FEDERAL ELECTION COMMISSION
Washington, DC 20463

February 14, 2005

CERTIFIED MAIL
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ADVISORY OPINION 2004-43

Gregg P. Skall, Esq.
Womble, Carlyle, Sandridge & Rice, P.L.L.C.
Seventh Floor
1401 Eye Street, N.W.
Washington, D.C. 20005

Dear Mr. Skall:

We are responding to your advisory opinion request on behalf of the Missouri Broadcasters Association ("MBA") regarding whether, under the Federal Election Campaign Act of 1971, as amended ("FECA"), a broadcaster would be making a corporate in-kind contribution by selling advertising time at the Lowest Unit Charge ("LUC")[1] to a candidate who may have failed to include a fully compliant Communications Act Statement in one of his advertisements and, therefore, may not be entitled to the LUC under section 315(b) of the Communications Act. 47 U.S.C. 315(b).

Background

The facts of this request are presented in your letter of October 29, 2004, as supplemented by your letters of November 19, 2004, January 21, 2005, and February 8, 2005.

MBA is a voluntary association of broadcasters who are Federal Communications Commission ("FCC") licensees of radio and television stations throughout Missouri. In its request, MBA asks the Federal Election Commission ("FEC") to assume that Senator Christopher Bond's advertisements did not contain a fully compliant Communications Act Statement and that he therefore was not entitled to the LUC. The MBA then asks about the legal consequences of a broadcaster having nonetheless afforded the benefits of the LUC to Senator Bond.

[1] The LUC is the lowest advertising rate that a station charges other advertisers for the same class and amount of time for the same period. *See* 47 U.S.C. 315(b)(1) and 47 CFR 73.1942(a)(1).

FECA prohibits any corporation from making any contribution or expenditure in connection with a Federal election. 2 U.S.C. 441b(a). FECA and Commission regulations define the terms "contribution" and "expenditure" to include any gift of money or anything of value for the purpose of influencing a Federal election. 2 U.S.C. 431(8)(A)(i) and 431(9)(A)(i); 11 CFR 100.52(a) and 100.111(a); see also 2 U.S.C. 441b(b)(2) and 11 CFR 114.1(a)(1) (providing a similar definition for "contribution or expenditure" with respect to corporate activity). Commission regulations further define "anything of value" to include all in-kind contributions and state that, unless specifically exempted under 11 CFR 100.71(a), the provision of any goods or services (including advertising services) without charge, or at a charge which is less than the usual and normal charge for such goods or services, is a contribution. 11 CFR 100.52(d)(1); see also 11 CFR 100.111(e)(1).

The Bipartisan Campaign Reform Act of 2002, P.L. 107-155, 116 Stat. 81 (March 27, 2002) ("BCRA"), amended section 315 of the Communications Act of 1934, 47 U.S.C. 315(b), such that a Federal candidate "shall not be entitled" to the LUC if any of his advertisements makes a direct reference to his opponent and fails to contain a statement identifying the candidate and stating that the candidate approved the communication (the "Communications Act Statement"). For radio broadcasts, the Communications Act Statement must consist of a personal audio statement by the candidate identifying himself and the office sought, and stating his approval of the message. In the case of television advertisements, for a period of no less than four seconds at the end of the ad, there must appear simultaneously (i) a clearly identifiable photographic or similar image of the candidate; and (ii) a clearly readable printed statement, identifying the candidate and stating that he has approved the broadcast and that his authorized committee paid for the broadcast.

BCRA also amended section 441d of FECA to include a similar, though not identical, required statement in political advertisements (the "FECA Statement"). The FECA Statement for any radio advertisement, whether or not the ad mentions a candidate's opponent, requires the candidate to identify himself, and state that he approved the message. The FECA Statement does not require a candidate to state the office he is seeking. For any television advertisement, the FECA Statement requires a candidate to identify himself and state that he approved the communication. This must be done either (1) while an unobscured, full-screen view of the candidate is displayed, or (2) by means of a voice-over by the candidate, accompanied by a clearly identifiable photographic or similar image of the candidate. The statement must also appear in writing at the end of the communication in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, and for a period of at least four seconds. 2 U.S.C. 441d(d)(1); *see also* 11 CFR 110.11(c)(3).

Although the Communications Act generally requires broadcasters to charge candidates the LUC for a candidate's political advertisements in the 45 days preceding a primary election and the 60 days preceding a general election, BCRA amended 315(b) of the Communications Act to provide that a Federal candidate "shall not be entitled" to

receive the LUC if any of his advertisements failed to include a fully compliant Communications Act Statement. 47 U.S.C. 315(b). Specifically, once a broadcaster airs a Federal candidate's political advertisement that does not contain a fully compliant Communications Act Statement, that candidate is no longer guaranteed the LUC for any advertisement aired in the remaining days leading up to the election.

Questions Presented

Does a broadcaster make an in-kind contribution by charging a Federal candidate the LUC for advertising time when the candidate may not be "entitled" to the LUC under the Communications Act? If the LUC is an in-kind contribution, must the broadcaster re-bill the candidate for the difference between the LUC and some higher rate?

The Commission concludes that a broadcaster's decision to offer Senator Bond the LUC under these circumstances did not result in an in-kind contribution under FECA and Commission regulations.

The Commission has reviewed the ads provided by MBA and has concluded that there is no violation of any disclaimer requirement over which the Federal Election Commission has jurisdiction. The Commission notes that the disclaimer requirements in the Federal Election Campaign Act are substantially similar to those in the Communication Act, and that the FEC has substantial expertise in evaluating disclaimer issues. Moreover, the FCC has not, to our knowledge, come to a contrary conclusion, either through evaluation of the merits in this case or by promulgating regulations (under the disclaimer provisions of the Communications Act) that would warrant a different result.

Because the Commission concludes that there is no evidence of a violation of the disclaimer requirements, providing the LUC did not, in this instance, result in an in-kind contribution. The Commission need not reach your question regarding re-billing.

The conclusion in this response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Scott E. Thomas
Chairman