FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 30, 2006

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2006-10

Robert F. Bauer, Esq.
Caroline P. Goodson, Esq.
Perkins Coie LLP
607 Fourteenth St., NW
Washington, DC 20005

Dear Mr. Bauer and Ms. Goodson:

We are responding to your advisory opinion request concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to public service announcements ("PSAs") that EchoStar Satellite LLC ("EchoStar") is planning to create and broadcast. The Commission concludes that EchoStar's planned PSAs featuring Federal candidates would not be coordinated communications provided that certain conditions are met. Specifically, the planned PSAs would qualify for the charitable solicitation exemption from the definition of "coordinated communication" in 11 CFR 109.21(g) provided that: (1) the organizations for which the funds are solicited are of the type described in 11 CFR 300.65; and (2) the solicitations themselves comply with the requirements of 11 CFR 300.65.

Background

The facts presented in this advisory opinion are based on your letter received on February 21, 2006 and your electronic-mail message received on May 11, 2006.

EchoStar is a limited liability company that is treated as a corporation for tax purposes and FECA purposes. *See* 11 CFR 110.1(g). It provides pay-TV satellite service nationwide via its Direct Broadcast Satellite system under the brand name "DISH Network." EchoStar plans to air a series of PSAs nationwide that will feature well-known Americans delivering messages that promote, and solicit donations to, charitable causes, such as aid to victims of Hurricane Katrina, or awareness of important health

issues such as breast cancer or heart disease. The Appendix to this advisory opinion contains a sample PSA script. Background imagery in the communications will be limited to imagery associated with the charitable organization and will not include any campaign- or election-related images.

EchoStar will produce, direct, and record the PSAs, and will have complete financial and creative control over each PSA, including its timing. EchoStar intends to ask prominent Americans, including Members of Congress, to appear in the PSAs and read the scripts provided by EchoStar. Regardless of whether or not a particular PSA features a Member of Congress, the PSAs will not contain campaign materials or expressly advocate the election or defeat of a clearly identified Federal candidate; nor will they refer to any political party, election or campaign, or solicit any contributions for a political campaign or political committee. Moreover, you have represented that no campaign issues will be permitted as topics for any of the PSAs and the PSAs will not make reference to any pending official matter.[1]

EchoStar does not intend to air PSAs featuring candidates during the relevant "electioneering communication" time period.[2] Thus, any PSA featuring a Member of Congress who is a candidate for election will not air in that Member's State (in the case of Senate candidates) or Congressional district (in the case of House candidates) within 30 days of the Member's primary or runoff election, as applicable, or within 60 days of the Member's general or runoff election, as applicable.

Question Presented

Do EchoStar's proposed public service announcements featuring Members of Congress constitute coordinated communications under the Act and Commission regulations?

Legal Analysis and Conclusions

No, EchoStar's proposed public service announcements featuring Members of Congress ("the proposed PSAs") do not constitute coordinated communications under the Act and Commission regulations if they satisfy the requirements set forth below.

The Act 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) and (9)(A); 11 CFR 100.52(a) and 100.111(a); *see also* 2 U.S.C. 441b(b)(2); 11 CFR 114.1(a)(1) (incorporating these definitions into the terms "contribution" and "expenditure" with respect to corporate

[1] Not all Commissioners agree that this fact is relevant.

[2] The Act and Commission regulations define an "electioneering communication" as any broadcast, cable, or satellite communication that (1) refers to a clearly identified candidate for Federal office; (2) is publicly distributed within 60 days before a general election or 30 days before a primary election for the office sought by the candidate referenced in the communication; and (3) in the case of a Congressional candidate, is targeted to the relevant electorate. *See* 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29(a).

activity). The Act defines an in-kind contribution to include an expenditure "made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 2 U.S.C. 441a(a)(7)(B)(i). A coordinated communication is an in-kind contribution by the person paying for the communication, unless it comes within an exemption from the definition of "contribution." 2 U.S.C. 441a(a)(7)(B)(i); 11 CFR 109.21(b).

The Act and Commission regulations prohibit any corporation from making any contribution or expenditure, including providing "anything of value," in connection with a Federal election. 2 U.S.C. 441b(a); 11 CFR 114.1(a), 114.2(b)(1) and (b)(2). Any person who is prohibited from making contributions or expenditures, such as a corporation, is also prohibited from paying for a coordinated communication. 11 CFR 109.22. Thus, EchoStar may not air PSAs that constitute coordinated communications.

The Commission recently revised the definition of "coordinated communication" at 11 CFR 109.21. *See* Explanation and Justification for Final Rules on Coordinated Communications, 71 FR 33190 (June 8, 2006).[3] Generally, a communication is considered a coordinated communication if it satisfies the following three-pronged test: (1) the communication is paid for, in whole or in part, by a person other than the Federal candidate or authorized committee in question; (2) one or more of the six conduct standards set forth in 11 CFR 109.21(d) is satisfied; and (3) one or more of the four content standards set forth in 11 CFR 109.21(c) is satisfied. *See* 11 CFR 109.21(a). However, there are exceptions to the general definition, including certain kinds of endorsements and solicitations by Federal candidates. *See* 11 CFR 109.21(g); *see also* 11 CFR 109.21(f) and (h).

In particular, the regulation exempts from the definition of "coordinated communication" public communications in which a Federal candidate solicits funds for organizations pursuant to 11 CFR 300.65 provided that the public communications do not promote, support, attack, or oppose the soliciting candidate or another candidate seeking election to the same office as the soliciting candidate. *See* 11 CFR 109.21(g). The proposed PSAs are public communications as defined in 2 U.S.C. 431(22) and 11 CFR 100.26 because they are satellite communications. In addition, Federal candidates appearing in the PSAs will solicit funds for charitable organizations. Based on your description of the PSAs, the Commission concludes that the PSAs would not promote, support, attack or oppose the Federal candidates participating in the PSAs.[4] Accordingly, EchoStar's proposed PSAs would qualify for the charitable solicitation exception provided that: (1) the organizations for which the funds are solicited are described in 26 U.S.C. 501(c) and have applied for or have been granted tax-exempt status pursuant to 26 U.S.C. 501(a) ("section 501(c) organizations"); and (2) the solicitations themselves

[3] The revised regulation will take effect on July 10, 2006. *See* 71 Fed. Reg. 33190 (June 8, 2006). As you requested, we are analyzing the proposed PSAs under the revised regulation.

[4] *See* Advisory Opinion 2003-25 (Weinzapfel) (concluding that U.S. Senate candidate Evan Bayh's endorsement of mayoral candidate Jonathan Weinzapfel in an advertisement did not promote, support, attack, or oppose Senator Bayh).

comply with the requirements of 11 CFR 300.65.[5] *See* 11 CFR 109.21(g)(2); 11 CFR 300.65. If these conditions are met, EchoStar's PSAs featuring Federal candidates would not constitute coordinated communications.[6]

Furthermore, proposed PSAs that will be publicly distributed more than 90 days before the featured candidates' elections[7] or that will not be publicly distributed within the featured candidates' jurisdictions would not be coordinated communications because they would not satisfy the content prong of the three-part test.[8] If the proposed PSAs, however, will be publicly distributed in the featured candidates' jurisdictions within 90 days of the featured candidates' elections and the PSAs do not solicit funds for section 501(c) organizations, then they would constitute coordinated communications.[9]

Because the proposed PSAs would qualify for the charitable solicitation exception in 11 CFR 109.21(g) under the facts presented in your request, it is unnecessary to consider the press exemption here. If the proposed PSAs were not exempt under 11 CFR 109.21(g), it would be necessary to consider the press exemption. *See* 2 U.S.C. 431(9)(B)(i); 11 CFR 100.73 and 300.65.

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[5] Section 300.65 permits Federal candidates or officeholders to make a "general solicitation" on behalf of a 501(c) organization without regard to the Act's amount limitations or source prohibitions under certain circumstances. *See* 11 CFR 300.65(a). Such a "general solicitation" may be made on behalf of a section 501(c) organization if (1) the organization does not engage in activities in connection with an election; or (2) the organization's principal purpose is not to conduct election activity and the solicitation is not to obtain funds for activities in connection with an election. *Id.* Such a "general solicitation" may seek unlimited contributions without regard to the Act's source prohibitions or amount limitations. *Id*.

[6] The Commission notes that the solicitation exemption set forth at 11 CFR 109.21(g)(2) applies without regard to when a communication is made. Even if the proposed communications were to be made during the "electioneering communication" period they would not constitute coordinated communications, although they would be subject to the restrictions applicable to electioneering communications, assuming they otherwise satisfied the definition of "electioneering communication" at 2 U.S.C. 434(f)(3)(A)(i); 11 CFR 100.29(a).

[7] For PSAs in future years that feature candidates for President or Vice President, proposed PSAs that are publicly distributed either in a particular State more than 120 days before the featured candidate's primary election in that State, or after the general election would not be coordinated communications. *See* 11 CFR 109.21(c)(4)(ii).

[8] The other content standards would not be satisfied because the proposed PSAs would not be electioneering communications, would not disseminate, distribute, or republish campaign materials, and would not expressly advocate the election or defeat of a clearly identified Federal candidate. *See* 11 CFR 109.21(c)(1) through (3).

[9] The payment prong would be satisfied because EchoStar would be paying for the PSAs. The conduct prong would be satisfied because the candidate would be appearing in the PSAs. *See* Advisory Opinion 2003-25 (Weinzapfel). The Commission has determined that communications that satisfy the three-pronged coordinated communication test are "for the purpose of influencing a Federal election." *See* 11 CFR 109.21(b). Although the Commission considered replacing the fourth content standard in former 11 CFR 109.21(c)(4) with a standard based on public communications "made for the purpose of influencing a federal election," it ultimately declined to do so because it determined that a bright-line test was more appropriate. *See* Notice of Proposed Rulemaking on Coordinated Communications, 70 Fed. Reg. 73946, 73952 (Dec. 14, 2005); *see also* Explanation and Justification for Final Rules on Coordinated Communications, 71 Fed. Reg. at 33200. Thus, any communications that meet the coordinated communication test are, by definition, "for the purpose of influencing an election."

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)

Michael E. Toner
Chairman

Enclosure: (Advisory Opinion 2003-25 (Weinzapfel))

EXHIBIT A

Sample PSA Script: Women and Heart Disease

Announcer: Hello, I'm [NAME]. Most of us think of heart disease as a problem that mostly affects men. But today, heart disease is one of the leading causes of death among American women. It doesn't have to stay that way. Lower cholesterol, daily exercise, and regular visits to your doctor can help you fight back. So have heart, America, and together we can reduce the risk of heart disease.

Voice Over: This message brought to you by DISH Network.

ATTACHMENT A
Page 1 of 1

CONCURRENCE IN ADVISORY OPINION 2006-10 OF COMMISSIONERS DAVID M. MASON AND HANS A. von SPAKOVSKY AND DISSENT OF CHAIRMAN MICHAEL E. TONER

Commissioners Mason and von Spakovsky voted for this advisory opinion with the reservations expressed below. Because of the same reservations, Chairman Toner dissented. Accordingly, this is a concurrence as to Commissioners Mason and von Spakovsky and a dissent as to Chairman Toner.

This advisory opinion concerns the coordination regulation, 11 C.F.R. § 109.21 (2006), and particular public-service announcements (PSAs) in which federal candidates make solicitations for charities. The advisory opinion correctly concludes that the PSAs are not coordinated communications. However, the advisory opinion, citing the advisory-opinion request, notes that no "campaign issues" will be topics of the PSAs and that the PSAs will not refer to any "pending official matter." Advisory Op. 2006-10, 2006 WL 1879008, at *1 & n.1 (F.E.C. June 30, 2006), *available at* http://ao.nictusa.com/ao/no/060010.html (all Internet sites visited July 10, 2006). We write to explain that these facts are irrelevant and to emphasize that the use of the phrase "campaign issues" does not mean the Commission has a defined test for what constitutes a "campaign issue."

As an initial matter, the PSAs are exempt from the coordination regulation, because they do not promote, support, attack, or oppose ("PASO") the candidates, or opponents of the candidates, making solicitations. That is the end of the inquiry. *See* 11 C.F.R. § 109.21(g)(2). The enumeration of additional non-statutory, non-regulatory factors is inappropriate in an advisory opinion, whose purpose is to apply the statute and regulations. *See* 2 U.S.C. § 437f(a)(1) (1986).

There is no basis to conclude that the "campaign issues" and "official matters" criteria proffered in the request have any bearing on proper interpretation or application of any relevant statutory or regulatory requirements.

First, the coordination regulation includes four separate content standards. *See* 11 C.F.R. § 109.21(c)(1)-(4). The Commission could have chosen "campaign issues" and "pending official matters" as fifth and sixth content standards, but it did not. *See id.* At one time the Commission did attempt to pursue coordination claims based on a "campaign themes" theory, *see, e.g.*, Compl. at 7, *FEC v. Forbes*, No. 04-5352 (S.D.N.Y. Sept. 3, 1998), but the Commission withdrew the most recent suit filed on that basis, *see* Statement of Reasons of Vice Chairman Wold & Comm'rs Elliott, Mason & Sandstrom for Voting to Withdraw the Commission's Complaint in *FEC v. Forbes, et al.*, (F.E.C. May 26, 1999), *available at* http://eqs.sdrdc.com/eqsdocs/00003A06.pdf, and later promulgated a coordination regulation without adding "campaign themes" to the regulation.

See 11 C.F.R. § 100.23 (2000), *repealed as noted in* Coordinated and Independent Expenditures, 68 FED. REG. 421, 422 (2003) (final rules) (citing P. L. 107-155, § 214(b), (c) (2002)); General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures, 65 FED. REG. 76138, 76138-40, 76141-45 (2000) (final rules). This is not because the possibility did not arise. Indeed, in response to questions from Commissioner Toner at the 2002 hearing on coordinated and independent expenditures, there was substantial discussion of coordination of advertising on "campaign themes."[1] Thus, excluding "campaign themes" was not accidental or an oversight. Moreover, the litigation spawning the most recent coordination rulemaking did include disputes over coordination of "helpful themes." *See, e.g.*, Reply Br. for FEC at 16, *Shays v. FEC*, No. 04-5352 (D.C. Cir. March 25, 2005). However, the resulting orders and opinions did not address the issue, *see, e.g.*, *Shays v. FEC*, 337 F. Supp.2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005), and the Commission did not address it in the revised regulation. *See* Coordinated Communication, 71 FED. REG. 33190 (2006) (final rules); Coordinated Communication, 70 FED. REG. 73946 (2005) (notice of proposed rulemaking).

Second, in considering 11 C.F.R. § 109.21(g), the Commission considered adopting, but chose not to adopt, a definition of PASO. *Cf.* Coordinated Communications, 70 FED. REG. at 73951 (proposing a safe harbor for communications not to be treated as coordinated); Coordinated Communications, 71 FED. REG. at 33199 & n.38 (declining to replace the time frame in the fourth content standard of the previous coordination regulation, 11 C.F.R. § 109.21(c)(4)(ii) (2003), with a PASO standard); *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003) (opinion of Stevens & O'Connor, JJ., joined by Souter, Ginsburg & Breyer, JJ.) (summarily holding that PASO is not unconstitutionally vague). Having just declined to adopt a regulatory definition, the Commission may not, in the advisory-opinion process, create new, generic standards altering that standard. *See* Statement of Reasons of Vice Chairman Wold & Comm'rs Elliott, Mason & Sandstrom on the Audit of Dole for President Comm., Inc., *et al.* at 4-5 (F.E.C. June 24, 1999), *available at* http://www.fec.gov/members/mason/masonstatement5.htm. After all, the Commission may not use "advisory opinions to establish rules of conduct." *Id.* at 2. Instead, the Commission establishes rules of conduct by rulemaking. "Rulemaking is not simply the preferred method for filling in the FECA. It is the required method." *Id.* at 3. Thus, we may, in an advisory opinion, conclude that particular communications PASO, but we may not, validly, declare as a generic standard, that communications mentioning "campaign issues" PASO.

Third, the Commission also considered, but did not adopt, a lobbying exception to the electioneering-communication regulation predicated in part on reference to pending official matters. *See* Coordinated and Independent Expenditures, 68 FED. REG. at 441. This occurred during the same 2002 rulemaking cycle in which the coordination rule was adopted in similar form to its current iteration. *Compare* 11 C.F.R. § 109.21 (2003) *with id.* (2006). Having considered and rejected application of the "pending official matter" standard in a closely related rulemaking,[2] we may not, in an advisory opinion, revive and inject that standard here.

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[1] *See, e.g.*, 2 Hearing on Proposed Rulemaking on Coordinated & Independent Expenditures 21-22, 25-26 (F.E.C. Oct. 23-24, 2002); 1 *id.* 214-15, 231-32.

[2] Electioneering communications are a content standard in the coordination regulation, *see* 11 C.F.R. 109.21(c)(1), and the statutory limit on our electioneering-communication exemption authority is the same PASO standard used in

Given these three factors, if those who insisted on including the "no mention of campaign issues and pending official matters" factors as a condition of voting to approve this advisory opinion, *see* Open Meeting Agenda Audio File (F.E.C. June 22, 2006), *available at* http://www.fec.gov/agenda/2006/agenda20060622.shtml, are suggesting that these exclusions are relevant to the question of whether a communication PASOs a candidate, that suggestion is interesting. Unfortunately, the bare reiteration of these factors provides no support for that point, nor any guidance on how those factors relate to the PASO standard. In considering a "lobbying" exclusion, reference to pending official matters was proposed as a threshold factor in determining that a communication was *not* promoting or attacking a candidate. While the Commission did not adopt that proposal, *see* Coordinated and Independent Expenditures, 68 FED. REG. at 441, it ran directly counter to the suggestion that might be gleaned from reading the current opinion as it could be read, *i.e.*, that reference to pending official matters could constitute promoting or attacking a candidate. The conclusion that could be drawn from this opinion, that mentioning a pending official matter constitutes PASO, runs directly counter to the suggestion in the "lobbying" proposal, that mention of pending official matters is a threshold requirement for *avoiding* PASO. This confusion underlines the fact that the "pending official matter" category was irrelevant to a proper answer to the request.

Nevertheless, the phrase "campaign issues" does appear in a Commission regulation and in advisory opinions.

The regulation concerns voter guides. *See* 11 C.F.R. § 114.4(c)(5) (2003). More specifically, it concerns corporate or union spending on voter guides discussing "campaign issues." However, the regulation does not prohibit the corporate or union spending. Rather, it permits what might otherwise be prohibited corporate or union spending provided that, *inter alia*, the spending is *not* coordinated. *See id.* § (i)-(ii)(A). Therefore, the regulation does not apply to coordinated communications. Thus, the reference in the regulation to "campaign issues" has no bearing on the coordination regulation itself, much less on communications that the coordination regulation exempts. *See, e.g.*, 11 C.F.R. § 109.21(g)(2).

Most references to "campaign issues" in advisory opinions concern voter guides. Several others address payment of legal expenses with campaign funds. Two, however, do address candidate communications in fora provided by corporations. Both conclude that the mere discussion of "campaign issues" alone is not sufficient to make payments for or incident to a candidate's speech a contribution to, or a prohibited expenditure in connection with, the candidate's campaign *See* Advisory Op. 1996-11, 1996 WL 270977, at *5 (F.E.C. May 20, 1996) ("discussion of campaign issues by the candidate during a campaign necessitates further scrutiny to determine campaign-relatedness"), *available at* http://ao.nictusa.com/ao/no/960011.html; Advisory Op. 1992-

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11 C.F.R. § 109.21(g)(2). *See* 2 U.S.C. § 434(f)(3)(B)(iv) (2004) (citing 2 U.S.C. §431(20)(A)(iii) (2002) (referring to "a public communication that refers to a clearly identified candidate for [f]ederal office .. and that [PASOs] a candidate for that office"). "Public communication" is defined in 2 U.S.C. § 431(22) *and* 11 C.F.R. § 100.26 (2006). This definition uses the terms "mass mailing" and "telephone bank." "Mass mailing" is defined in 2 U.S.C. § 431(23) and 11 C.F.R. § 100.27 (2002), and "telephone bank" is defined in 2 U.S.C. § 431(24) and 11 C.F.R. § 100.28 (2002).

6, 1992 WL 51226, at *3 (F.E.C. Feb. 14, 1992) ("discussion of campaign issues during an election by the candidate necessitates further scrutiny to determine campaign-relatedness"), *available at* http://ao.nictusa.com/ao/no/920006.html. Thus, to the extent that advisory opinions dealing with different statutory and regulatory provisions bear on the current advisory-opinion request, they suggest that mere discussion of campaign issues alone does not sweep an activity within Commission regulations.

Finally, notwithstanding the use of "campaign issues" at one place in the regulations and in several advisory opinions, if the phrase in this opinion were read as establishing a substantive standard defining the reach of the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq.*, or of the PASO standard, we would have grave reservations about the vagueness of the phrase standing alone. *Cf., e.g., Buckley v. Valeo*, 424 U.S. 1, 40-41 & nn.47-48, 76-77 (1976) (discussing vagueness). In a permissive section of our regulations on voter guides, the vagueness is of lesser concern. Vagueness is also of lesser concern in a standard only triggering further scrutiny. *See* Advisory Op. 1996-11, *supra;* Advisory Op. 1992-6, *supra*. Unfortunately, the instant opinion could be read as excluding messages that refer to campaign issues from the exemption. Who, after all, is to say what constitutes a campaign issue? For example, is education a "campaign issue"? Is Hurricane Katrina? Yet education and disaster relief are likely subjects of PSAs at issue here.

Since the purpose of advisory opinions is to construe FECA and regulations, *see* 2 U.S.C. § 437f(a)(1), and because the "campaign issues" and "pending official matters" categories do not appear in the relevant portions of the statute and regulations, including these categories, without further definition or explanation, is neither appropriate nor helpful.

September 26, 2006

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Michael E. Toner
Chairman

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David M. Mason
Commissioner

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Hans A. von Spakovsky
Commissioner