AGENDA DOCUMENT NO. 05-08-B

FEDERAL ELECTION COMMISSION
SECRETARIAT

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**AGENDA ITEM**
For Meeting of: 2-14-05

**SUBMITTED LATE**

**MEMORANDUM**

**DATE:** February 14, 2005

**TO:** The Commission

**FROM:** Vice Chairman Michael E. Toner MT

**RE:** Advisory Opinion 2004-43 Missouri Broadcasters Association

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Attached please find a proposed amendment to Agenda Document No. 05-08 that I plan to offer at the Commission's Open Session on February 14, 2005.

AO 2004-43
Agenda Document 05-08

Delete Page 5, line 9 through page 6, line 6.
Insert Page 5 line 9:

As noted above, the Commission assumes without deciding for purposes of this opinion that one of Senator Bond's advertisements did not contain an adequate Communications Act Statement. BCRA amended 315(b) of the Communications Act to provide that a Federal candidate "shall not be *entitled*" [emphasis added] to receive the LUC if any of his advertisements have failed to include the required Communications Act Statement. 47 U.S.C. 315(b).

Under the plain meaning of these statutory provisions, a candidate who satisfies the Communications Act Statement requirement is guaranteed the LUC as a matter of law. It is equally plain under these statutory provisions that a candidate who fails to include the Communications Act Statement does not have a legal guarantee to receive the LUC. In this circumstance, the statutory language is permissive, making clear that broadcasters have the discretion to provide the LUC to candidates who fail to include the Communications Act Statement, but are not legally required to do so. Nowhere in either the Communications Act or BCRA is there any statutory language indicating that broadcasters are legally barred from affording such candidates the LUC, or that providing the LUC could somehow constitute, under FECA, an illegal in-kind corporate contribution from the broadcaster to the candidate. This interpretation is consistent with how the FCC has construed the BCRA amendments to the Communications Act. See footnote 5 supra (FCC has interpreted BCRA amendments to allow a station to offer the LUC to a candidate who fails to include an adequate Communications Act Statement, as long as the station treats all Federal candidates in a consistent, non-discriminatory manner). See also McConnell v. FEC, 540 U.S. 93, 364 (2003) (Stevens, J., dissenting) (observing that the statute "does not *require* broadcast stations to charge a candidate higher rates for unsigned ads that mention the candidate's opponent. Rather, the provision simply permits stations to charge their normal rates for such ads.") (emphasis in original)

Accordingly, a broadcaster does not make an in-kind contribution under FECA by charging a Federal candidate the LUC for advertising time when the candidate is not "entitled" to the LUC under the Communications Act. Because the Commission has concluded that no in-kind contribution results, we do not need to reach your question regarding re-billing.