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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

August 26, 1998

**AGENDA ITEM**  
For Meeting of: 9-2-98

**MEMORANDUM**

TO: The Commission

THROUGH: James A. Pehrkon  
Acting Staff Director

FROM: Lawrence M. Noble  
General Counsel

N. Bradley Litchfield  
Associate General Counsel

Jonathan M. Levin  
Senior Attorney

Subject: Draft AO 1998-17

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for September 2, 1998.

Attachment

**DRAFT**

1 ADVISORY OPINION 1998-17

2  
3 John C. Dodge  
4 Cole, Raywid & Braverman, L.L.P.  
5 1919 Pennsylvania Avenue, N.W.  
6 Suite 200  
7 Washington, D.C. 20006

8  
9 Dear Mr. Dodge:

10  
11 This responds to your letter dated August 3, 1998, on behalf of Daniels  
12 Cablevision, Inc. ("Daniels"), concerning the application of the Federal Election  
13 Campaign Act of 1971, as amended ("the Act"), and Commission regulations to a plan to  
14 provide free cable television air time to Federal candidates in California.

15 Daniels has operated two cable television systems in southern California since the  
16 1960s, serving the communities of Desert Hot Springs, Encinitas, Carlsbad, and other  
17 portions of northern San Diego County and Riverside County.<sup>1</sup> You state that Daniels  
18 serves more than 69,000 subscribers and is the 70<sup>th</sup> largest cable system operator in the  
19 U.S. Daniels is a privately held corporation, and its facilities are not owned or controlled  
20 by any political party, political committee, or candidate.

21 You note the many news programming services and other public services that  
22 Daniels provides for the local communities, including city council meetings and coverage  
23 of local news in a manner not available on local channels. You state that Daniels now  
24 wishes to continue such activities by granting to Federal candidates the opportunity to  
25 cablecast their spot advertisements for free. Daniels will make available, to all *bona fide*  
26 candidates for the United States Senate from California and for the U.S. House of  
27 Representatives from the 44<sup>th</sup>, 48<sup>th</sup>, and 51<sup>st</sup> Districts of California, sufficient free time to  
28 accommodate up to 750 thirty-second spot advertisements for each of the eight weeks  
29 preceding the general election of November 3, 1998. Daniels will consider a candidate to  
30 be *bona fide* if she or he: (1) meets the specific requirements to run for the U.S. Senate or

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<sup>1</sup> Desert Hot Springs is served by Desert Hot Springs Cablevision ("DHS") which, along with Daniels Cablevision is wholly owned by William R. "Bill" Daniels, Jr. You state that, for ease of reference, DHS and Daniels Cablevision are together referred to as "Daniels."

1 House established by the State of California and enforced by the California Secretary of  
2 State; and (2) meets the definition of candidate set forth in 2 U.S.C. §431(2).<sup>2</sup>

3 During this free time, the spot advertisements will run on the commercial cable  
4 programming channels provided by Daniels, including CNN, Headline News, and ESPN.  
5 Each candidate will be permitted to run an equal number of advertisements during the  
6 time that Daniels makes available. The ads will appear on a random basis between the  
7 hours of 6:00 a.m. and midnight. The specific time slots allocated to the candidates will  
8 be developed by Daniels and made available to the public for review. Depending on the  
9 number of candidates who participate, each candidate will be permitted to run between 15  
10 and 60 free spots a week. The time that Daniels is making available would otherwise be  
11 sold to commercial advertisers (perhaps including political advertisers). The monetary  
12 value of the total of the free time made available is approximately \$86,250 and is  
13 approximately 20 percent of the commercial advertising time generally available during  
14 the eight-week period.

15 Daniels will also require that the advertisements submitted by the candidates will  
16 be of technical quality at least equivalent to that required of commercial leased access and  
17 public, educational, and governmental programmers.<sup>3</sup> The candidates will be responsible  
18 for the production of their own advertisements, and Daniels will exercise no control over  
19 the content of the ads. A candidate's advertisements must be submitted by the close of  
20 business on the Wednesday preceding the week in which they will be aired. If a  
21 candidate does not submit the ads in a timely manner, the ads will not be aired that week.  
22 This will prevent candidates from "stockpiling" their time for use as the election nears.  
23 Candidates who do not submit their ads in a timely manner may submit ads for the  
24 following ad period, and will be included in that week's cycle of ads.

25 In support of the proposal, you cite the "equal opportunities" and "lowest unit  
26 rate" provisions of the Communications Act. 47 U.S.C. §315(a) and (b). In its public  
27 comment letter dated August 14, 1998, which was submitted for the record on this

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<sup>2</sup> Under this section, an individual qualifies as a candidate if she and her authorized committees (and anyone else authorized by her) have received contributions aggregating in excess of \$5,000 or has made expenditures aggregating in excess of \$5,000. See 11 CFR 100.3(a).

<sup>3</sup> You indicate that this requirement is derived from Federal Communications Commission regulations and is meant to ensure at least a minimum level of technical quality for the advertisements.

1 advisory opinion request, the General Counsel of the FCC summarized the relevant  
2 statutory provisions.<sup>4</sup>

3         The FCC General Counsel points to two key provisions of the Communications  
4 Act at 47 U.S.C. §315, i.e., the requirements for "equal opportunities" and "lowest unit  
5 charge." Section 315(a) of the Communications Act requires a broadcaster or cable  
6 operator to "afford equal opportunities" to all candidates for an elective office if one  
7 candidate for that office is permitted to advertise on the facilities of the broadcaster or  
8 cable operator. Section 315(b) provides that, during the 45 days preceding a primary  
9 election and the 60 days preceding a general election, a candidate is entitled to pay for  
10 advertising at no more than "the lowest unit charge of the station for the same class and  
11 amount of time for the same period."<sup>5</sup>

12         Section 315(b) was enacted in 1972, along with the "reasonable access" rule at  
13 section 312(a)(7), as part of the Federal Election Campaign Act of 1971. The "reasonable  
14 access" rule (which does not apply to cable operators) directs the FCC to revoke a  
15 broadcaster's license "for willful or repeated failure to allow reasonable access to or  
16 permit purchase of reasonable amounts of time" by Federal candidates. Congress added  
17 these provisions for a twofold purpose: first, to give candidates "greater access to the  
18 media so that they may better explain their stand on the issues, and thereby more fully  
19 and completely inform the voters"; secondly, "to halt the spiraling cost of campaigning  
20 for public office." S. Rep. No. 92-96, 92d Cong., 1st Sess. 20 (1971).

21         FCC Counsel recognizes that, due to the complexity of broadcasting and cable  
22 casting practices, the calculation of the lowest unit charge may be difficult, and has led to  
23 complaints by candidates that they were charged more than the lowest unit charge. He  
24 states that a provision of free time would avoid such litigation and would be consistent  
25 with Congressional intent behind enacting the lowest unit charge rule, i.e., the reduction  
26 of campaign costs. Counsel also notes that FCC regulations permit a station to establish a  
27 special discount rate to sell time to candidates which is even lower than the lowest unit  
28 charge. Moreover, FCC regulations contemplate the provision of free time to candidates,

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<sup>4</sup> This opinion's references to and reliance on the FCC General Counsel's legal analysis of FCC statutes and rulings omits some of his citations to FCC materials. The omitted citations are found in the full text of Counsel's comments, which are part of the public record for this opinion.

<sup>5</sup> That section also provides that, during times other than those periods, candidates cannot be charged more than "the charges made for comparable use of such station by other users thereof."

1 stating that when free time is provided for use by candidates, the cable operator or  
2 broadcaster must place a record of the free time in "the political file." The political file is  
3 available for public inspection and includes records of all requests for cablecast time by  
4 candidates, the disposition of any such requests, and all free time provided to candidates.

5 Given the foregoing summary of the applicable Communications Act provisions  
6 and FCC rules which govern cable operators such as Daniels, this advisory opinion  
7 request poses the issue of whether donations by Daniels of free advertising spot time to  
8 candidates for Federal office would be prohibited corporate contributions under the Act  
9 and Commission regulations. For the reasons set forth herein and subject to conditions  
10 stated herein, the Commission concludes that Daniels' proposal would not entail  
11 contributions and would be permissible under the Act.

12 The Act prohibits "any corporation whatever" from making any contribution or  
13 expenditure in connection with a Federal election. 2 U.S.C. §441b(a). The Act and  
14 Commission regulations define the terms "contribution" and "expenditure" to include any  
15 gift of money or anything of value for the purpose of influencing a Federal election. 2  
16 U.S.C. §431(8)(A)(i) and (9)(A)(i); 11 CFR 100.7(a)(1) and 100.8(a)(1); see also 2  
17 U.S.C. §441b(b)(2) and 114.1(a)(1) (providing a similar definition for "contribution or  
18 expenditure" with respect to corporate activity). Commission regulations further define  
19 "anything of value" to include all in-kind contributions and state that, unless specifically  
20 exempted under 11 CFR 100.7(b), the provision of any goods or services (including  
21 advertising services) without charge, or at a charge which is less than the usual and  
22 normal charge for such goods or services, is a contribution. 11 CFR 100.7(a)(1)(iii)(A);  
23 see also 11 CFR 100.8(a)(1)(iv)(A).

24 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  
30 2 U.S.C. §431(9)(B)(i).<sup>6</sup> Commission regulations similarly exempt from the definitions  
31 of contribution and expenditure "[a]ny cost incurred in covering or carrying a news story,

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<sup>6</sup> According to the House report on the 1974 amendments to the Act, this exception made plain the Congressional intent that the Act would not "limit or burden in any way the first amendment freedoms of

1 commentary, or editorial by any broadcasting station (including a cable television  
2 operator, programmer, or producer), newspaper, magazine, or other periodical publication  
3 . . . unless the facility is owned or controlled by any political party, political committee,  
4 or candidate ..." 11 CFR 100.7(b)(2) and 100.8(b)(2).

5 Several factors must be present to conclude that the proposed activity falls within  
6 the media exemption of 2 U.S.C. §431(9)(B)(i). First, the entity engaging in the activity  
7 must be a press entity as described by the Act and regulations. See Advisory Opinions  
8 1996-48, 1996-41, 1996-16 and opinions cited therein. Furthermore, in previously  
9 applying the media exemption, the Commission cited two criteria, based on the statutory  
10 exemption, that would be relevant to determining the scope of the exemption. These are  
11 (1) whether the press entity is owned by a political party, political committee, or  
12 candidate,<sup>7</sup> and (2) whether the press entity is acting as a press entity in performing the  
13 media activity. Advisory Opinion 1982-44 (citing *Reader's Digest Association v.*  
14 *Federal Election Commission*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981)).

15 In analyzing a proposal from a corporation that operated an on-line computer  
16 information service, the Commission concluded that the corporation's donation of free  
17 on-line accounts to candidates would be an in-kind contribution and prohibited by 2  
18 U.S.C. §441b(a). Advisory Opinion 1996-2. The Commission noted that neither the  
19 corporation nor its described services qualified for the press exemption. Advisory  
20 Opinion 1996-2, n.2.

21 Advisory Opinion 1982-44 provides a contrast. There, the Commission  
22 determined that the prohibition on corporate contributions applies equally to media  
23 corporations unless their activities fall within the news story, commentary or editorial  
24 exemption. The Commission decided in that opinion that the commentary exemption  
25 would permit an incorporated broadcasting station to donate free time in two-hour blocks  
26 to each of the two major political parties for campaign-related messages without the  
27 donation of such time being treated as a contribution under the Act. The Commission

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the press ..." and would assure "the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 4 (1974).

<sup>7</sup> 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

1 recognized that the commentary exemption would allow third persons access to the  
2 broadcast media to discuss issues from a highly political and partisan perspective. It also  
3 noted that the Act's commentary exemption did not define the format for the commentary  
4 or its length.

5 Although the Communications Act and FCC rules were not addressed in Advisory  
6 Opinion 1982-44, the Commission views those provisions as a framework for the  
7 implementation of Daniels' proposal. Daniels is not owned or controlled by a candidate,  
8 political party, or political committee. It is a media entity covered under the exemption at  
9 11 CFR 100.7(b)(2) and 100.8(b)(2), and it will be performing a function that is  
10 contemplated as a public service function of such an entity under the Communications  
11 Act. The Communications Act provisions indicate that the entities covered should  
12 provide reasonable access to candidates on an equal opportunity basis to more fully  
13 inform the voters during the defined pre-election periods.<sup>8</sup>

14 The Commission views the proposed activity as falling within the category of  
15 commentary, which includes the concept of guest commentary. This conclusion,  
16 however, is premised upon the continued application of the equal opportunities rule and  
17 the lowest unit charge rule to cable operators, and Daniels' compliance with those rules.  
18 Material revisions or modifications in any of the statutory provisions, or in FCC  
19 regulations or rulings applying them, would mean that this advisory opinion may no  
20 longer be relied upon by Daniels or other cable operators.<sup>9</sup> The implementation by an  
21 FCC-regulated media entity, Daniels, that is consistent with the equal opportunities  
22 requirements, along with the fact that the provision of free time on this basis is  
23 contemplated and encouraged by FCC rules, takes the Daniels proposal outside the realm

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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).

<sup>8</sup> Although cable operators are not subject to the "reasonable access" requirements, they are still governed by the equal opportunities and lowest unit charge provisions which are themselves designed to encourage use of the public media by candidates to inform the voters before the election. The Commission notes that its regulations extend to cable operators the same news media (or press) exemption that is explicitly given in the Act to any broadcasting station. That regulatory approach at least implies that the Commission will not narrowly condition its views as to the scope of the media exemption on the differing application of the Communications Act to cablecasters on the one hand, and broadcast licensees on the other, in circumstances such as those presented by the Daniels proposal.

<sup>9</sup> A material revision would include, but not be limited to, any FCC ruling that resulted in repealing or relaxing a cable operator's current obligations to Federal candidates.

1 of mere in-kind contributions of advertising space.<sup>10</sup> Given these features, the Daniels  
2 proposal constitutes the performance of a media function encouraged and required under  
3 the Communications Act, and, in its similarity to the activity in Advisory Opinion 1982-  
4 44, it is considered to be commentary.<sup>11</sup>

5 Although not explicitly posed in Daniels' request, the Commission notes the  
6 disclaimer requirements of the Act and Commission regulations. 2 U.S.C. §441d and 11  
7 CFR 110.11. In general, these requirements apply to any person who makes an  
8 expenditure for the purpose of financing communications expressly advocating the  
9 election or defeat of a clearly identified candidate, or to solicit contributions, through the  
10 use of any broadcasting station and other specified public media. The Act and  
11 regulations do not apply these requirements to Daniels when it donates (or sells  
12 discounted) time to a candidate for Federal office or the authorized campaign committee  
13 of such a candidate. The requirements would apply, however, to the Federal candidate  
14 and her campaign committee who is the donee (or purchaser) of the spot time. Of  
15 relevance here are the following requirements: (1) if the communication is paid for and  
16 authorized by candidate or her committee, the communication shall state that it has been  
17 paid for by such candidate or committee; and (2) if such a communication is authorized  
18 by a candidate or her committee, but paid for by any other person, the communication  
19 shall state that it is paid for by that person and authorized by the candidate or her  
20 committee. 2 U.S.C. §441d(a)(1) and (2); 11 CFR 110.11(a)(1)(i) and (ii).

21 Each candidate who advertises under the proposed program should be advised by  
22 Daniels of the necessity for a disclaimer in compliance with the above provision.  
23 Assuming that the costs for producing candidate X's advertisements will be paid for by  
24 X's committee (X for Congress), examples of such a disclaimer include: (1) "Paid for by  
25 X for Congress"; (2) "Paid for by X for Congress and time provided free by Daniels  
26 Cablevision"; or (3) "Time for the following message is provided free by Daniels

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<sup>10</sup> Thus, the Commission does not agree with your statement in the request to the effect that making free advertising time available to only one candidate would constitute commentary and be permissible under the Act's media exemption.

<sup>11</sup> Given the basis for the conclusion of this opinion, the Commission notes that the underlying rationale for Advisory Opinion 1986-22 is modified. That opinion concluded that a broadcaster's proposal to give discounts on media purchases by Federal candidates was permissible because the same discounts were available to its commercial advertisers. This advisory opinion issued to Daniels is based instead upon compliance with FCC requirements that apply to the provision of cable advertising time to Federal candidates.

1 Cablevision to help inform the public about the current House campaign and other costs  
2 are paid by X for Congress.”<sup>12</sup>

3 This response constitutes an advisory opinion concerning application of the Act  
4 and Commission regulations to the specific transaction or activity set forth in your  
5 request. 2 U.S.C. §437f.

6 Sincerely,

7  
8 Joan D. Aikens  
9 Chairman

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11  
12 Enclosures (AOs 1996-48, 1996-41, 1996-16, 1996-2, 1986-22 and 1982-44)  
13

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<sup>12</sup> The Commission notes that in the document entitled “The Daniels Plan” submitted by you, Daniels states that “[q]ualified candidates who have not produced advertisements but are interested in participating can contact Daniels Cablevision about the system’s production facilities.” If Daniels provides the use of such facilities, the campaign must pay Daniels the usual and normal charge for the use of such facilities and must make payment within a commercially reasonable period of time. 11 CFR 100.7(a)(i)(iii)(A) and (B), 114.9(c), and 116.3(b), (c), and (d).