FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

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

FROM: OFFICE OF THE COMMISSION SECRETARY

DATE: February 11, 2005

SUBJECT: COMMENT: DRAFT AO 2004-43

Transmitted herewith is a timely submitted comment by Mr. Donald J. Simon regarding the above-captioned matter.

Proposed Advisory Opinion 2004-43 is on the agenda for Monday, February 14, 2005.

Attachment

"Donald Simon"
<DSimon@SONOSKY.COM>

02/11/2005 09:42 AM

To <lnorton@fec.gov>, <rsmith@fec.gov>

cc <sthomas@fec.gov>, <mtoner@fec.gov>, <ewaintraub@fec.gov>, <bsmith@fec.gov>, <dmcdonald@fec.gov>, <dmason@fec.gov>, <secretary@fec.gov>, "Skall, Gregg" <GSkall@wcsr.com>

bcc

Subject Comment on Revised Draft AO 2004-43

Attached please find comments on Revised Draft AO 2004-43 submitted by Democracy 21, the Campaign Legal Center and the Center for Responsive Politics. I am sending a courtesy copy to each Commissioner as well.

Don Simon

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Comment on DRAFT AO 2004-43.PDF

By Electronic Mail

February 11, 2005

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 again on AOR 2004-43, a request by the Missouri Broadcaster's Association (MBA), which 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 key question in the matter is what effect to give to provisions of BCRA that amended 47 U.S.C. § 315(b) of the Communications Act, which provides for the LUC. The BCRA amendments state that a candidate "shall not be entitled" to the LUC unless he provides certain disclosure statements in his broadcast ads (the so-called "BCRA Statement."). *Id.* at 315(b)(2)(A).

We commented in December on the first draft opinion prepared by the general counsel. That draft concluded that a broadcaster does not make an impermissible corporate contribution in offering the LUC to a candidate who fails to include the "BCRA Statement" in his ad – and is thus not "entitled" to the LUC – so long as the broadcaster offers the LUC to all other candidates, "whether or not the candidate was 'entitled' to the LUC..." Agenda Doc. 04-113 (Dec. 9, 2004) at 5.

The revised draft reaches precisely the same conclusion: "[T]he Commission concludes that a broadcaster may offer the LUC to a Federal candidate whose advertisement did not include the required Communications Act 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." Agenda Doc. 05-08 at 5. By this, it makes clear that all "similarly situated" candidates include "any other Federal candidate, whether or not the candidate was 'entitled' to the LUC..." *Id.* at 6.

The flaws in the reasoning of the new draft are the same as the flaws of the old draft, and our prior comments thus remain relevant. For the convenience of the Commission, we attach our earlier comments. As we said before:

> 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 logic of the revised draft opinion, like the earlier draft, is grounded on bootstrap reasoning:

- discounts are not in-kind contributions if offered "in the ordinary course of business."

- the Communications Act requires the LUC discount to be offered to candidates who include the required BCRA Statement in their ads, and thus who are "entitled" to receive that benefit, so:

- the LUC is a discount that is offered "in the ordinary course of business" to entitled candidates, and therefore:

- a broadcaster may offer the LUC to *any* candidate because it is a discount offered "in the ordinary course of business" which is, by definition, not an in-kind contribution.

In short, by this reasoning, because the law requires the discount to be offered to some candidates, it may be offered to all candidates, without regard to whether the candidates are or are not "entitled" to it. Thus, the general counsel concludes, if one candidate complies with the law and receives the LUC, all other candidates can then become "free riders" on this benefit and receive it as well, even if they fail to comply with the conditions set forth in the law to receive it.

The correct approach would be to hold that the LUC must be offered to all candidates who are entitled by law to receive it. But the Commission should *not* consider it to be in the "ordinary course of business" for a corporation to offer a benefit to a candidate who "shall not be entitled" to receive that benefit. 47 U.S.C. § 315(b)(2)(A). Doing so, by definition, is a discretionary act in which the broadcaster is choosing to favor some candidates by providing those candidates with a benefit that they are not entitled to receive. And when that broadcaster is a corporation, it is making an illegal contribution under section 441b of FECA.

This is not the same situation as airline discounts, or bulk purchase book rates, or the other kinds of commercial volume discounts that have formed the basis for the Commission's past rulings in this area. There, the question has been whether a candidate is receiving the same discount that the vendor makes available "in the ordinary course of business and on the same terms and conditions to the vendor's other customers that are not political organizations or committees." *E.g.* Ad.Op. 2001-08. In that context, the sensible position is for the Commission to require corporate vendors to treat all candidates alike, and if they provide a commercially available benefit to one candidate, they must provide the same benefit to all.

Here, the "benefit" at issue here is a statutorily mandated entitlement to a discount, but one that is specifically provided *only* to candidates who meet certain conditions. Treating the candidates who *do* meet those conditions the same as the candidates who *do not* meet those conditions ignores the fact that the law itself establishes two classes of candidates for purposes of this benefit – those who are entitled to receive it and those who are not. It is, in the words of *Buckley*, the "grossest discrimination" to treat "things that are different as though they were exactly alike..." And when a corporation so discriminates in its treatment of candidates, FECA provides that it is making an illegal corporate contribution to the candidate receiving the benefit.

Finally, as we explained in our earlier comments, the general counsel's draft is contrary to congressional intent, and undermines the clear purposes of the BCRA amendments to the Communications Act. Congress clearly sought to limit the benefit of the LUC to those candidates who include the required BCRA Statement in their ads. Whether or how the FCC chooses to enforce the Communications Act provision is not the issue here. The FEC has its own independent obligation to enforce the FECA, including the ban on corporate contributions, in a manner that faithfully implements the law. Instead, the draft response permits broadcast corporations to provide benefits to candidates who are not legally entitled to those benefits, in plain violation of FECA.[1]

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[1] In a supplemental submission filed on January 21, 2005, MBA responded at length to our earlier comments. MBA complains that our analysis would "deputize" the broadcasters to "become the judge and jury" of whether a candidate has complied with BCRA, a burden "that amounts to conscription!" The broadcasters further complain that they "were never consulted whether they were willing or equipped to accept this role." MBA supplemental comments at 5.

MBA's complaint is best directed to Congress, not to the Commission. But MBA is wrong in two senses. First, any corporation has the obligation to comply with FECA – *i.e.*, to ensure that it is not treating candidates more favorably than its non-political customers, and to ensure that it treats all candidates alike. That is a garden-variety FECA obligation that applies to broadcasters as well as all other corporate vendors. There are multiple advisory opinions construing this obligation and if MBA is

We again urge the Commission to reject the general counsel's draft response, 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/ J. Gerald Hebert*	*/s/ Lawrence M. Noble*
Fred Wertheimer Democracy 21	J. Gerald Hebert Paul S. Ryan Campaign Legal Center	Lawrence M. Noble Center for Responsive Politics

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cc: Each Commissioner
Commission Secretary

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confused about what the law means or how to apply it, it is free to ask for clarification of its duties in the future, as it has in this advisory opinion request. It is in this sense no more "conscripted" to obey the law than is any other corporate citizen.

But secondly, the broadcasters who comprise MBA are not just any corporations. They are federal licensees who serve as trustees of the public airwaves, and who are explicitly enjoined by their licenses to serve the public interest. Congress has imposed multiple obligations on broadcast licensees in the political arena, such as the duties to provide "reasonable access," 47 U.S.C. § 312(a)(7) and "equal opportunity," 47 U.S.C. § 315(a), to candidates, in addition to the LUC requirement. 47 U.S.C. § 317(b). BCRA also expanded the obligations of broadcasters to maintain public records relating to broadcast purchases by candidates, or for messages "relating to any political matter of national importance." 47 U.S.C. § 315(e)(1)(B). As the Supreme Court noted in an analogous context in *McConnell v. FEC*, 540 U.S. 93, 236 (2003), such requirements on broadcasters "simply run with the territory." It is less true that broadcasters have been "conscripted" to bear such public interest burdens, than that they volunteered to do so in accepting their valuable licenses to use the public's airwaves.