FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: COMMISSION SECRETARY

DATE: December 15, 2004

SUBJECT: COMMENT: DRAFT AO 2004-43

Transmitted herewith is a timely submitted comment by Democracy 21, the Campaign Legal Center, and the Center for Responsive Politics regarding the above-captioned matter.

Proposed Advisory Opinion 2004-43 is on the agenda for Thursday, December 16, 2004.

Attachment

By Electronic Mail

December 15, 2004

Lawrence Norton, Esquire
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Comment on Draft AO 2004-43

Dear Mr. Norton:

We are writing to comment on Draft A.O. 2004-43, a draft response to an advisory opinion request by the Missouri Broadcasters Association (MBA). The MBA request poses the question of whether a broadcaster can permissibly sell advertising at "Lowest Unit Charge" (LUC) to a candidate who, by law, is not "entitled" to receive that discount because the candidate failed to include legally required disclaimer statements in his or her campaign advertisements.

The general counsel's draft response concludes that a broadcaster *may* provide the discount to a candidate who is not entitled to it, and that doing so does not constitute an impermissible corporate contribution so long as the discount is provided to all other candidates as well. This conclusion is legally incorrect, and violates both common sense and congressional intent, which was to make the LUC discount available *only* to those candidates who include the required disclaimer statements in their ads.

In section 305(a) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Congress amended section 315(b) of the Communications Act of 1934 to provide that a candidate will receive the benefit of the Lowest Unit Charge *only* if the candidate includes certain specified disclaimer statements in broadcast ads that refer to other candidates for the same office. These disclaimer statements (referred to in the Draft A.O. as the "BCRA Statement") must both identify the candidate and state that the candidate has approved the broadcast ad. 47 U.S.C. § 315(b)(2)(C), (D).

Congress set forth this condition on receiving the benefit of the LUC *twice* in the statute:

In subsection (2)(A) of section 315(b), Congress provided that a Federal candidate "*shall not be entitled* to receive" the LUC for an ad that contains a reference to another candidate for the same office "*unless* the reference meets the requirements of

subparagraphs (C) or (D)." (emphasis added). (Subparagraphs (C) and (D) set forth the requirements of the "BCRA Statement" that the candidate identify himself or herself and state that he or she has "approved" the ad, for television and radio broadcasts, respectively).

In subsection (2)(B) of section 315(b), Congress additionally provided that if a Federal candidate "makes a reference" to another candidate for the same office "that does not meet the requirements of subparagraph (C) or (D), such candidate *shall not be entitled* to receive" the LUC for that broadcast "or any other broadcast during any portion of the 45-day and 60-day periods" (preceding the primary and general elections, respectively), "that occur on or after the date of such broadcast, for election to such office." (emphasis added).

Thus, the statutory language twice sets forth the absolute and unequivocal condition that a candidate "shall not be entitled" to the LUC unless his ads contain the "BCRA Statement." If the mandatory nature of this language is not sufficiently clear on its face, the legislative history of the provision removes any doubt as to its purpose. The provision was introduced as a floor amendment to BCRA on March 22, 2001, co-sponsored by Senators Wyden and Collins. In introducing it, Senator Wyden said:

> It says, *if you want that lowest unit rate* provided for in this law that we are guaranteeing to you, th*en you must put your name and your face at the end of this ad* for a few seconds so the people know who is paying for this ad...It is a very reasonable kind of requirement *in exchange for* that lowest unit rate.
>
> Cong.Rec. S2694 (daily ed. March 22, 2001) (emphasis added).
>
> The fact is that this is a stand-by-your-ad requirement. This is a proposal that makes it clear that *to get that lowest unit rate*, you have to be held personally accountable.
>
> *Id.* at S2697 (emphasis added).

Senator Collins, to the same effect, said:

> Under our proposal, the candidate's picture would appear at the end of the ad and the candidate would have to have a statement saying he or she approved the ad *in order to get the lowest broadcast rate.*
>
> *Id.* at S2695 (emphasis added).

Notwithstanding the clear and mandatory language of the provision, and the congressional purpose behind it, the Draft Advisory Opinion essentially proposes that the Federal Election Commission join with the Federal Communications Commission to

abandon any enforcement of this provision of law, and thus to make it meaningless. This is an extraordinary abdication of the agencies' mutual law enforcement obligation.

The FEC general counsel observes – in a footnote – that an "informal" conversation between FEC staff and FCC staff confirmed that FCC *staff* "interprets" the amendment "to allow a station to offer the LUC to a candidate who has failed to include the BCRA Statement in one of his advertisements, as long as it treats all Federal candidates in a consistent, non-discriminatory fashion." Draft A.O. 2004-43 at 3 n.4.

This is tantamount to an announcement that it is acceptable for one candidate to receive the benefits of ignoring the law so long as all other candidates, including those who comply with the law, receive the LUC as well. "Non-discrimination," in this lexicon, is treating candidates who comply with the law and candidates who ignore the law as the same.

The FEC, of course, is not responsible for the wrongheaded position of a sister agency (or at least, of its staff) in interpreting the Communications Act. But the Draft Advisory Opinion proposes to embrace the very same flawed logic as the basis for the FEC's own position in interpreting the ban on corporate contributions contained in section 441b of FECA.

Thus, in analyzing the question of whether it is an illegal corporate contribution for a broadcaster to offer the LUC discount to a candidate who is clearly not "entitled" to it as a matter of law – a candidate who has failed to include the statutorily required "BCRA Statement" in his ad – the general counsel concludes:

> [A] broadcaster may offer the LUC to a Federal candidate whose advertisement did not include the required BCRA Statement without making an in-kind contribution, *so long as the broadcaster provides the LUC to all similarly situated Federal candidates*, thereby ensuring that the discount does not favor any particular candidate.
>
> Therefore, based on your representation that no MBA member who offered the LUC to Senator Bond failed to make the LUC available to any other Federal candidate, *whether or not the candidate was "entitled" to the LUC*, the offer of the LUC to Senator Bond did not constitute a prohibited in-kind contribution.
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> Draft AO 2004-43 at 5 (emphasis added).

The general counsel's flawed reasoning is that no corporate contribution to any one candidate is made so long as all candidates are treated equally, and if all candidates are offered the LUC (whether they are entitled to it by law or not), then no one candidate is favored.

The fallacy of this reasoning is that it simply ignores the key fact -- not all of the candidates are "similarly situated" for purposes of the LUC. Some candidates include the "BCRA Statement" in their ads; others do not. Or to put it differently: some candidates are "entitled" to the LUC by law; other candidates are specifically *not* entitled to it. The whole point of this provision of law is to *distinguish* between candidates for purposes of the LUC, based on whether they include the "BCRA Statement" or not. To treat both sets of candidates alike – and to reason that a broadcaster "does not favor" any candidate by offering the discount to all – completely defeats the very point of the law, and equates two categories of candidates that, by law, must be distinguished. As the Supreme Court said in *Buckley v. Valeo*, 424 U.S. 1 (1976), "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike...." *Id.* at 97 *quoting Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

The result of this kind of "gross discrimination," in the words of the Supreme Court, is an impermissible corporate contribution by the broadcaster. As the general counsel notes, a corporation does not make an impermissible contribution when it offers a discount to a candidate "in the ordinary course of business." *E.g.*, Ad.Op. 2004-18. But the FEC should not consider it to be the "ordinary course of business" for a corporation to offer a benefit to a candidate who "shall not be entitled" to receive that benefit. It is one thing for a corporation to offer a discount to a candidate when the law requires that the candidate receive the benefit. It is something very different for the broadcaster to offer the same discount to a candidate not so entitled. That offer, by definition, is given voluntarily by the broadcaster on a discretionary basis and thus has all the hallmarks of a donation. Conferring a discretionary benefit on an candidate not entitled to the benefit violates any sensible construction of the "ordinary course of business" standard. It should be considered a contribution by the broadcaster, and hence, a violation of section 441b.

Finally, if there is any discretion in the matter (and we do not believe there is), the Commission should choose that interpretation of the law that best comports with the language of the statute and the plain congressional purpose. Here, there can be no serious question but that Congress sought to limit the benefit of the LUC to those candidates who include the "BCRA Statement" in their ads. Whatever course the FCC chooses to take on this matter, the FEC has its own independent obligation to faithfully implement the law.

The position taken in the Draft A.O. renders the BCRA amendment to section 315(b) of the Communications Act meaningless by holding candidates harmless for ignoring the law, and allowing broadcasters to provide precisely the benefit to such candidates that the law intends them to withhold.

Furthermore, in so doing, the Draft also distorts section 441b of FECA by permitting broadcast corporations to provide a benefit to candidates who are legally not "entitled" to that benefit. The FEC in effect would be licensing the MBA to be a knowing participant in breaking the law.

The Commission should reject the Draft A.O., and instead advise MBA that when a broadcaster provides the LUC to a candidate in violation of section 315(b) of the Communications Act, the broadcaster is making an illegal corporate contribution under section 441b of FECA.

We appreciate the opportunity to comment on this matter.

Sincerely,

/s/Fred Wertheimer	*/s/ Trevor Potter*	*/s/ Lawrence M. Noble*
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cc: Each Commissioner
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