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FEDERAL ELECTION COMMISSION
Washington, D.C. 20463

January 19, 2000

AGENDA ITEM

For Meeting of: 1-27-00

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence M. Noble *L.M.N.*
General Counsel

N. Bradley Litchfield *N.B.L.*
Associate General Counsel

Michael G. Marinelli *M.G.M.*
Staff Attorney

SUBJECT: Revised Draft Advisory Opinion 1999-32

Attached is the revised draft of the subject opinion for the Commission's approval on the January 27 agenda. This draft represents major revisions to Agenda Document No. 99-136 which was considered at the Commission's December 9, 1999, meeting.

The changes in this draft are made pursuant to discussion at that Commission meeting and further submissions by the requester on December 16, 1999, and January 6, 2000. The current draft has changes in both the factual presentation and its application of the law to the requester's situation. The changes are denoted by the bold font.

Attachment

1 **ADVISORY OPINION 1999-32**

DRAFT

2
3 **William C. Oldaker**
4 **Oldaker & Harris, LLP**
5 **818 Connecticut Avenue N.W.**
6 **Suite 1100**
7 **Washington, DC 20008**

8
9 **Dear Mr. Oldaker:**

10
11 **This refers to your letters dated September 4, 1999 and the most recent**
12 **being January 6, 2000,¹ concerning the application of the Federal Election**
13 **Campaign Act of 1971 ("the Act"), as amended, and Commission regulations to**
14 **the status of the Tohono O'odham Nation ("the Nation"), a Federally recognized**
15 **Indian tribe in southern Arizona, as a Federal contractor.**

16 **FACTS**

17 ***Relationship of Nation to its utility authority***

18 **You explain that the Nation is a non-corporate entity and is organized pursuant to**
19 **Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476. The Tohono**
20 **O'odham Nation has formed a Utility Authority ("TOUA"), a tribally chartered**
21 **unincorporated entity, which operates as a subordinate commercial enterprise of the**
22 **Nation. Your request documents indicate that TOUA was established as a legal**
23 **entity by a resolution of the Tohono O'odham Legislative Council on May 22, 1991.²**

24 **You further explain that among TOUA's purposes, as detailed in its Plan of**
25 **Operation, are the provision of utility services (such as electric, gas and telephone) to all**

¹ These letters are dated September 4 and 29, October 29, December 8, and 16, 1999 and January 6, 2000.

² TOUA was created to be the successor in interest to an earlier tribal utility company, the Papago Tribal Utility authority, which was established in 1970, prior to a change in the Nation's name and adoption of a new constitution in 1986. See Resolution of the Tohono O'odham Legislative Council

1 areas and persons within the Nation, provision of utility services to the Nation's members
2 at the lowest possible cost, and the improvement of the health and welfare of Nation
3 residents. See TOUA Plan, Section 4, part A1 and A2.' While TOUA is not
4 incorporated and would not normally be considered as having a separate legal
5 identity from Nation, the control and operation of TOUA is "patterned as closely as
6 is feasible on the lines of a chartered public service corporation of similar
7 magnitude with a Management Board comparable to a Board of Directors of such
8 corporation." TOUA Plan, Section 6.

9 You state that all members of TOUA's management board are appointed by
10 the Chairman of the Nation and approved by the Tohono O'odham Legislative
11 Council. TOUA is also required to make a formal, annual report to the Council,
12 including a presentation of its budget. TOUA Plan Section 7A(9). Notwithstanding
13 these provisions, the request indicates that TOUA enjoys a degree of autonomy in its
14 functions and operations. Funds from this enterprise are kept separately from other
15 tribal funds. You explain that TOUA has its own bank account, hires its own
16 employees, establishes its own personnel policies and employee benefits, purchases
17 and sells its own property and hires and directs its own legal counsel. TOUA Plan,
18 Section 7. Also, no member of the Tohono O'odham Council can be member of the
19 TOUA management board. TOUA Plan, Section 9B.

No. 91-175 (May 22, 1991).

³ Regarding the use of TOUA revenue, you explain that in accordance with section 4(A)(6) of the Plan, distribution is made "in the order of priority of use." The last enumerated authorized use is "to provide a fair return to the Nation on its investment." You explain that, as demonstrated in TOUA's 1997 annual report (which, you state, is the most recent), revenue from the operations is used to pay operating expenses and repay loans and debts. The current general manager of TOUA has stated that he is unaware of any distribution of revenue to the Nation because TOUA has used its

1 *Utility services to Federal agencies*

2 Currently, TOUA is the only provider of utility services on the Nation's territories
3 ("the Reservation"). TOUA's standard practice is to provide utility services for which all
4 customers are billed on a monthly basis, using a formula of kilowatt-hours multiplied by
5 a certain dollar amount. Among TOUA's many customers are several Federal agencies
6 with offices and facilities on the Reservation. The Federal agencies receiving utility
7 services from TOUA are the Bureau of Indian Affairs ("BIA") and the Indian Health
8 Service ("IHS"). In addition to contract administration and implementation of various
9 Department of Interior programs, the BIA maintains three schools for the Nation's
10 children. IHS runs a hospital and affiliated programs such as housing for the hospital's
11 physicians. The BIA and IHS facilities are on the Reservation and administer programs
12 only to the Nation's residents. These services do not extend beyond the Reservation.

13 As part of its mandate, TOUA provides services to these agencies in the same
14 manner as the rest of its customers. TOUA has no written contract for the provision of
15 utility services to the Federal agencies conducting business on the Reservation, just as
16 TOUA has no written contract to provide utility services to any of its residential or
17 commercial customers. Like all residential and business customers, these Federal
18 agencies are billed monthly by TOUA based on actual utility usage. You explain that the
19 billing of Federal agencies by TOUA constitutes approximately 10% of its total billing of
20 all customers. Your request includes a sample billing form that TOUA submits to BIA.

21 Given these facts, the Tohono O'odham Nation requests an advisory opinion that
22 the regular and customary provision of utility services to these Federal agencies does not

revenues to fund operations and pay debts.

1 cause the Nation to become a Federal contractor thereby prohibiting it, under 2 U.S.C.
2 §441c and 11 CFR 115.2(a), from making Federal election campaign contributions.

3 **ACT AND COMMISSION REGULATIONS**

4 The term "person" as defined in the Act includes an individual, partnership,
5 committee, association, corporation, labor organization, or any other organization or
6 group of persons, but such term does not include the Federal Government or any
7 authority of the Federal Government. 2 U.S.C. §431(11). Under 2 U.S.C. §441c, it is
8 unlawful for any person who is a Federal contractor to directly or indirectly "make any
9 contribution of money or other things of value, or to promise expressly or impliedly to
10 make any such contribution to any political party, committee, or candidate for public
11 office..."

12 Commission regulations indicate that the prohibition bans contributions to Federal
13 candidates and Federal political committees, but does not prohibit contributions in State
14 and local elections. 11 CFR 115.2(a). This prohibition extends from the commencement
15 of the contract negotiations until the completion of the contract performance or the
16 termination of negotiations. 11 CFR 115.1(b), 115.2(b). Commission regulations at 11
17 CFR 115.1(a) define the term "Federal contractor" to mean, in part, a person who:

- 18
19 (1) Enters into any contract with the United States
20 or any department or agency thereof either for--
21 (i) The rendition of personal services; or
22 (ii) Furnishing any material, supplies, or
23 equipment; or
24 (iii) Selling any land or buildings;
25 (2) If the payment for the performance of the
26 contract or payment for the material, supplies,
27 equipment, land, or building is to be made in whole
28 or in part from funds appropriated by the Congress.

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Under 11 CFR 115.1(c) of the regulations, the term "contract" includes:

- (1) A sole source, negotiated, or advertised procurement conducted by the United States or any of its agencies;
- (2) A written (except as otherwise authorized) contract, between any person and the United States or any of its departments or agencies, for the furnishing of personal property, real property, or personal services; and
- (3) Any modification of a contract.

APPLICATION TO NATION

Existence of Federal Contract

As "any other organization or group of persons," the Nation would meet the definition of "person" under section 431(11). See Advisory Opinion 1993-12. The Nation is therefore subject to the provisions of 2 U.S.C §441c and would be prohibited from making contributions if the type of agreement presented in this request is within the definition of contract under the quoted Commission regulations.

One element of the regulatory definition of "contract" is the furnishing of personal property, real property, or personal services. See 11 CFR 115.1(c)(2) and (a)(1). This element is met by TOUA's agreement with various Federal agencies to provide utility services. You claim that TOUA's arrangement to provide utility services with various Federal offices is not a written agreement. The Commission notes that the billing statements could themselves be construed to serve as a written agreement to provide services. However, even if the agreement is not a written contract, it may still meet the requirements of the regulations since 11 CFR 115.1(c)(2) recognizes that a non-

1 written agreement may be a covered contract if that agreement is "otherwise --
2 authorized."

3 Assuming the TOUA utility service agreement qualifies as contract under the
4 regulations, the circumstances presented here require additional analysis. As a
5 preliminary matter, the request cites the possible application of Advisory Opinion
6 1993-12. The Commission examined various agreements entered into by a Native
7 American tribal entity and the Federal Government. The Commission noted that
8 several types of agreements would not be considered contracts for the purposes of 2
9 U.S.C. §441c, despite the contractual form of the agreements, since these agreements
10 were grants and special "self-determination" contracts by which the Federal
11 Government gave various tribal instrumentalities the obligations to carry out
12 functions which the Federal Government itself had previously assumed, pursuant to
13 its obligations to provide for the welfare of the tribal populations. This portion of
14 Advisory Opinion 1993-12, is not, however, relevant to TOUA's situation since the
15 utility services contract at issue here is neither a grant nor a self-determination
16 contract. Therefore, absent other circumstances, the prohibitions of section 441c
17 would apply, as they did to the other commercial agreements considered in the 1993
18 opinion.

19 *Status of TOUA*

20 Your request presents the question of whether, for purposes of section 441c,
21 the Nation and TOUA can be treated as separate entities thereby permitting a
22 distinction between the political contributions of the Nation and the possible Federal
23 contractor status of TOUA. The Commission notes that the general relationships

1 between tribal governments and their commercial ventures are unique and differ
2 from usual relationships considered in past advisory opinions regarding entities that
3 may be affiliated with each other. For jurisdictional purposes and in certain
4 commercial situations, the Federal courts have maintained that a tribal enterprise
5 may be treated as a separate and distinct entity from the tribe itself. See, for
6 example, *Navajo Tribe v. Bank of New Mexico*, 700 F.2d. 1285 (10th Cir. 1982) (right
7 of set off did not attach to tribe for activities of Navajo housing authority) and
8 *Navajo Tribal Utility Authority v. Arizona Department of Revenue*, 608 F. 2d 1228 (9th
9 Cir. 1979) (tribal housing authority did not enjoy same status as tribe for extending
10 jurisdiction to Federal court).⁴

11 The Commission notes that TOUA is not a corporation and thus is not
12 formally separate from the Nation; corporate status was an option available under
13 section 17 of the Indian Reorganization Act, 25 U.S.C. §477, and under the Nation's
14 constitution.⁵ However, this fact is not necessarily dispositive of the question. Case
15 law suggests that to determine whether a tribe is acting in its business or in some
16 other capacity, courts must look beyond whether the tribe or one of its units has
17 incorporated itself. The courts instead look to the conduct in question and the
18 powers actually granted to the tribe, or the enterprise, under their governing
19 documents. See *Mescalero Apache Tribe v. Jones* 411 U.S. 145, 157-58, n. 13 (1973);

⁴ The court noted in *Bank of New Mexico* that "where sovereignty is not an issue, courts have consistently held that tribal enterprises are separate and therefore, independent of the Tribe." *Bank of New Mexico* at 1288.

⁵ Section 17 of the IRA authorizes Indians to request the Secretary of the Interior to issue charters of incorporation to their tribes once the tribes have adopted constitutions and bylaws and organized tribal governments under section 16 of the IRA, 25 U.S.C. §476. See *White Apache Tribe* at 866 for a discussion of section 17.

1 see also *White Apache Tribe v. Williams*, 810 F.2d 844, 866 (9th Cir. 1987)(Fletcher
2 C.J., dissenting).

3 The Commission notes, as indicated in the request, that TOUA enjoys similar
4 autonomous attributes considered significant by the Ninth Circuit in *Navajo Tribal*
5 *Utility* and the Tenth Circuit in *Bank of New Mexico*.⁶ Further, as noted above,
6 TOUA has its own bank account, employees, personnel policies, employee benefits
7 and legal counsel. These additional factors highlight further the status of TOUA
8 within the Nation. Considering all these elements together, particularly the
9 specialized and unique treatment afforded to tribal commercial entities in other
10 areas of law, the Commission believes, in the specific circumstances of this request,
11 that TOUA can be treated as a separate entity from the Nation and that the
12 commercial activity of TOUA as a Federal contractor can be separated from the
13 Nation and its political activities.

14 Accordingly, section 441c prohibits TOUA, as a Federal contractor, from
15 making contributions to a Federal candidate or political committee during the
16 period it provides utility services to the Federal agencies located on the reservation.⁷
17 However, the Nation may make contributions as a "person" under the Act with one

⁶ Both the Navajo Tribal Utility Authority and TOUA, though not incorporated, are "patterned to operate as closely as feasible on the lines of chartered public service corporation with a management board comparable to a Board of Directors of such a corporation." Both entities permit non tribal members to serve on the Management Board. As you indicate in your request, in the case of TOUA, a majority of the Management Board may be from outside the Nation, and no member of the Nation's Council may be a member of the Board. TOUA Plan, Section 9B. Further, like the Navajo Housing and Development Enterprise in *Bank of New Mexico*, TOUA (which earns its own revenues) does not have the power to appropriate the general funds of the Nation for its own use.

⁷ The Commission further notes, however, that 11 CFR 115.6 permits the employees, officers, or individual members of an unincorporated association, or other group or organization which is a Federal contractor, to make otherwise lawful contributions from their own personal assets, or to form a non-connected political committee. See Advisory Opinions 1998-11, 1991-1, and 1990-20.

1 **condition.⁵ The Commission notes your statement that there is no current**
2 **distribution of TOUA revenues to the Nation. Should this situation change, given**
3 **the prohibitions of 2 U.S.C. §441c, the Nation may not use such revenues to make**
4 **contributions to Federal candidates or political committees.⁶**

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

8 **Sincerely,**

9
10 **Darryl R. Wold**
11 **Chairman**

12
13 **Enclosures (AO, 1998-11, 1993-12, 1990-1, 1990-20, 1995-32, 1995-31, 1981-61, 1981-**
14 **49 and 1980-7)**

⁵ The Commission notes that the analysis used here differs from that of Advisory Opinion 1993-12. In that opinion, while the Commission determined that the grants and self determination contracts entered into by a tribe did not cause the tribe to become a Federal contractor, it determined that the procurement contracts entered into by the tribe with the Bureau of Indian Affairs fell within the parameters of section 441c and made the tribal authority a Federal contractor for purposes of the Act. These procurement contracts were entered into by unincorporated tribal commercial enterprises. The approach taken herein would require further analysis of the relationship of the tribal enterprises considered in the 1993 opinion before the application of section 441c could be determined. Therefore, the Commission concludes that the portion of Advisory Opinion 1993-12 concerning the analysis of procurement contracts between tribal enterprises and the Federal Government is superseded by this opinion.

⁶ The Commission notes that this approach is consistent with past opinions regarding contributions made by holding companies owning subsidiaries that are disqualified by the Act from making contributions. See Advisory Opinions 1998-11, 1995-32, 1995-31, 1981-61, 1981-49 and 1980-7. Advisory Opinion 1998-11 is of particular relevance. In that opinion, a limited liability holding company wholly owned two other limited liability companies which were Federal contractors. The Commission determined that the holding company was legally distinct from its subsidiaries and could make Federal contributions whereas the two Federal contractor companies could not. However, the holding company had to use revenues other than those provided by its subsidiary Federal contractor companies to make its contributions.