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FEDERAL ELECTION COMMISSION
Washington, DC 20463

November 27, 1996

MEMORANDUM

AGENDA ITEM
For Meeting of: DEC 5 1996

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Rosemary C. Smith
Senior Attorney

SUBJECT: Draft AO 1996-48

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for December 5, 1996.

Attachment

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ADVISORY OPINION 1996-48

**Bruce D. Collins, Esq.
Corporate Vice President and General Counsel
National Cable Satellite Corporation
400 North Capitol St., N.W.
Suite 650
Washington, D.C. 20015**

Dear Mr. Collins:

This responds to your letter dated November 7, 1996, which requests an advisory opinion on behalf of the National Cable Satellite Corporation ("NCSC") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to NCSC's proposed broadcast of various candidate campaign materials.

NCSC is a nonprofit corporation created by the cable television industry. It was formed to provide information and public affairs programming throughout the United States on a 24-hour per day basis via two cable television networks, C-SPAN and C-SPAN 2 ("C-SPAN Networks"). Your request describes NCSC's proposed broadcast of candidate video biographies and campaign commercials as a part of its regular news and public affairs programming on the C-SPAN Networks.

You indicate that the Mission Statement of C-SPAN makes clear that the role of the C-SPAN Networks "is to provide the public with balanced, unfiltered news and information about the development of public policy and the role of federal, state and local governments (including both Houses of Congress), in the development of that policy." As an integral part of this public affairs programming, you state that NCSC plans to produce a series of television programs covering congressional and presidential elections to be aired on the C-SPAN Networks. Your letter further indicates that NCSC's in-depth coverage of Federal elections "includes candidate appearances and debates, discussions with pollsters and media experts about the campaigns, and viewer call-in programs."

1 NCSC plans to obtain from the campaigns video biographies of the candidates and
2 campaign commercials, and to air them at no charge to the candidates as part of two
3 programs, "Road to the Capital" and "Road to the White House." During the programs,
4 the video material will be introduced by a narrative explaining that it is a campaign
5 commercial or video. The size of the video image on the screen will be reduced to allow
6 space for written text beneath the image identifying it as a campaign commercial. NCSC
7 believes these biographies and commercials to be newsworthy, and believes that airing
8 them will assist viewers in understanding the complex policy issues being discussed by the
9 candidates. The candidates and their campaign committees will have no control over the
10 timing or context in which the campaign commercials and video biographies are broadcast
11 by the C-SPAN Networks.

12 You ask whether, given these facts and circumstances, the news and commentary
13 exception in the Act would permit NCSC to air Federal candidate video biographies and
14 campaign commercials as part of its regular news and public affairs programming.

15 The Act and Commission regulations define the terms "contribution" and
16 "expenditure" to include any gift of money or anything of value made by any person for
17 the purpose of influencing any election for Federal office. 2 U.S.C. §431(8)(A)(i) and
18 431(9)(A)(i); 11 CFR 100.7(a)(1) and 100.8(a)(1). See also 2 U.S.C. §441b(b)(2) and
19 11 CFR 114.1(a)(1) (providing a similar definition of "contribution or expenditure" with
20 respect to corporate contributions). The term "person" includes a corporation. 2 U.S.C.
21 §431(11). Furthermore, with certain exceptions, the Act and Commission regulations
22 prohibit a corporation, including a nonprofit corporation, from making contributions or
23 expenditures in connection with any Federal election. 2 U.S.C. §441b(a) and 11 CFR
24 114.2(b). The Act specifically exempts from the definition of "expenditure":

25 any news story, commentary, or editorial distributed through the
26 facilities of any broadcasting station, newspaper, magazine, or other
27 periodical publication, unless such facilities are owned or controlled
28 by any political party, political committee, or candidate.

29 2 U.S.C. §431(9)(B)(i).

1 Commission regulations similarly exclude from the definitions of contribution and
2 expenditure “[a]ny cost incurred in covering or carrying a news story, commentary, or
3 editorial by any broadcasting station, newspaper, magazine, or other periodical
4 publication.” 11 CFR 100.7(b)(2) and 100.8(b)(2). According to the legislative history of
5 this “press exemption,” Congress intended to preserve the traditional role of the press with
6 respect to campaigns:

7 [I]t is not the intent of the Congress in the present legislation to limit or
8 burden in any way the first amendment freedoms of the press and of
9 association. Thus [the exemption] assures the unfettered right of the
10 newspapers, TV networks, and other media to cover and comment on
11 political campaigns.

12 H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4 (1974).

13 Several factors must be present to conclude that NCSC’s proposed activity falls
14 within the press exemption of 2 U.S.C. §431(9)(B)(i). First, NCSC must be a press entity
15 as described by the Act and regulations. See Advisory Opinions 1996-41, 1996-16 and
16 opinions and cases cited therein. Furthermore, in previously applying the press exemption,
17 the Commission cited two criteria, based on the statutory exemption, that would be
18 relevant to determining the scope of the press exemption. These are (1) whether the press
19 entity is owned by a political party, political committee, or candidate, and (2) whether the
20 press entity is acting as a press entity in performing the media activity.¹ Advisory Opinion
21 1982-44 (citing *Reader’s Digest Association v. Federal Election Commission*, 509 F. Supp.
22 1210, 1215 (S.D.N.Y. 1981)).

23 NCSC and the C-SPAN Networks qualify as press entities, as set forth in the
24 exemption. The Commission recently revised its regulations to make clear that cable
25 television programmers, producers and operators are considered broadcasters within the

¹ Commission regulations provide that, in the event the facilities are owned or controlled by a political party, political committee, or candidate, the exemption would still apply to the cost of a news story “(i) which represents a bona fide news account communicated in a publication of general circulation or on a licensed broadcasting facility, and (ii) which is part of a general pattern of campaign-related news accounts which give reasonably equal coverage to all opposing candidates in the circulation or listening area ...” 11 CFR 100.7(b)(2) and 100.8(b)(2).

1 meaning of the press exemption. See 61 *Fed. Reg.* 18049 (April 24, 1996). Through the
2 C-SPAN Networks, NCSC serves as a non-commercial producer and provider of 24-hour a
3 day programming devoted to news, commentary and editorials. There is no indication that
4 NCSC or the C-SPAN Networks are owned or controlled, in whole or in part, by any
5 political party, political committee, or candidate.

6 In producing "Road to the Capital," "Road to the White House," and other news,
7 commentary and editorial programming, NCSC would retain control over the context in
8 which campaign commercials and candidate biographies are used. Moreover, NCSC
9 would take the affirmative steps described above to ensure that viewers do not conclude
10 that the airing of such materials constitutes an endorsement by the C-SPAN Networks of
11 the candidates depicted. Thus, the use of campaign-produced advertising and biographical
12 materials does not alter the basic nature of the programs as news stories, editorials or
13 commentaries. These materials would be aired because they have significant news value,
14 and because they assist viewers in understanding the complex issues discussed by the
15 candidates. Neither the campaign committees nor the candidates would have the ability to
16 determine when or how their election advocacy messages are presented to the viewers.
17 This conclusion is not altered by your statement that NCSC is not supported by advertising
18 revenues, and would not charge a fee for the airing of the campaign materials used in the
19 above-described programming.

20 Based on the foregoing, the Commission concludes that NCSC and the C-SPAN
21 Networks are press entities that will be acting in their capacities as press entities when
22 producing and carrying the above-described programming. The dissemination of candidate
23 video biographies and campaign commercials as part of the programming you have
24 proposed would therefore be permissible under the Act.

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

28 Sincerely,

29 Lee Ann Elliott Chairman

30 Enclosures (AOs 1996-41, 1996-16, and 1982-44)