



FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 19, 1990

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1990-14

Michael A. Nemeroff
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006

Dear Mr. Nemeroff:

This responds to your letter dated July 6, 1990, as supplemented by your letter dated October 16, 1990, requesting an advisory opinion on behalf of the American Telephone & Telegraph Company and its subsidiary, AT&T Communications, Inc. (hereinafter referred to collectively as "AT&T"), concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the provision of 900 line telephone services to promote candidates and political committees.

You state that AT&T's 900 telephone service allows the public to telephone a number, which has the capability of handling thousands of calls simultaneously, to receive a pre-recorded or live message and to register an opinion. This service would be publicized through print or broadcast advertisements or by direct mail. AT&T will offer this 900 service at a per call charge established by the political committee, but not exceeding \$50. Each 900 number will have one per call charge, although each political committee may request several 900 telephone numbers at different uniform charges to solicit different levels of contributions.

You note that 900 telephone service involves a number of services provided by various companies, only one of which would be AT&T or a similar company. You state that companies known as telephone service bureaus usually coordinate 900 services for businesses, charities, or political committees, and provide the location where the 900 calls terminate and the message is played. Service bureaus are able to record and transcribe caller responses, contract with telephone companies for telephone and billing services, and provide, or contract with another company that provides, marketing services to develop and implement the necessary advertising and prepare the political committee's phone message.

You state that service bureaus can gather the names and addresses of callers through the use of a technological feature known as Automatic Number Identification ("ANI"). AT&T is able to provide a service bureau with the telephone number from which each 900 number call was made, whether by touch-tone or rotary dial, in an ANI-served area. The service bureau may then retain a company which can convert these numbers to callers' names and addresses. Currently, ANI covers 85 percent of telephones in the U.S., and, by late 1993, this will increase to 95 percent.

You indicate that AT&T's MultiQuest service is the most attractive for political committees. This service enables a committee to convey campaign messages, to obtain callers' opinions on issues, and to solicit contributions. AT&T expects to contract with service bureaus that select MultiQuest, rather than with committees.

You state that MultiQuest is comprised of two basic features, i.e., the delivery of telephone calls under tariffs filed with the FCC and state utility commissions, and a bill collection service known as Premium Billing which is provided under contract at a standard charge that is usually 10 percent of caller revenue. The charges for those features are deducted from the funds remitted to the telephone service bureau. The tariff charge covers the cost of the services described in the applicable tariffs including AT&T's return on investment. The Premium Billing charge covers the cost of the billing and collection, bad debts, and AT&T's return on investment.

You describe the terms for billing and collection set out in a Premium Billing contract. The contract requires AT&T to "undertake good faith efforts" to collect the charges from the callers. AT&T has the right, however, to remove from a caller's bill any charge which the caller disputes or refuses to pay. You state that, if a caller claims that a call was unauthorized or made by mistake, AT&T may credit the caller's bill and provide the service bureau with a list of telephone numbers for which the charges were refused. The service bureau remains liable, however, for the tariff charges related to the call.

Instead of billing the callers directly, AT&T contracts with a Local Exchange Carrier (LEC), such as the Chesapeake & Potomac Telephone Company in the Washington area, to bill its callers for AT&T's service, as well as the LEC's service. Each LEC purchases AT&T's receivables and then collects from the callers. If a caller does not pay a charge, but does not contact AT&T to inform it of such nonpayment, the LEC will treat this as a bad debt covered by a standard charge to AT&T, which in turn is covered by AT&T's standard charge to the service bureau. You state that the LEC generally does not inform AT&T of callers who refuse to pay, except when the amount is large.

Under the Premium Billing contract, call revenues will be sent to the service bureau no later than 90 days after the end of the calendar month in which the calls were made. You state that AT&T typically sends these funds within 60 days. Approximately 30 days prior to such transmittal, AT&T will send the service bureau a Call Detail Report for each 900 number which lists the total number of calls for the month along with the telephone number, date, time, and caller charge for each call.

AT&T also provides the bureau with a monthly Call Refund Report for each 900 number which lists the telephone numbers of callers who successfully refused a charge. You explain that, if a caller questions the billing and the AT&T representative determines that the Premium Billing charge is inappropriate, the representative may delete the call and include it on the Refund Report. If a caller "simply does not pay a charge (or the entire bill)," the call will be included in the Detail Report, but not in the Refund Report. As explained above, although the funds representing such charges will be sent to the service bureau, they will also be treated as bad debt covered by AT&T's Premium Billing charge, "which historically has been adequate to cover all such bad debts." You state that this procedure applies "equally" to both political and nonpolitical customers. You state that the receipt of the Detail and Refund reports prior to the receipt of the funds provides sufficient time to determine whether a committee may lawfully accept the funds.

Under the Premium Billing contract, AT&T proposes to place the burden of compliance with the Act on the service bureau and on the political committee. AT&T requires the service bureau to comply with MultiQuest guidelines as a condition to the contract, and these guidelines, in turn, require political committees "to agree to procedures specified by FECA." You have enclosed proposed revised guidelines that impose obligations on the service bureau and the political committee. These guidelines include requirements that: (1) the MultiQuest application from the bureau and the promotional materials clearly state that a portion of the charges will be remitted to an identified political organization; (2) a message be included at the outset of the program identifying the person who has authorized and paid for the program; (3) AT&T receive a representation and warranty from the service bureau that the bureau will comply with all applicable Federal, state, and local laws "during the term of the program" and, specifically, with 2 U.S.C. 432(b) and 11 CFR 102.8, requiring it to forward all funds, after deducting its fees and expenses, to the committee treasurer within 10 days of its receipt for "candidate committees" and within 30 days for "political party or political action committees"; and (4) the service bureau agree to forward the Call Detail Report to the treasurer promptly.

According to the revised guidelines, AT&T must also receive a letter from the political committee with these further assurances: (1) The treasurer will agree to abide by 11 CFR 103.3 with regard to the receipt, deposit, and refund of contributions raising questions of legality. (2) The treasurer will use the telephone numbers of callers to identify their names and addresses. Contributions from corporate or union sources and contributions from persons who have previously contributed the maximum will be returned. (3) The treasurer will request the service bureau to record the caller name, address, and telephone number. For callers that cannot be identified through ANI, the treasurer will "request the transcription of this information and utilize it to identify additional contributors" and/or telephone the unidentified numbers to obtain the caller's name and address. Contributions that would still be unidentifiable are to be considered as anonymous contributions under 11 CFR 110.4(c)(3). The treasurer may retain any unidentifiable contributions under \$50 from a single telephone number. "All other unidentified contributions may not be accepted by the treasurer but may be used for any lawful purpose unrelated to any federal election." (4) For programs which may stimulate contributions from outside the U.S., i.e., in Canadian or Mexican border areas, the treasurer must agree to Numbering Plan Area (NPA) blocking for appropriate area codes. (5) The treasurer will compare the identity of callers with the committee's contributor records and record all contributions of persons who have contributed more than \$50 in the same year. For other contributions under

\$50, only the date and total amount of funds from the program need to be recorded. (6) The treasurer must report all expenditures for the program including the funds withheld by the service bureau to cover its fees and expenses. The bureau will be reported as the payee of all funds withheld from contribution receipts.

You note that the Commission has issued two advisory opinions concerning the use of 900 service, but that those opinions have been issued to telephone service bureaus. Advisory Opinions 1990-1 and 1988-28. Your inquiry pertains to the role of a different vendor in the rendering of 900 services, one further removed from the political committee. Specifically, you ask the following questions:

- (1) May AT&T extend credit to telephone service bureaus or political committees for 900 service without requiring a deposit from its customer?
- (2) Is AT&T required to comply with FCC rules when it extends credit to a service bureau for services to a political committee?
- (3) Does AT&T have any obligation under the Act if it remits funds from a caller which the political committee may not accept?
- (4) If AT&T's customer, the service bureau, and the bureau's customer, the political committee, comply with the MultiQuest guidelines, will they be in compliance with the Act?

By letter dated December 7, 1990, you request permission for AT&T to withdraw question four from this advisory opinion request. You refer to Advisory Opinion Request 1990-28 which was recently submitted by Call Interactive, a telephone service bureau, and explain that the Commission can better deal with questions concerning telephone service bureaus in the context of the new request. In accordance with your request, the Commission will not respond to question four in this opinion.

Answer to Question 1

The Act prohibits a corporation from making any contribution or expenditure in connection with any Federal election. 2 U.S.C. 441b(a); 11 CFR 114.2(b). The term "contribution or expenditure" is defined to include "any direct or indirect payment, distribution, loan, advance, deposit or gift of money, or any services, or anything of value...to any candidate, campaign committee, or political party or organization, in connection with any [Federal] election." 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a)(1). "Anything of value" includes services provided at less than the usual and normal charge, i.e., less than the commercially reasonable hourly or piecework charge for the services prevailing at the time the services were rendered. 11 CFR 100.7(a)(1)(iii)(B). Advisory Opinions 1987-27 and 1979-36.

Your first question presents two possible relationships. In most situations, AT&T will be dealing directly with the service bureau, and such a relationship will be conditioned upon representations and agreements by the bureau and the treasurer of the political committee as to compliance with

provisions of the Act. You state that AT&T does not expect to contract directly with political committees because of the cost of call termination equipment.

In outlining the obligations of a service bureau contracting with a political committee for the provision of 900 services in Advisory Opinion 1990-1, the Commission noted that the bureau proposed to require that the committee pay a deposit sufficient to cover the costs of the 900 program and adequate to cover any losses. It was also noted that each campaign was solely liable for the costs of the program and that, if the program were a complete failure, it would be terminated in order to ensure that losses would not exceed the initial deposit. Based on these representations, the Commission concluded that the provision of services would not result in contributions by the incorporated service bureau. The Commission's concerns were two-fold. First, the Commission wished to ensure that none of the costs of the program would be left unpaid by the committee. Second, the Commission was concerned that, regardless of the degree of success of the effort to raise funds, the committee would retain contribution proceeds while forgoing little, or the committee would assume little or no risk with the vendor bearing all, or nearly all, the risk. See Advisory Opinions 1990-19, 1990-1, 1989-21, 1979-36, and 1976-50.

Under your proposal, the phone company and/or the service bureau receive payment by deducting a percentage of the proceeds from the callers' payments. Without a deposit paid by the committee adequate to ensure against loss by the company contracting with it, the committee will receive the benefit of the proceeds even though the company incurs the loss of the funds it advanced in the form of services provided. If AT&T contracts directly with a political committee and sidesteps the service bureau, it should require such a deposit. If, however, AT&T contracts with the service bureau, the bureau need not pay a deposit to AT&T. As indicated by Advisory Opinion 1990-1, the committee, by paying an adequate deposit to the service bureau, assuming liability for the costs of the program, and agreeing to the termination of the program to avoid losses if the program is unsuccessful, will have avoided the problems of advance of corporate services and nonpayment by the committee for corporate services.

Answer to Question 2

You refer to 2 U.S.C. 451 which provides that the FCC shall promulgate regulations with respect to the extension of credit, without security, by any person regulated by the FCC to any Federal candidate, "or to any person on behalf of such a candidate," for goods or services provided in connection with the candidate's campaign. Common carriers regulated by the FCC, such as AT&T, are obligated to comply with the FCC's regulations concerning extension of credit to political committees which appear at 47 CFR 64.804. (Reprinted in 11 CFR at pages 236 and 237, January 1990 edition.) You state that section 451 should not apply to the extension of credit by AT&T to a service bureau, contending that the phrase "to any person on behalf of" a candidate should be interpreted to apply only to credit extended to an authorized political committee on behalf of such a candidate. You assert that, when AT&T's customer is a service bureau, AT&T is not extending credit to its political committee customer. You further state that AT&T has no contractual relationship with the candidate or committee and neither the candidate nor committee is liable to AT&T for its charges.

The Commission notes that the regulations promulgated by the FCC refer to "a candidate or person on behalf of such candidate." 47 CFR 64.804(a) and (b). The definition or interpretation of the language appearing in the regulation bears directly on the coverage of that regulation. Such an interpretation should be made by the FCC and is outside the jurisdiction of the Commission. See 11 CFR 114.10(a).

Answer to Question 3

You state that AT&T has structured its MultiQuest service to promote compliance with the Act. You state that you have done this principally by requiring a contribution amount of \$50 or less for each 900 telephone call and by providing the service bureau with all available caller telephone numbers in advance of the receipt of the funds. These telephone numbers are itemized in a monthly Call Detail Report for each 900 number. You assert that, through these steps, the committee's recordkeeping obligation will be simplified and the committee will be able to obtain caller names and addresses necessary to follow the procedures in 11 CFR 103.3(b).

You assert that AT&T has no obligation to determine whether its 900 line caller may lawfully make a contribution or whether the political committee may accept such a contribution. You contend that AT&T's only obligation is to follow its usual and normal billing and collection procedures at its usual and normal charges. You maintain that AT&T's position is akin to that of the credit card issuers in Advisory Opinion 1978-68.

In that opinion, a Senate campaign's advertisements asked persons to phone a toll-free number and make contributions by credit card over the phone. Under that plan, an independent company, which you characterize as a telephone service bureau, would record the credit card information. The service bureau was regarded by the Commission as a "person who receives a contribution for an authorized political committee" and thus was obligated to forward contributions to the committee within a certain time period, along with the required information. 2 U.S.C. 432(b). With respect to the credit card company, however, the Commission only required that it follow its usual and normal collection procedures to obtain payment from those using the cards to make contributions and that it render its services in the ordinary course of business for the usual and normal charges. By doing so, the company would avoid a contribution of anything of value in violation of 2 U.S.C. 441b.

As a general matter, the same may be said for AT&T. As long as AT&T, or any other company providing service to AT&T in connection with its Multiquest service, provides its usual and normal services at its usual and normal charges it will not, in most circumstances, have made a prohibited corporate contribution. There are circumstances, however, in which the character of the Multiquest service could lead to prohibited contributions by AT&T unless it takes steps to avoid them.

As stated above, AT&T does not collect payment directly from the caller but instead sells its receivables to a LEC. Thus, it may obtain payments on the phone calls before the payments are actually made by some of the callers, and such payments from the LEC to AT&T are passed on to the service bureau and then to the committee. This is similar to the situation in which a contribution is made by credit card but the "proceeds" are passed on to the committee before the

contributor actually pays the credit card issuer. Nevertheless, there are differences. When a person makes a 900 line phone call, he or she has not yet made a contribution. The caller has merely pledged to make a contribution, and, according to the facts presented by you, may decide not to make the payment. The contribution does not occur until the caller pays, e.g., on the phone bill. When a person makes a contribution by credit card, however, the contribution is considered to have been made at the time that the card or card number is presented. See Advisory Opinion 1990-4. The contributor is strictly obligated by the card agreement to make payment of the credit card bill and incurs substantial penalties with possible collection fees and cancellation of future credit privileges for nonpayment. Although LECs may impose a late charge on the unpaid portion of AT&T's bill under AT&T's billing contract with the LECs, you inform us that AT&T is prohibited by the FCC from refusing to serve callers for nonpayment of a valid 900 service charge.

Because the Premium Billing contract requires AT&T to remit proceeds for 900 charges that have been billed to callers without any guarantee that those charges have previously been paid by the callers or that they will be paid, the Commission is concerned that AT&T could, under some circumstances, be implicated in making an unlawful advance of corporate funds to a political committee. For example, a situation could arise wherein a high volume of calls are made in response to an extensive and successful promotion of a campaign's 900 number just before the occurrence of an event adversely reflecting on the campaign, or just before the campaign is ended by the candidate very abruptly and unexpectedly. Those who called in response to such a promotion and who receive a billing for their 900 calls may, in large or even overwhelming numbers, decline to pay for those calls without making any other protest of the charge to AT&T or to the LEC that forwards AT&T's bill. In that event, AT&T may have remitted substantial sums of money in accordance with the calls listed on the Call Detail Report without having made deductions pursuant to the Call Refund process. In such circumstances, AT&T's payment would supposedly represent many contributions that will never be made. This will result in the receipt by the campaign of funds that do not represent contribution proceeds, but are instead advances of corporate funds.

You have stated that if a caller decides not to pay a 900 charge, but does not protest the charge, the LEC will treat this as a bad debt covered by a standard charge to AT&T which, in turn, is covered by AT&T's standard charge to the service bureau. It appears, however, that AT&T's charge to the service bureau does not at present contemplate the hypothetical situation discussed above. Therefore, AT&T should take steps to avoid such contributions.

AT&T must monitor political contribution programs more closely than other programs and should not remit funds to the service bureau if it appears that, because of an adverse event, callers may refuse to make payments in excess of the bad debt allowance. The Commission notes that this requirement is consistent with section 7-A of the Premium Billing contract. Under that section, AT&T reserves the right to terminate the agreement or billing services if it determines, in its sole discretion, that its image would be adversely affected or its reputation or goodwill damaged by the continued offer of billing services.

In addition, in order to reduce the possibility of a violation by AT&T of section 441b, it should take steps to increase the standard charge or require a deposit or payment from the service

bureau, or implement another comparable business policy, to cover such a contingency. The Commission notes that section 3-A-(3) of the Premium Billing contract provides for an AT&T charge to its customer based on an "uncollectible discount rate" which applies to services similar to AT&T MultiQuest.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

Lee Ann Elliott
Chairman for the Federal Election Commission

Enclosures (AOs 1990-19, 1990-4, 1990-1, 1989-21, 1988-28, 1987-27, 1979-36, 1978-68, and 1976-50)