrence M. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comment on AOR 2006-31

Dear Mr. Norton:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 in regard to Advisory Opinion Request (AOR) 2006-31, filed by the Bob Casey for Pennsylvania Committee (the "Committee"), seeking advice as to whether, "[h]aving forfeited eligibility to the lowest unit rate" as a result of its failure to comply with the disclaimer requirements of 47 U.S.C. § 315(b)(2), the Committee may nevertheless receive the "lowest unit charge" (LUC) for television airtime "without accepting an illegal in-kind contribution from a corporation in the amount of the difference between that rate and the corporation's usual and normal charge for the time sold?" AOR 2006-31 at 6.

For the reasons set forth below, the Commission should advise the Committee that, having forfeited eligibility to the LUC as a result of its failure to comply with the disclaimer requirements of 47 U.S.C. § 315(b)(2), the Committee's acceptance of the LUC from a corporate broadcast station would constitute acceptance of an illegal corporate contribution in the amount of the difference between the LUC and the broadcast corporation's usual and normal charge for the time sold.

I. A federal candidate must comply with the BCRA Statement requirement of 47 U.S.C. § 315(b)(2) in order to lawfully receive the "lowest unit charge" discount from a broadcast corporation.

In 2002, Congress amended the Communications Act of 1934, through passage of the Bipartisan Campaign Reform Act of 2002 (BCRA), to provide that a federal candidate will receive the benefit of the LUC from broadcast corporations *only* if the candidate includes a specified disclaimer statement ("BCRA Statement") in ads that refer to other candidates for the same office.

With respect to television ads, the BCRA Statement requirement is met only if:

- at the end of the ad;
- there appears simultaneously;

- for a period of not less than four seconds;
- a clearly identifiable photographic or similar image of the candidate; and
- a clearly readable printed statement, identifying the candidate and stating that the candidate has approved the ad and that the candidate's authorized committee paid for the ad.

See 47 U.S.C. § 315(b)(2)(C).

With respect to radio ads, the BCRA Statement requirement is met only if the ad "includes a personal audio statement by the candidate that identifies the candidate, the office the candidate is seeking, and indicates that the candidate has approved the broadcast." *Id.* at § 315(b)(2)(D).

Congress *twice* in the statute set forth the inclusion of BCRA Statement as a condition for receiving the benefit of the LUC.

In subsection (2)(A) of section 315(b), Congress provided that a federal candidate "*shall not be entitled* to receive" the LUC for an ad that contains a reference to another candidate for the same office "*unless* the reference meets the requirements of subparagraphs (C) or (D)." 47 U.S.C. § 315(b)(2)(A) (emphasis added).

In subsection (2)(B) of section 315(b), Congress additionally provided that if a federal candidate "makes a reference" to another candidate for the same office "that does not meet the requirements of subparagraph (C) or (D), such candidate *shall not be entitled* to receive" the LUC for that broadcast "or any other broadcast during any portion of the 45-day and 60-day periods [preceding the primary and general elections, respectively], that occur on or after the date of such broadcast, for election to such office." 47 U.S.C. § 315(b)(2)(B) (emphasis added).

Thus, the statutory language twice sets forth the absolute and unequivocal condition that a candidate "shall not be entitled" to the LUC unless the candidate's ads contain the BCRA Statement. If the mandatory nature of this language is not sufficiently clear on its face, the legislative history of the provision removes any doubt as to its purpose. The provision was introduced as a floor amendment to BCRA on March 22, 2001, co-sponsored by Senators Wyden and Collins. In introducing it, Senator Wyden explained:

> It says, *if you want that lowest unit rate* provided for in this law that we are guaranteeing to you, then *you must put your name and your face at the end of this ad* for a few seconds so people know who is paying for this ad. ... It is a very reasonable kind of requirement *in exchange for* that lowest unit rate.

Cong. Rec. S2694 (daily ed. March 22, 2001) (emphasis added).

Senator Wyden continued: "The fact is that this is a stand-by-your-ad requirement. This is a proposal that makes it clear that *to get that lowest unit rate*, you have to be held personally accountable." *Id.* at S2697 (emphasis added).

Senator Collins, to the same effect, said: "Under our proposal, the candidate's picture would appear at the end of the ad and the candidate would have to have a statement saying he or she approved the ad *in order to get the lowest broadcast rate*." *Id.* at S2695 (emphasis added).

In the words of the Committee in AOR 2006-31, "[t]he legislative history indicates that Congress intended the lowest unit charge to be unavailable to candidate who did not abide by the disclaimer requirements. AOR 2006-31 at 2. The Committee acknowledges that "a candidate who fails to comply with the [BCRA Statement] requirement loses eligibility for the discounted rates for the remainder of the election period." *Id.*

Yet, despite the clear and mandatory language of the statute, and the Committee's understanding of the congressional purpose behind it, the Committee inexplicably seeks permission from the Commission to ignore the federal law requirement that it include the BCRA Statement in its ads in order to lawfully receive the LUC.

II. Advisory Opinion 2004-43 (Missouri Broadcasters Association) addressed a distinctly different legal question than that which is posed by the Committee in AOR 2006-31.

In February 2005, the Commission published Ad. Op. 2004-43 in response to a request by the Missouri Broadcasters Association (MBA) regarding whether a broadcaster's decision to offer a senator's campaign committee the LUC for several specific ads resulted in illegal in-kind corporate contributions. The Commission reviewed the ads in question and advised the MBA: "Because the Commission concludes that there is no evidence of a violation of the disclaimer requirements, providing the LUC did not, in this instance, result in an in-kind contribution." Ad. Op. 2004-43 at 4.

The Commission *did not* determine in Ad. Op. 2004-43 whether providing the LUC to a committee that did violate the BCRA Statement requirement would result in an illegal corporate in-kind contribution.

By contrast, here the Committee explicitly proposes to violate the BCRA Statement requirement. For this reason, the Commission's advice in Ad. Op. 2004-43 regarding a federal candidate committee that *did not* violate the BCRA Statement requirement has no relevance in this advisory opinion proceeding.

Furthermore, the Committee here is not asking the Commission to enforce or interpret provisions of the Communications Act, as amended by BCRA. Instead, the Committee is asking the Commission to opine on the applicability of longstanding federal campaign finance statutes and regulations prohibiting corporations from making contributions or expenditures in connection with federal elections.

Put differently, whereas in Ad. Op. 2004-43 the Commission addressed the threshold question of whether a particular committee's ads had violated the BCRA Statement requirement, here the Commission has been asked to apply the corporate contribution ban in an instance where the BCRA Statement requirement clearly has (or will be) violated.

III. Acceptance of the LUC by a committee that has forfeited eligibility to receive the LUC constitutes acceptance of a corporate contribution in violation of 2 U.S.C. § 441b(a).

The Committee proposes to violate the BCRA Statement requirement, yet still receive the discounted LUC from corporate broadcasters. As the Commission has explained:

> FECA prohibits any corporation from making any contribution or expenditure in connection with a Federal election. 2 U.S.C. 441b(a). FECA and Commission regulations define the terms "contribution" and "expenditure" to include any gift of money or anything of value for the purpose of influencing a Federal election. 2 U.S.C. 431(8)(A)(i) and 431(9)(A)(i); 11 CFR 100.52(a) and 100.111(a); see also 2 U.S.C. 441b(b)(2) and 11 CFR 114.1(a)(1) (providing a similar definition for "contribution or expenditure" with respect to corporate activity). Commission regulations further define "anything of value" to include all in-kind contributions and state that, unless specifically exempted under 11 CFR 100.71(a), the provision of any goods or services (including advertising services) without charge, or at a charge which is less than the usual and normal charge for such goods or services, is a contribution. 11 CFR 100.52(d)(1); see also 11 CFR 100.111(e)(1).

Ad. Op. 2004-43 at 2.

The voluntary provision of the LUC discount rate by a broadcast corporation to a committee not legally entitled to receive the LUC clearly constitutes "the provision of . . . goods or services . . . at a charge which is less than the usual and normal charge for such goods or services" and, therefore, constitutes an in-kind contribution from the broadcast corporation to such committee. *See* 11 C.F.R. § 100.52(d)(1). Such a contribution from a corporate broadcaster to a federal candidate committee would clearly violate the corporate contribution ban established by 2 U.S.C. § 441(b)(a).

Indeed, if the LUC was not "less than the usual and normal charge" for such advertising services, the Committee would neither be seeking the LUC, nor seeking the Commission's advice. Instead, the Committee would simply pay the usual and normal charge for the advertising.

Commission regulations further provide: "If goods or services are provided at less than the usual and normal charge, the amount of the in-kind contribution is the difference between the usual and normal charge for the goods or services at the time of the contribution and the amount charged the political committee." 11 C.F.R. § 100.52(d)(1).

In this instance, the amount of the corporate broadcaster's illegal contribution to the Committee would be the difference between the usual and normal charge for the proposed advertising and the LUC.

IV. Conclusion

For the above-stated reasons, the Commission should advise the Committee that, in order to receive the LUC without violating the federal law prohibition on corporate contributions, the Committee must comply with the BCRA Statement requirement of 47 U.S.C. § 315(b)(2). We appreciate the opportunity to comment on this matter.

Sincerely,

/s/ Fred Wertheimer

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