FEDERAL ELECTION COMMISSION
Washington, DC 20463

STATEMENT

OF

CHAIRMAN MICHAEL E. TONER AND COMMISSIONERS

HANS A. von SPAKOVSKY AND DAVID MASON

ON

ADVISORY OPINION REQUEST 2006-31

On September 19, 2006, the Federal Election Commission ("Commission") received a request from the Bob Casey for Pennsylvania Committee ("Casey Committee") for an advisory opinion on the issue of whether a broadcast station makes a prohibited in-kind contribution under the Federal Election Campaign Act of 1971 ("FECA") if the station provides, and the political committee accepts, the lowest unit charge ("LUC") for advertising airtime when the political committee is not "entitled" to the LUC under the Communications Act of 1934.[1] Two alternative drafts were made available to the public for comment on October 11.[2] We supported Draft A which properly applied FECA and Commission regulations and afforded the appropriate deference to the Federal Communications Commission ("FCC") to interpret and enforce the Communications Act. On October 13, the Commission issued a letter to the Casey Committee informing it that the Commission was unable to respond to the request because there were not four votes to approve either draft.

The Commission's statutory jurisdiction does not extend to the Communications Act. The FCC, which does have jurisdiction over the Communications Act, has taken the position that broadcast stations may offer the LUC on a non-discriminatory basis to all candidates, regardless of whether a political committee is "entitled" to the LUC under the Communications Act. In this context, as long as a broadcast station offers the LUC to all Federal candidates on an equal, nondiscriminatory basis, the LUC constitutes a discount offered in the ordinary course of business and is not an in-kind contribution to a political committee. Providing the LUC in this manner does not violate FECA.

[1] The Commission faced this same question in Advisory Opinion 2004-43 (Missouri Broadcasters Association), but failed to reach a definitive result.

[2] Available at http://www.fec.gov/aos/2006/aor2006-31draft.pdf.

I. BACKGROUND

A. Facts

The facts of this matter are based on the Casey Committee's letter to the Commission of September 19, 2006,[3] requesting an advisory opinion, as supplemented by its emails of September 20, 2006.

The Casey Committee is the authorized committee of Bob Casey, a candidate for election to the United States Senate from the Commonwealth of Pennsylvania. Mr. Casey's opponent in the general election is incumbent Senator Rick Santorum.

KDKA Television has informed both federal candidates that it is prepared to offer them the LUC for their political television advertisements regardless of whether the disclaimers in the advertisement meet the requirements of the Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81 (March 27, 2002) ("BCRA"). The Communications Act of 1934 generally requires broadcasters to provide candidates the LUC for a candidate's political advertisements in the 45 days preceding a primary election and the 60 days preceding a general election. *See* 47 U.S.C. § 315(b)(1)(A). However, BCRA amended the Communications Act, 47 U.S.C. 315(b), to provide that a Federal candidate "shall not be entitled to receive" the LUC if any of the candidate's television advertisements makes a "direct reference" to the candidate's opponent and fails to contain a "clearly readable printed statement [] identifying the candidate and stating that the candidate has approved the broadcast and that the candidate's authorized committee paid for the broadcast." Additionally, this statement must be accompanied by a "clearly identifiable photographic or similar image of the candidate," and appear "at the end of [the] broadcast" for at least 4 seconds. BCRA sec. 305, 116 Stat. at 101, codified at 47 U.S.C. § 315(b)(2)(C).

On September 20, KDKA amended its Political Disclosure Statement, which sets forth the station's policies regarding the sale of time to candidates for public office, to provide as follows: "It is not presently clear whether a station may, as a matter of its own discretion, continue to afford the lowest unit charge to a candidate who has caused the broadcast of an ad that does not comply with the above disclaimer requirements [*i.e.*, does not contain a proper disclaimer statement under Section 315 of the Communications Act]. Pending further guidance from the Federal Election Commission or the Federal Communications Commission, the Station will continue to afford the lowest unit rate to candidates in these circumstances." *See* Amendment to Political Disclosure Statement of KDKA, included in Advisory Opinion Request of Bob Casey for Pennsylvania Committee.

The FCC has jurisdiction over the Communications Act, but has not yet promulgated regulations implementing the BCRA amendments to the Communications Act. Informal conversations between Commission staff members and FCC staff members confirm, however, that the FCC staff interprets the BCRA amendments to the Communications Act to allow a television station to offer the LUC to a candidate whose

[3] Available at http://www.fec.gov/aos/2006/aor2006-31.pdf.

advertisements do not contain the proper Communications Act Statement, as long as the station treats all Federal candidates in a consistent, non-discriminatory manner.[4] The Casey Committee informed the Commission that FCC staff members have further confirmed this interpretation in informal conversations with KDKA and other television stations. The FCC has not made a formal determination as to whether any of the advertisements at issue contain a proper Communications Act Statement.

B. Lowest Unit Charge

While the Commission lacks authority to implement or enforce the LUC provisions of the Communications Act, it is important to understand what the LUC is and how a broadcast station calculates it when considering how it interacts with FECA's corporate contribution prohibition.

The Communications Act requires broadcasters selling time to candidates during specified periods before elections to charge them the station's "lowest unit charge" for the same classification of advertising. *See* 47 U.S.C. § 315(b)(1)(A) (charges may not exceed "during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, *the lowest unit charge of the station for the same class and amount of time for the same period*") (emphasis added).[5] In other words, "[a] candidate shall be charged no more per unit than the station charges its most favored commercial advertisers for the same classes and amounts of time for the same periods." 47 CFR 73.1942(a)(1)(i).[6] "By

[4] It is not our intention to interpret the FCC's statute, but we understand the FCC's informal advice to indicate that the FCC has come to the same conclusion as Vice Chairman Toner and Commissioner Smith in Advisory Opinion 2004-43 (Missouri Broadcasters Association), that the statutory language in Section 315, "shall not be entitled to receive," is permissive, meaning broadcasters have the *discretion* to provide the LUC to candidates who fail to include a proper disclaimer statement, but are not legally required to provide those candidates with the LUC under such circumstances. This position was articulated by Justice Stevens, who observed that BCRA "does not *require* broadcast stations to charge a candidate higher rates for unsigned ads that mention the candidate's opponent. Rather, the provision simply permits stations to charge their normal rates for such ads." *McConnell* v. *FEC*, 540 U.S. 93, 364 (2003)(Stevens, J., dissenting) (emphasis in original). (Justice Stevens, Ginsburg, and Breyer would have upheld the BCRA provisions now codified at Section 315 of the Communications Act. The Court majority, however, dismissed a challenge to those provisions on standing grounds.)

[5] Recognized classes of time that broadcasters may employ when determining the LUC are "non-preemptible, preemptible with notice, immediately pre-emptible and run-of-schedule." 47 CFR 73.1942(a)(1)(ii). Additionally, "stations may establish and define their own reasonable classes" within these recognized classes, so long as these subclasses are fully disclosed. 47 CFR 73.1942(a)(1)(iii) – (v). A station may not, however, "establish a separate, premium-period class of time sold only to candidates." 47 CFR 73.1942(a)(1)(vi). *See Codification of the Commission's Political Programming Policies*, 7 FCC Rcd. 678, 690-692 (Dec. 12, 1991). "Amount of time" refers to the length of time sold, such as 30 or 60 seconds. The term "period" (or "daypart") refers to the time of day that an advertisement is aired, such as prime time, late night, or drive time. *See also* National Association of Broadcasters, *Political Broadcasting Catechism* 16th ed. 33-45 (2004); The Campaign Legal Center, *The Campaign Media Guide* 16-21 (2004) *available at* http://www.campaignlegalcenter.org/attachments/1121.pdf.

[6] *See also* Reed E. Hundt, *The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters?*, 45 Duke L. J. 1089, 1103 n.53 ("The Lowest Unit Charge Rule is intended to make available

adopting the lowest unit charge requirement, Congress intended to place candidates on a par with a broadcast station's most-favored advertiser."[7] "The lowest unit charge rule was intended to prevent broadcasters from exercising their market power to extract additional profits from candidates and to maintain the availability of the broadcast forum."[8]

The "[l]owest unit charge may be calculated on a weekly basis with respect to time that is sold on a weekly basis, such as rotations through particular programs or dayparts. Stations electing to calculate the lowest unit charge by such a method must include in that calculation all rates for all announcements scheduled in the rotation, including announcements aired under long-term advertising contracts. Stations may implement rate increases during election periods only to the extent that such increases constitute 'ordinary business practices,' such as seasonal program changes or changes in audience ratings." 47 CFR 73.1942(a)(1)(viii).

II. QUESTION PRESENTED

Would the Casey Committee receive a prohibited in-kind contribution if an incorporated television station charged Mr. Casey the LUC for advertising time when Mr. Casey is not "entitled" to the LUC under the Communications Act?[9]

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to the candidate who buys only one or a few spots the same rate paid by the broadcaster's best commercial customer, who buys in bulk.").

[7] *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd. 678, 688 (Dec. 12, 1991).

[8] Paul B. Matey, *Abundant Media, Viewer Scarcity: A Marketplace Alternative to First Amendment Broadcast Rights and the Regulation of Televised Presidential Debates*, 36 Ind. L. Rev. 101, 116 (2003).

[9] Because the Commission's statutory jurisdiction does not extend to the Communications Act, the Commission cannot determine whether the proposed advertisements would comply with section 315 of the Communications Act. However, this Statement assumes that the proposed advertisements are *not entitled* to the LUC, based on the requestor's assertion that "none [of the advertisements] will meet the additional requirements of 47 U.S.C. 315(b)(2)(C)." We reiterate, however, that the FCC *could* find that the proposed advertisements fully satisfy the requirements of the Communications Act. Therefore, we take no position on the merits of the Casey Committee's stipulation.

III. LEGAL ANALYSIS AND CONCLUSIONS

No, the Casey Committee would not receive a prohibited in-kind contribution if an incorporated television station charged Mr. Casey the LUC for advertising time for its proposed advertisements. As long as the television station offers the LUC to all Federal candidates, the LUC is a permissible discount offered in the ordinary course of business, and not an in-kind contribution under FECA.

The Commission does not have any jurisdiction over the Communications Act and the question of whether or not a disclaimer in an advertisement meets its requirements. The Commission only has jurisdiction over whether a disclaimer in an advertisement meets the requirements of the FECA. Because the Commission does not have the authority to determine whether a disclaimer meets the requirements of the Communications Act, the Commission cannot determine if any given ad is or is not "entitled" to the LUC. Furthermore, the Commission does not have the jurisdiction to determine the consequences of non-entitlement under the Communications Act, particularly the continued availability of the LUC. However, for the purposes of this matter, we assume that the ads in question do not meet the disclaimer requirements of the Communications Act and thus are not guaranteed, or "entitled" to, the LUC.

Under FECA, a corporation makes a prohibited in-kind contribution to a political committee when it offers that committee a discount outside of its normal course of business. In these circumstances, the difference between the usual and normal, fair market price and the discounted price paid is an in-kind contribution. *See* 11 CFR 100.52(d)(1). FECA prohibits corporations from making any contributions or expenditures in connection with a Federal election. *See* 2 U.S.C. 441b(a). The Act 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. *See* 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 and expenditure" with respect to corporate activity). "Anything of value" is defined to include all in-kind contributions and, 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 that is less than the usual and normal charge for such goods or services, is an in-kind contribution. *See* 11 CFR 100.52(d)(1); 11 CFR 100.111(e)(1).

The Commission has held that discount prices that are less than the usual and normal charge are not contributions if such discounts are offered in the ordinary course of business. *See, e.g.*, Advisory Opinions 2004-18 (Friends of Joe Lieberman), 1996-2 (CompuServe), and 1989-14 (Anthony's Pier 4 Restaurant). Since the LUC is a statutorily-guaranteed discount that must be provided to all candidates whose advertisements satisfy Section 315 of the Communications Act, it is by definition a discount offered in the ordinary course of business to candidates. Additionally, because the LUC itself is based on the rates available to certain commercial advertisers, and it is being offered on a nondiscriminatory basis to all federal candidates, it is also by definition a rate provided to other customers in the ordinary course of business.

Accordingly, the provision of the LUC to the Casey Committee would not result in a prohibited in-kind contribution, regardless of whether the Casey Committee's advertisements comply with Section 315 of the Communications Act Statement, so long as the television station provides the LUC to all Federal candidates. When the LUC is provided to all candidates on an equal basis, it is necessarily the usual and normal charge provided to candidates in the ordinary course of business.

In comments received in response to Drafts A and B, the National Association of Broadcasters, the North Carolina Association of Broadcasters, the Ohio Association of Broadcasters, the Virginia Association of Broadcasters, the Arizona Broadcasters Association, the California Broadcasters Association, the Illinois Broadcasters Association, the Louisiana Broadcasters Association, the Michigan Broadcasters Association, the New Jersey Broadcasters Association, the Oregon Association of Broadcasters, and the Washington State Association of Broadcasters all urged the Commission to adopt Draft A. As one group of these commenters noted, broadcasters "find themselves as the political football in an often vicious game played by political candidates."[10]

The broadcast association commenters support the FCC's interpretation of Section 315 and agree that section permits broadcasters to "voluntarily charg[e] the LUC to any candidate who has lost his *entitlement* to the LUC" (emphasis in original). Furthermore, "[u]nlike other corporate contributors, FCC licensees have an independent statutory obligation to treat all candidates alike with respect to what otherwise might be deemed in-kind contributions. Congress recognized that furnishing discounts for campaign advertisements would be consistent with a broadcast station's obligation to operate in the public interest and, therefore, would not constitute in-kind contributions. Consequently, the only restriction on broadcaster discounts in the Communications Act is that they must be furnished to all candidates for the same office."

IV. CONCLUSION

It is unfortunate for the regulated community and the many broadcasters who submitted comments to the Commission that we were unable to provide a response to the Advisory Opinion Request due to the split in opinion among the Commissioners on an issue that to us seems very clear. The FCC has already informally advised both the Requestor and the Commission that the Communications Act is *not* violated when a broadcaster provides the LUC to Federal candidates on an equal, nondiscriminatory basis. Our colleagues' approach, as reflected in Draft B, relies on a different interpretation of the Communications Act. This interpretation, however, is beyond the Commission's jurisdiction to make. The regulated community can take comfort in the fact that three Commissioners interpret FECA's requirements consistently with the conclusion reached by

[10] Broadcast stations cannot avoid this dilemma altogether. While Section 315 does not *require* broadcasters to sell advertising time to candidates for purposes of "equal opportunities" and the LUC, under Section 312(a)(7) of the Communications Act, the FCC may revoke a station's license "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time fro the use of a broadcasting station . . . by a legally qualified candidate for Federal elective office on behalf of his candidacy."

the FCC. In light of the foregoing, we are confident that a broadcaster or political committee that adheres to this approach will not be subject to liability under FECA.

October 24, 2006

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Michael E. Toner
Chairman

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David M. Mason
Commissioner

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Hans A. von Spakovsky
Commissioner