Advisory Opinion 2006-31

Statement for the Record
Vice Chairman Robert D. Lenhard
Commissioner Steven T. Walther
Commissioner Ellen L. Weintraub

The Bob Casey for Pennsylvania Committee (the "Casey Committee"), the authorized committee of Bob Casey, a candidate for election to the United States Senate from the Commonwealth of Pennsylvania, requested an Advisory Opinion addressing whether it would be a prohibited in-kind corporate contribution under the Federal Election Campaign Act ("FECA") for a television station to sell advertising time to the Casey Committee at the Lowest Unit Charge ("LUC"),[1] if the Casey Committee was not "entitled" to receive the LUC under section 315 of the Communications Act, 47 U.S.C. 315(b).

Following the Commission's longstanding precedent for analyzing discounts offered to Federal candidates, we concluded that providing the LUC to the Casey Committee in these circumstances would be a prohibited in-kind corporate contribution, unless the LUC was provided to the Casey Committee as a discount offered in the ordinary course of the television station's business on the same terms and conditions offered to the station's non-candidate customers. If the LUC was provided as a discount in the ordinary course of business, the LUC would not be an in-kind contribution, even in an instance in which a committee such as the Casey Committee was not "entitled" to the LUC under the Communications Act. Unfortunately, we were unable to obtain the support of a fourth Commissioner for our opinion, and consequently the Commission was unable to approve an Advisory Opinion by the required affirmative vote of four members.

Background

The Communications Act generally requires broadcasters to provide candidates the LUC in the 45 days preceding a primary election and the 60 days preceding a general election. 47 U.S.C. 315(b). The Bipartisan Campaign Reform Act ("BCRA") amended the Communications Act to provide that a Federal candidate "shall not be entitled" to the LUC if any of the candidate's advertisements makes a direct reference to the candidate's opponent, but fails to contain a statement both identifying the candidate and stating that the candidate has approved the communication (the "Communications Act Statement"). See 47 U.S.C. 315(b).

[1] The LUC is the lowest advertising rate that a station charges other advertisers for the same class and amount of time for the same period. *See* 47 U.S.C. 315(b)(1) and 47 CFR 73.1942(a)(1).

KDKA Television, an incorporated television station, informed both the Casey Committee and the authorized committee of Casey's opponent that it would make the LUC available for advertisements run by either candidate, regardless of whether the advertisements included the required Communications Act Statement. Several other incorporated television stations also assured the Casey Committee that they, too, would make the LUC available to the Casey Committee regardless of whether the advertisements included the proper Communications Act Statement.

The Casey Committee asked the Commission for its opinion as to whether the Casey Committee could accept the offers it received from KDKA and other television stations to provide airtime at the LUC, regardless of whether the advertisements included the proper Communications Act Statement. The Casey Committee represented in its Advisory Opinion request that it would like to produce and broadcast advertisements that would satisfy the disclaimer requirements of FECA, *see* 2 U.S.C. 441d(d)(1)(b), but not contain the required Communications Act Statement.

The Federal Communications Commission ("FCC") has jurisdiction over the Communications Act, but has not yet promulgated regulations implementing the BCRA amendments to the Communications Act and has not made a formal determination as to whether any of the advertisements proposed by the Casey Committee would or would not contain the proper Communications Act Statement. The FCC's determination of whether a station may provide the LUC to a candidate not entitled to it under the FCC's access and non-discriminatory rules is, of course, separate and distinct from the Commission's determination of whether providing the LUC to a candidate not entitled to it is an in-kind contribution under FECA.

Legal Analysis and Conclusions

Following the Commission's longstanding precedent for analyzing discounts offered to Federal candidates, it is our opinion that providing the LUC to the Casey Committee in these circumstances would be a prohibited in-kind corporate contribution, unless the LUC was provided to the Casey Committee as a discount offered in the ordinary course of the television station's business on the same terms and conditions offered to the station's non-candidate customers.

First, we must note that the Commission does not have jurisdiction over the Communications Act and whether or not a disclaimer meets it requirements. The Commission has jurisdiction over both the issue of whether a disclaimer meets the requirements of FECA and whether a corporation has provided an in-kind contribution by providing the LUC to a candidate not "entitled" to receive it. However, for the purposes of this Advisory Opinion, the Casey Committee represented that the ads in question would not meet the disclaimer requirements of the Communications Act and thus would not be "entitled" to the LUC.

Under Commission regulations, a corporation makes a prohibited in-kind contribution to a political committee when it offers that committee a discount outside of its ordinary course of business. 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). 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. *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). 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 that is less than the usual and normal charge for such goods or services, is a contribution. *See* 11 CFR 100.52(d)(1); *see also* 11 CFR 100.111(e)(1).

If a broadcaster provides the LUC to a Federal candidate who is not legally entitled to receive it, the broadcaster's sale price would constitute a discount. The Commission has held, however, that "the purchase of goods or services at a discount does not result in a contribution when the discounted items are made available in the ordinary course of business *and on the same terms and conditions to the vendor's other customers that are not political committees*." Advisory Opinion 2004-18 (Friends of Joe Lieberman) (*emphasis added*). The Commission has consistently analyzed discounts in this manner. In Advisory Opinion 1996-02 (CompuServe) the Commission stated that:

> "The Commission has permitted a number of the proposed transactions on the basis that the discount or rebate is made available in the ordinary course of business, and on the same terms and conditions (e.g., business volume), to the company's other customers that *are not political committees or organizations.* Such transactions have included a publisher's sale of books to the author's principal campaign committee at a 'bulk rate' purchase price, subject to certain conditions, where such a rate is a standard price available for large purchasers who agree to those conditions; a bank's grant of fee waivers on loans to candidates where it has provided waivers, based on similar business considerations (e.g., estimated profitability of an account), to commercial customers; the offer of catering and reception services to political committees at a reduced rate available on equal terms to *other customers*; and the offer by a hotel corporation of discount or complimentary rooms and other amenities to campaigns that reserve a certain number of rooms at the appropriate rate where the same offer is made to other customers satisfying the same conditions." (*emphasis added*).
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> - *Citing* Advisory Opinions 1995-47 (Representative Underwood), 1994-10 (Franklin National Bank), 1989-14 (Anthony's Pier 4 Restaurant), and 1987-24 (Hyatt Corp.). *See also* Advisory Opinions 1978-45 (Representative Coleman), 1982-30 (Sunrise-Sunset Corporation), 1985-28 (Friends of Lane Evans), 1986-22 (WREX-TV), 1988-25 (General Motors Corp.), 1995-46 (Friends of Senator D'Amato), 2001-08 (Senator Specter).

Despite the Commission's broad and consistent use of this approach, our colleagues found it inapplicable to a Federal candidate's purchase of television advertising. The draft they supported argued that by creating a special discount to which only Federal candidates are eligible, the BCRA amendments to the Communications Act established Federal candidates as a separate class of television advertising customers.

Draft A at fn. 5. Accordingly, they found the inquiry of whether similarly situated non-candidate customers would have received the LUC irrelevant to the determination of whether a Federal candidate could receive the LUC. Under their analysis, if a station chose to provide the LUC to *all* Federal candidates regardless of a disclaimer, the LUC could be permissibly provided to *any* Federal candidate, disclaimer or not, and regardless of whether the LUC would be provided to non-candidate customers.

If our colleagues' interpretation is correct, then the practical effect of BCRA's passage was explicitly to entitle the LUC to Federal candidates that include a disclaimer, and implicitly to entitle the LUC to Federal candidates that do not. In our opinion, this result is contrary to the plain language of the BCRA amendments to the Communications Act. The statute provides, "In the case of a candidate for Federal office, such candidate *shall not be entitled to receive* the [LUC] for the use of any broadcasting station … *unless* such reference [contains the Communications Act Statement]." 47 U.S.C. 315(b)(2)(A) (*emphasis added*). Moreover, this interpretation is contrary to the intent of the amendments, as expressed by their co-sponsors, Senators Wyden and Collins. In introducing the provision, Senator Wyden stated, "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). He further stated, "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. Senator Collins, the provision's co-sponsor, stated, "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.

In accord with the Commission's longstanding precedent, and the plain language and legislative history of the BCRA amendments to the Communications Act, we concluded that providing the LUC to the Casey Committee would result in a prohibited in-kind corporate contribution, unless the LUC was otherwise provided as a discount offered to all similarly situated advertisers that are not authorized committees of Federal candidates (i.e., the discount is ordinarily offered to any customer purchasing the same type and volume of advertising as the Federal candidate). If provided to all similarly situated advertisers that are not Federal candidates, the LUC would not be an in-kind contribution to the Casey Committee, regardless of whether the Casey Committee has complied with Section 315 of the Communications Act.[2]

The Commission received several comments from broadcasters stating that this construction of the Communications Act could place stations in the difficult position of evaluating whether a certain advertisement did or did not contain a proper Communications Act disclaimer. These commenters stated that stations would likely be

[2] The situation presented here differed materially from that presented in Advisory Opinion 2004-43 (Missouri Broadcasters Association), in which the Commission concluded that a broadcaster's decision to offer a Federal candidate the LUC did not result in an in-kind contribution when there was no evidence of a violation of the disclaimer requirements. In the present situation, the Casey Committee stipulated that its advertisements will, in fact, not contain the proper Communications Act Statement, and the Commission had no basis for second-guessing that stipulation.

forced to make these determinations in response to complaints received in the limited time period immediately before elections. We are sympathetic to these commenters' concerns, and note that under Section 315 of the Communications Act, a candidate or candidate committee must provide a certification at the time of purchase stating whether an advertisement requiring a disclaimer under Section 315 contains a proper disclaimer. *See* 47 U.S.C. §§315 (b)(2)(A); (E). A television station provided with the proper certification would ordinarily provide the candidate or candidate committee with the LUC under Section 315 of the Communications Act. Accordingly, provided the station received a proper certification from the candidate, we would have considered the LUC a discount offered to the candidate pursuant to Section 315, and therefore, not an impermissible in-kind corporate contribution by the station, regardless of whether the disclaimer was or was not in fact sufficient under the Communications Act. Under this construction, however, the certification would not have shielded the candidate or candidate committee from any resulting FECA liability for receiving an impermissible in-kind corporate contribution, or for failing to include a proper FECA disclaimer in an advertisement. *See*, *e.g.*, 2 U.S.C. 441d(d)(1)(b); 11 CFR 110.11(c)(3). This determination would not have altered a television station, candidate, or candidate committee's obligations under any law or regulation outside of the Commission's jurisdiction.

We believe this construction would have sufficiently addressed the commenters' concerns, while preserving the Commission's ability to regulate impermissible in-kind corporate contributions under FECA. Unfortunately, no fourth Commissioner agreed.

____(signed)__________________ ___10/25/06___
Robert D. Lenhard Date
Vice Chairman

_____(signed)__________________ ___10/25/06_____
Steven T. Walther Date
Commissioner

_____(signed)__________________ ___10/25/06______
Ellen L. Weintraub Date
Commissioner