



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

MEMORANDUM

TO: The Commission
Staff Director
General Counsel
FEC Press Office
FEC Public Records

FROM: *MWE* Marjorie W. Emmons/Delores Hardy *MH*
Secretary of the Commission

DATE: October 30, 1996

SUBJECT: COMMENTS: PROPOSED AO 1996-42

Transmitted herewith is a timely submitted comment from Mr. Michael A. Nemeroff.

Proposed Advisory Opinion 1996-42 is on the agenda for Thursday, October 31, 1996.

Attachment:

7 pages

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October 29, 1996

Marjorie W. Emmons
Secretary
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Comments on Draft Advisory Opinion 1996-42

Dear Madame Secretary:

These comments are submitted on behalf of Lucent Technologies Inc. ("Lucent Technologies") in response to the staff's draft advisory opinion regarding the procedure followed to transfer payroll deduction authorization of Lucent Technologies' employees from AT&T PAC to Lucent Technologies PAC. More than one year ago, AT&T Corp. announced the planned spin-off of Lucent Technologies. During most of 1996, AT&T PAC has operated as the PAC for AT&T Corp., Lucent Technologies, and NCR Corporation. AT&T PAC has informed contributors and the recipients of its contributions that it was making contributions on behalf of AT&T Corp., Lucent Technologies, and NCR Corporation employees. After the initial public offering of Lucent Technologies' shares on April 3, 1996, Lucent Technologies began planning its own PAC. The Lucent Technologies PAC was organized on August 2, 1996, to serve only Lucent Technologies employees. On September 18, 1996, a letter was sent to those employees, who had voluntarily authorized payroll deductions to the AT&T PAC, informing them of their right to either withdraw their payroll authorization or continue their payroll deduction to the Lucent Technologies PAC after September 30, 1996. The letter included a simple form by which Lucent Technologies employees could withdraw their authorization of payroll deductions. The effectiveness of this process is illustrated by the fact that, in little more than one month, more than 560 of the 2900 employees, who had authorized payroll deductions to the AT&T PAC, have exercised their right to terminate payroll deductions to the Lucent Technologies PAC.

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We requested approval for this procedure for withdrawing payroll deduction authorization based on the same procedure, which was permitted by the Commission in A.O. 1994-23 and A.O. 1991-19. In those opinions the Commission allowed the PAC of a company merging with an acquiring company to notify in writing its employees, who had authorized payroll deduction, of their right to terminate their authorization upon the merger of the two companies. If the employees did not cancel their authorization, payroll deduction would be continued to the PAC of the acquiring company. The employees of the acquired company had never authorized payroll deduction to that PAC, but citing FEC v. National Education Ass'n, 457 F. Supp. 1102 (D.D.C. 1978), the Commission found the proposed notification procedure to be "in compliance with the standard of voluntariness set out in 11 C.F.R. § 114.5(a)(1)-(5)." A.O. 1991-19, CCH Fed. Elec. Camp. Fin. Guide, § 6024 at 11,726 (1991). A.O. 1994-23 applied the same standard of voluntariness to the same procedure and reached the same result. In neither case did the Commission require the PAC of the acquiring company to solicit new authorizations from the employees of the acquired company.

If the Commission did not require a new authorization when an acquired company and its PAC were merged into another company, a new authorization should not be required for a spin-off. In the merger situation, there is a question of whether the acquiring company's PAC would fairly represent the acquired company's employees. No such question exists for a spin-off. Therefore, employees of a spin-off who have already authorized payroll deduction to the former parent have given their affirmative consent, and an opportunity to withdraw such consent, as required by A.O. 1991-19 and A.O. 1994-23, should be sufficient to comply with the standard of voluntariness in the Commission's regulations.

The Commission staff, however, rejects our request for approval for this procedure without any analysis of whether Lucent Technologies has complied with the standard of voluntariness in section 114.5(a)(1)-(5) as described in A.O. 1991-19 and A.O. 1994-23. The staff merely relies on Advisory Opinion 1989-16 which is distinguishable from the facts in our advisory opinion request. In A.O. 1989-16, CCH Fed. Elec. Camp. Fin. Guide, § 5967 (1989), a spun-off corporation created a new PAC after the spin-off and sought permission to transfer funds from its former parent's PAC and to transfer the payroll deductions from its employees who had authorized payroll deduction to its former parent's PAC. The spun-off company did not create a new PAC prior to the spin-off when it would have been affiliated to the

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parent's PAC and transfers between the PACs would have been permitted. Also, it did not give its employees an opportunity to withdraw payroll deduction authorization before the spin-off, as was done by Lucent Technologies PAC. Instead, the new company formed a new PAC after the spin-off and the transfer of payroll deduction authorization was proposed without any effort to allow employee withdrawal. Not surprisingly, the Commission did not approve this procedure because no effort was made to comply with the regulations. 11 C.F.R. § 114.5(a)(1)-(5).

The Commission's policies regarding payroll deductions are based upon the policy of voluntary contributions first announced in Pipefitters Local 562 v. United States, 407 U.S. 385, 414 (1972) (contributions are voluntary when they result from a "knowing free-choice"). The Federal Election Campaign Act of 1971 also requires a "knowing free-choice" for contributions to be voluntary because it prohibits:

a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction.

2 U.S.C. § 441b(b)(3)(A). The Commission regulations implement this statute at 11 C.F.R. § 114.5(a)(1)-(5). There is nothing in these regulations that requires any particular procedure for the authorization of payroll deductions. The requirement of written authorization comes not from a regulation but from case law. In FEC v. National Education Ass'n, 457 F. Supp. 1102 (D.D.C. 1978), the court held that the NEA's reverse check-off procedure violated section 441b(b)(3)(A) and the Commission's regulations because it "requires the dissenter to act to prevent a contribution rather than requiring his affirmative assent to make one." Id. at 1106. The court went on to require prior authorization for payroll deduction:

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This Court's decision does not preclude the defendants from using the payroll deduction method for funding its political action committee. It simply requires that the union member be asked beforehand if he wants a contribution to be deducted along with his dues.

Id. at 1109 (emphasis added).

The facts in our advisory opinion request are distinguishable from those in National Education Ass'n because the Lucent employees first provided their "affirmative assent" to payroll deduction for the AT&T PAC. In addition, the letter from Lucent Technologies to its employees notifying them of the planned transfer of their payroll deductions to the Lucent Technologies PAC gave them a second chance to exercise their "voluntary free-choice" as required by Pipefitters. See attached letter. The letter notified the employees of the political purposes of the Lucent Technologies PAC and their right to terminate payroll deduction "without reprisals." Unlike the cumbersome procedure followed by the NEA, Lucent provided a simple form attached to the letter to terminate payroll deduction. One month after the letter was sent, more than 560 Lucent employees of the 2900 employees who had authorized payroll deductions to the AT&T PAC, decided to terminate their payroll deduction to Lucent Technologies PAC. This substantial response demonstrates that Lucent Technologies PAC complied with the dicta in National Education Ass'n quoted above and the standard of voluntariness in the Commission's rules. 11 C.F.R. § 114.5(a)(1)-(5).

The staff draft advisory opinion concludes that this is not enough and states that "Lucent PAC must obtain express and separate payroll deduction authorizations from its eligible employees in order to implement payroll deductions for their contributions to Lucent PAC." Nothing in the Commission's rules requires Lucent to do that, and as already explained, the staff's reliance on A.O. 1989-16 is misplaced.

The issue raised here is a matter of first impression. There is no regulation or advisory opinion which settles the issues. Therefore, in making new policy, the Commission also should take into account its practical consequences. The staff's draft ignores the substantial resources required to solicit new authorizations from thousands of employees located in over 20 states. Moreover, it will not in any way promote the "knowing free-choice" required by Pipefitters and the Commission's

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regulations. Another letter directed to the employees will only add confusion. The employees have already exercised their voluntary free choice twice. That should be enough.

On a separate, but related matter, in response to the Office of General Counsel's request for a review of the facts set forth in the draft advisory opinion, we suggest the following clarification. On page 5, lines 10 through 12 should be changed to read as follows: "... February 1997, three of the directors, all of whom are pre-Distribution directors, will be proposed to the Lucent shareholders for election. See 11 C.F.R. 110.3(a)(3)(ii)(C), (E), and (F)."

We urge the Commission to reject the staff's analysis regarding payroll deductions and permit Lucent Technologies PAC to accept the payroll deductions of its employees who have not terminated such deductions.

Sincerely,



Michael A. Nemeroff

cc: Office of General Counsel



Martina L. Bradford
Vice President

1900 19th Street, N.W.
Suite 700
Washington, DC 20006
202-530-7000
FAX 202-530-7005

September 18, 1996

Dear Lucent Management Employee:

You have previously agreed to allow AT&T to deduct a regular amount each month from your salary and contribute that amount to the AT&T Political Action Committee (PAC).

On August 2, 1996, Lucent Technologies established the Lucent Technologies Political Action Committee. The purpose of the PAC is to solicit contributions from eligible management employees in order to make contributions to candidates for Federal elected office.

Lucent Technologies PAC is making arrangements to transfer your AT&T PAC payroll deduction to the Lucent Technologies PAC. You have the right to terminate your PAC payroll deduction for any reason if you so desire without reprisal. If you wish to terminate your payroll deduction, you should complete the enclosed form and mail it to Joe Priester, Manager, Lucent Technologies Public Affairs.

If you wish to continue payroll deductions to the Lucent Technologies PAC, there is nothing you need to do. We hope that you will continue to support the Lucent Technologies PAC just as you have supported the AT&T PAC. All of our business is affected by decisions made by legislative, regulatory and other governmental bodies. Therefore, it is essential that we have the ability to compete in the political process just as our competitors and customers do.

Your continued participation is necessary if we are to have a strong PAC. Thank you in advance for your consideration.

Sincerely,

Martina L. Bradford

Enclosure



Execute Only to Terminate Payroll Deductions

**Joe Priester
Manager-Public Affairs
Lucent Technologies Inc.
1900 19th Street, N.W.
Suite 700
Washington, D.C. 20006**

Dear Mr. Priester:

**Please be advised that I, _____
(Print or type your name)**

do not authorize payroll deductions for the Lucent Technologies Political Action Committee. Therefore, please notify the Corporate Payroll Office to stop payroll deductions that I have authorized to AT&T PAC. I do not want to continue to contribute the Lucent Technologies Political Action Committee after the official spin-off on or before September 30, 1996.

Sincerely,

Signature

Date: _____