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September 5, 2007

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AOR 2007-20

Thomasenia P. Duncan
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Advisory Opinion Request on Behalf of XM Satellite Radio

Dear Ms. Duncan:

This advisory opinion request is submitted on behalf of XM Satellite Radio Inc. ("XM"). Later in September 2007, XM will launch POTUS '08, a 24/7 commercial-free channel dedicated to the 2008 presidential election. This is an innovative effort to increase the depth and breadth of voter understanding of candidates and issues that are of vital importance to our country today. Among other things, the channel will provide free airtime for presidential candidates to use as each sees fit. XM seeks confirmation that (1) XM's provision of free airtime would not be a corporate in-kind contribution under 2 U.S.C. § 441b(a) or electioneering communication under 2 U.S.C. § 434(f) and (2) this free airtime for use by presidential candidates, which will not contain paid advertising, does not require candidate disclaimers applicable to advertising under 2 U.S.C. § 441d.

XM further requests that you consider this opinion request on an expedited basis. POTUS '08, will begin broadcasting on a full-time basis in September. Because of the important First Amendment press issues raised by this request, expedition is sought to assure XM and federal candidates that this innovative provision to presidential campaigns of airtime on POTUS '08 fully complies with federal election laws.

FACTS

XM is America's largest satellite radio company with more than 8 million subscribers. XM is owned by XM Satellite Radio Holding, Inc, a publicly traded corporation on the NASDAQ exchange. For a monthly fee, XM's subscribers can listen to more than 170 digital channels. XM is launching the first national radio channel dedicated exclusively to the presidential election. The details of the channel are contained in the attached May 21, 2007 press release from XM (See Exhibit 1). This 24-hour, commercial free channel, created in association with C-SPAN and other media outlets, will be called "POTUS '08." The channel's name comes

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from the Washington, D.C. insiders' code name for the President of the United States. POTUS '08 will be located at XM channel 130. POTUS '08 will be "free to air," meaning that anyone with an XM radio will be able to tune in, regardless of whether they have an XM subscription.

The presidential election channel will feature news updates, candidate interviews, complete speeches, debate coverage, latest polling results, fundraising status and live call-in shows. Non-traditional media outlets, such as bloggers and podcasters, will also provide content for the channel. It will also utilize C-SPAN's rich political archive to re-air archival audio of historic moments from past political campaigns. As a separate and distinct part of POTUS '08, the channel will also provide free airtime for presidential candidates or their representatives to speak to voters with no editing by XM, so that the candidate's views can be conveyed to the audience in an unfiltered manner ("Candidate Supplied Content"). Under access guidelines established by XM, Candidate Supplied Content will be content that legally qualified candidates for President supply to XM and that XM will broadcast on POTUS '08 during a time period each day that XM designates for this purpose.

XM's broadcasts on the POTUS '08 channel are subject to specific regulation by the Federal Communications Commission ("FCC"). The proposed channel will be in full compliance with both the "reasonable access" and "equal opportunities" provisions of the Communications Act. 47 U.S.C. §§ 312(a)(7), 315(a). *See also, Establishment of Rules and Policies for the Digital Audio Satellite Service in the 2310-2360 MHz Frequency Bands*, 12 FCC Rcd. 5754, ¶ 92 (1997)(requiring satellite radio providers to comply with the same political broadcasting rules as terrestrial broadcasters).

DISCUSSION

1. XM believes that the Candidate Supplied Content on its POTUS '08 channel is precisely analogous to the free cable television airtime to federal candidates in California that was previously approved by this Commission in Advisory Opinion 1998-17 (September 10, 1998) to Daniels Cablevision, Inc. The prior advisory opinion involved cable television regulated by the Federal Communications Commission and available only upon a payment of fee by subscribers. The free airtime on satellite radio, which is the subject of this request, differs in its medium (radio) and in the magnitude of the airtime but is substantially the same.

For the same reasons, XM's provision of free airtime, under FEC precedent, would not be a corporate in-kind contribution. In Advisory Opinion 1998-17, the Commission determined that an incorporated cable television provider could offer free airtime to federal candidates without the donated airtime constituting a prohibited corporate in-kind contribution. The Commission viewed "the proposed activity as falling within the category of commentary, which includes the concept of guest commentary." In its analysis, the Commission emphasized that the media entity covered under the press exemption in the FEC regulations was performing a public service under the Communications Act. As the Commission found, "in this instance, the Communications Act provides important guidance in interpreting the Federal Election Campaign Act by illuminating the policy Congress intended to foster." (Attached as Exhibit 2 are the comments filed by the general counsel of the Federal Communications Commission on August 14, 1998 that the

Commission relied on in Advisory Opinion 1998-17.) Because the free airtime to all candidates for the federal offices would comply with the Communications Act and FCC regulations, the Commission found that “these equal access assurances take the Daniels proposal outside the realm of mere in-kind contributions of advertising space.”

Similarly, in Advisory Opinion 2004-07, the Federal Election Commission concluded that MTV’s proposal to provide airtime for candidates to discuss issues on a cable television channel fell within the media exception, if MTV complied with the Communications Act and FCC regulations. Thus, on the basis of FEC precedents for free airtime on cable television, the proposed free airtime for Candidate Supplied Content on POTUS ‘08 would likewise be permissible and would not constitute a prohibited corporate in-kind contribution.

These cable television precedents were applied to Internet sites in Advisory Opinion 2005-16 where the Commission found that Internet websites in covering or carrying news stories, commentary or editorials were within the press exemption. Because the POTUS ‘08 channel is a press entity, and neither it nor XM is owned or controlled by any political party, political committee or candidate, XM’s costs in covering or carrying a news story, commentary or editorial about federal candidates for the office of United States President in 2008 should be likewise exempt from the definitions of contribution and expenditure.

Because the Commission precedents are so clear in the context of cable television and the Internet, and the First Amendment interest behind the press exemption is so compelling, XM requests the quickest possible expedition by the Commission in issuing an advisory opinion that the proposed radio content falls within the media exemption of 2 U.S.C. § 431(9)(B)(i). The Commission precedents, involving cable television and the Internet, apply equally to a radio channel such as of POTUS ‘08 and, for the same reasons, the POTUS ‘08 channel is a press entity. Moreover, the Candidate Supplied Content on the POTUS ‘08 channel will more fully inform the voters during an important election season and will comply with the Communications Act by providing reasonable access and equal opportunities to candidates for federal elective office. Thus, XM requests that the Commission confirm that on the first question free airtime provided through Candidate Supplied Content on POTUS ‘08 falls within the media exemption of 2 U.S.C. § 431(9)(B)(i) and would not be a corporate in-kind contribution or expenditure.

For similar reasons, neither Candidate Supplied Content nor the POTUS ‘08 channel would constitute electioneering communications. The POTUS ‘08 channel would mention by name many clearly identified Federal candidates, would be broadcast within 30 days of a primary election, and would target a nationwide electorate. However, the radio broadcasts would not be electioneering communications under 2 U.S.C. § 434(f) or 11 C.F.R. 100.29(c)(2) because the broadcasts on this channel, including candidate appearances and Candidate Supplied Content, would fall within the press exemption for this satellite radio channel that is not owned or controlled by any political party, political committee or candidate. The communication therefore falls under an exemption to the definition of “electioneering communication.” 2 U.S.C. 434(f); 11 C.F.R. 100.29(c)(2). XM requests that the Commission likewise confirm that the planned activities of the POTUS ‘08 channel are exempt from the definition of “electioneering communication.”

2. On the second question, XM requests confirmation that the provision of free airtime to presidential candidates through Candidate Supplied Content does not require candidate disclaimers. This Commission addressed a similar question in Advisory Opinion 2005-18 where a Congressman purchased time on a radio station and this Commission held that other federal candidates who appeared as guests on the program would not need to issue separate disclaimers. The Commission reasoned:

“Any other Member of Congress who appears on this show need not also make a disclaimer. You do not indicate that any other Member of Congress would have any editorial control over the content of the program or the statements of yourself, other guests, or callers. They will not pay for or authorize communication, and therefore would not be required to make a disclaimer under 2 U.S.C. § 441(d).”

Similarly here, radio appearances by federal candidates should not require a disclaimer under 2 U.S.C. § 441(d) and XM expressly requests that the Commission confirm this conclusion.

As previously noted, the POTUS '08 channel will, among other things, provide free airtime for presidential candidates through Candidate Supplied Content. This free airtime will not contain paid advertising. This is different from Advisory Opinion 1998-17 which held that each candidate who advertises under the proposed program should be advised of the necessity for a disclaimer in compliance with all applicable FEC regulations. XM submits that it is only advertisements, paid or unpaid, during the free airtime or otherwise that must include the appropriate legal disclaimers. Thus, XM seeks confirmation that the Candidate Supplied Content on POTUS '08 does not require inclusion of any particular disclaimer by that candidate.

Other than candidate appearances themselves as part of Candidate Supplied Content, for which XM believes that this Commission's precedents are clear, there may be ambiguity if a presidential candidate chooses to use his free airtime for Candidate Supplied Content on XM to refer to candidate-supplied material that is not an advertisement nor has been used elsewhere as an advertisement. XM requests that the Commission clarify, to the extent that there is ambiguity, that the disclaimers, as discussed in Advisory Opinion 1998-17, apply only to advertising.

Thank you for your consideration of this request on an expedited basis due to the imminent broadcast deadlines.

Very truly yours,



John C. Keeney, Jr.

Attachments

Exhibit 1

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XM RADIO TO LAUNCH FIRST NATIONAL RADIO CHANNEL DEDICATED TO THE PRESIDENTIAL ELECTION

XM Partners with C-SPAN, other media outlets on "POTUS '08" - a 24-Hour, Commercial-Free XM Radio Channel Devoted to 2008 Presidential Campaign

Washington, D.C., May 21, 2007 -- XM Satellite Radio today announced it will launch a new radio channel dedicated to the 2008 presidential election, marking the first time that a national radio channel has been devoted to a presidential campaign. The 24-hour, commercial-free channel, created in association with C-SPAN and other media outlets, will be called "POTUS '08." The channel's name (pronounced POH-tus) comes from the Secret Service code name for the President of the United States.

The channel will be "free to air" on XM, meaning that it will be broadcast free to all XM radio receivers. If a consumer has an XM radio but opts not to subscribe to XM, the consumer can still listen to the presidential election channel.

The presidential election channel will feature news updates, candidate interviews, complete speeches, debate coverage, latest polling results, fundraising status, and live call-in shows. The channel will provide free airtime for presidential candidates to speak to voters. Non-traditional media outlets, such as bloggers and podcasters, will provide content for the channel. It will also air archival audio of historic moments from past campaigns, tapping C-SPAN's rich political archive. Additional content will be announced prior to launch.

XM will preview the channel in June 2007 with live XM original coverage and a re-broadcast of candidate debates hosted by CNN. The channel will formally launch in September 2007 and air through November 2008, when voters go to the polls to elect the 44th president. More than 8 million customers listen to XM on satellite radios for the car, home, and portable use.

"This channel is a unique public service opportunity to provide our listeners with a commercial-free and politically neutral destination that is focused solely on this important presidential election," said Hugh Panero, chief executive officer, XM Satellite Radio.

"C-SPAN and XM Radio have been long time partners and are pleased to join forces to bring radio listeners up-to-date information about the historic and competitive 2008 presidential election," said Susan Swain, President and co-Chief Operating Officer, C-SPAN.

(more)

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“POTUS 08” will be located at XM Channel 130. The channel is the latest in a series of temporary XM channels devoted to special programming. These “microchannels” on XM have included the Live 8 concerts, holiday music channels, and Red Cross Radio, which provided daily information to Red Cross workers in the weeks following Hurricane Katrina. “POTUS ‘08” is the most ambitious microchannel on XM to date, and the first devoted to a major news event.

About XM

XM (NASDAQ: XMSR) is America's number one satellite radio company with more than 8 million subscribers. Broadcasting live daily from studios in Washington, DC, New York City, Chicago, the Country Music Hall of Fame in Nashville, Toronto and Montreal, XM's 2006 lineup includes more than 170 digital channels of choice from coast to coast: commercial-free music, premier sports, news, talk radio, comedy, children's and entertainment programming; and the most advanced traffic and weather information.

XM, the leader in satellite-delivered entertainment and data services for the automobile market through partnerships with General Motors, Honda, Hyundai, Nissan, Porsche, Subaru, Suzuki and Toyota is available in 140 different vehicle models for 2007. XM's industry-leading products are available at consumer electronics retailers nationwide. For more information about XM hardware, programming and partnerships, please visit <http://www.xmradio.com>.

About C-SPAN

C-SPAN, the political network of record, was created in 1979 by America's cable companies as a public service. Based in Washington, D.C., C-SPAN now offers three television networks, a nationally available radio station heard exclusively on XM Satellite Radio, and several Web sites. C-SPAN is currently available in 90.7 million households, C-SPAN2 in 82.1 million households and C-SPAN3 in 12.2 million households. For more information, visit www.c-span.org.

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Factors that could cause actual results to differ materially from those in the forward-looking statements in this press release include demand for XM Satellite Radio's service, the Company's dependence on technology and third party vendors, its potential need for additional financing, as well as other risks described in XM Satellite Radio Holdings Inc.'s Form 10-K filed with the Securities and Exchange Commission on 3-9-06. Copies of the filing are available upon request from XM Radio's Investor Relations Department. Programming is subject to change.

Exhibit 2



Federal Communications Commission
Washington, D.C. 20554

August 14, 1998

BY FAX AND FIRST CLASS MAIL

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

COMMENTS ON
AOR 1998-17
w/attachment

Aug 14 11:02 AM '98

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2001 SEP -5 P 3

Re: AOL 1998-17 (Daniels Cablevision, Inc.)

Dear Mr. Noble:

Daniels Cablevision, which operates two cable television systems in Southern California, has submitted to the FEC a plan to provide, in Daniels' words, "free campaign airtime for California candidates for Federal political office."¹ Daniels seeks an advisory opinion from the FEC to the effect that its plan is not prohibited by 2 U.S.C. § 441b(a), which generally prohibits corporations from making contributions or expenditures in connection with a federal election. You asked the FCC for guidance with respect to the interpretation of provisions of the Communications Act that are relevant to Daniels' request. This letter presents my own views concerning those provisions, but does not necessarily reflect the views of the FCC. In my view, to harmonize the Communications Act and the Federal Election Campaign Act, section 441b(a) should be construed not to prohibit any provision of advertising time to candidates that fulfills the obligations of a broadcaster or cable operator under the Communications Act. Daniels' plan fulfills its obligations under section 315 -- which requires broadcasters and cable operators to give discounts to candidates -- and therefore should be approved.

Daniels has offered to provide up to 750 free 30-second spot advertisements per week to candidates for four elective offices during the eight weeks preceding the November 3, 1998, election. Under the plan, all candidates on the ballot for the United States Senate and three seats in the House of Representatives would be entitled to an equal amount of free time. Daniels' plan appears to be the sort of plan that a number of persons have urged the FCC to mandate with respect to broadcasters.² It is fair to say that proposals to mandate the provision

¹ The Daniels Plan at 1 (attachment to Request for Advisory Opinion submitted to FEC by Daniels Cablevision, Inc. (Aug. 3, 1998) (AOR 1998-17)).

² The President asked the FCC "to develop policies, as soon as possible, which ensure that broadcasters provide free and discounted airtime for candidates to educate voters." Letter from President Clinton to Chairman William E. Kennard, Feb. 5, 1998. In addition, many Members of Congress have proposed a system of mandated free airtime for political

of free time to candidates have been controversial, but as far as I know no one at the FCC has questioned the desirability of permitting broadcasters or cable operators voluntarily to contribute free or discounted advertising time to candidates. As the Supreme Court stated in upholding 47 U.S.C. § 312(a)(7) -- which directs the FCC to revoke the license of a broadcaster "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time" by federal candidates -- the provision of advertising time contributes "to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process." *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981). It would materially and adversely affect the FCC's ability to implement the Communications Act if FECA were construed to prohibit the Daniels' plan.

Section 315(a) of the Communications Act requires a broadcaster or cable operator to "afford equal opportunities" to all candidates for an elective office if one candidate for that office is permitted to advertise on the facilities of the broadcaster or cable operator.³ Section 315(b) provides that, during the 45 days preceding a primary election and the 60 days preceding a general or special election, a candidate is entitled to pay for advertising at no more than "the lowest unit charge of the station for the same class and amount of time for the same period." At other times, section 315(b) provides that candidates cannot be charged more

candidates to address the problem of mounting campaign costs and provide more information to the electorate. For example, 42 Members of the United States House of Representatives signed Rep. Tiemey's February 19, 1998, letter to President Clinton, supporting the President's request that the FCC propose regulations providing for free or reduced rate time for candidates. In addition, on May 29, 1998, Rep. Louise Slaughter and 38 colleagues sent a letter to the FCC stating: "We urge you to proceed without delay with a notice of inquiry, and allow the Commission to begin to consider the obligation of broadcasters to provide free and reduced-cost air time to candidates for public office." Last year, 30 Members of the House of Representatives signed Rep. Slaughter's and Rep. Bonior's June 4, 1997, letter to the FCC and four more supplemental signatures were added subsequently. The letter asks the FCC to conduct an inquiry into what "additional public interest responsibilities" should accompany the expanded rights of broadcasters "in a digital age"; it also specifically urges the FCC to focus on "the proposals for licensees to provide free broadcast airtime to candidates, as advocated by Members of Congress, broadcast executives like Rupert Murdoch and Barry Diller, and respected public figures such as Walter Cronkite and David Broder." On June 13, 1997, 11 Senators, led by Senator Dick Durbin, sent a similar letter requesting that the FCC solicit and examine free time proposals as a method of facilitating campaign finance reform. Recommendations for free airtime for political campaigns have also been made by many individuals and groups, including the Center for Responsive Politics, Common Cause, Henry Geller, Delmer Dunn, John Ellis, Paul Taylor, and Newton Minnow.

³ Operators of direct broadcast satellite (DBS) facilities also are required to comply with the requirements of section 315. 47 U.S.C. § 335(a).

than "the charges made for comparable use of such station by other users thereof." As an initial matter, I trust it is clear that, by fulfilling its responsibilities under section 315 of the Communications Act, a broadcaster or cable operator does not violate section 441b(a) of FECA. The fact that section 315(b) of the Communications Act was enacted as part of FECA⁴ makes it particularly clear that Congress intended that the provisions be read harmoniously so that a broadcaster or cable operator that fulfills its duties under section 315 has not thereby violated section 441b(a) -- even though those duties may include providing a substantial discount to candidates for federal office that is not available to other purchasers of advertising time.

Congress's intent that FECA be read so as not to conflict with the Communications Act is further supported by a letter addressing certain FEC regulations relating to candidate debates from then House Administration Committee Chairman Frank Thompson to then FEC Chairman Tiernan, which was made part of the record, stating the Committee's understanding that

the regulations will have no effect on present communication policy as expressed in sections 312 and 315 of the Communication[s] Act. Under no circumstances would a broadcaster in fulfilling his obligation to provide reasonable access to candidates for public office be considered to have made an illegal contribution. Similarly, a broadcaster's coverage of a candidate which is not a "use" under section 315 of the Communication[s] Act would under no circumstances be considered a contribution by the broadcaster.⁵

That statement directly supports my view that section 441b(a) should be construed not to prohibit any provision of advertising time that fulfills the obligations of a broadcaster or cable operator under the Communications Act.

The FCC recognizes that, due to the complexity of broadcast and cable advertising practices, calculation of the lowest unit charge may be difficult. There have been a considerable number of complaints by candidates alleging that they were charged more than the lowest unit charge.⁶ [By providing a discount safely below any reasonable estimate of the lowest unit charge -- and free time plainly qualifies -- a broadcaster or cable operator may fulfill its duties under section 315 and avoid litigation altogether.] Former FCC General Counsel Robert L. Pettit discussed the complexity of the lowest unit charge calculation in 1992 in the attached letter involving *EZ Communications*. He also noted that, due to those

⁴ 1972 U.S.C.A.N. 1773.

⁵ 126 Cong. Rec. 5408 (1980).

⁶ See, e.g., Exclusive Jurisdiction with Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, as amended, 7 FCC Rcd 4123, 4123 ¶ 2 (1992).

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difficulties and "[g]iven Congress' clear intent to reduce campaign costs in enacting the lowest unit charge provision, . . . stations are permitted under FCC regulations to establish a special discounted class of time to sell to candidates." In addition, our regulations specifically contemplate the provision of free time: 47 C.F.R. § 76.207(b) states that "[w]hen free time is provided for use by or on behalf of candidates, a record of the free time provided shall be placed in the political file."⁷ Thus, just as any conclusion that providing discounted advertising time at the lowest unit charge violates FECA would interfere with our implementation of the Communications Act, so would a conclusion that any discount below the lowest unit charge violates FECA. Then broadcasters and cable operators would truly be in a bind: if they did not calculate the lowest unit charge with perfect precision, they either would be liable to candidates for an overcharge or subject to liability under FECA on account of an "undercharge."

As noted above, a broadcast license may be revoked under section 312(a)(7) of the Communications Act for failure "to allow reasonable access to" a broadcast facility by federal candidates.⁸ Cable operators are not subject to that provision. Nevertheless, in my view it would be perverse to conclude that cable operators may avoid a conflict between the lowest unit charge requirement of section 315(b) of the Communications Act and section 441b(a) of FECA by refusing to sell any time to candidates, and to conclude that the provision of free or discounted time by a cable operator to a candidate therefore violates FECA. That surely is not what Congress intended by providing in section 315(c) that cable operators, as well as broadcasters, are subject to the equal opportunities and lowest unit charge requirements. In addition, as the Supreme Court has stated, "[t]he First Amendment 'has its fullest and most urgent application precisely to the conduct of campaigns for political office,'" *CBS, supra*, 453 U.S. at 396 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)), and it would undermine first amendment values if FECA and the Communications Act were "harmonized" in a manner that discouraged the provision of free or discounted time to candidates.

It is important to bear in mind that section 315(a) of the Communications Act ensures that all donations of time -- as well as sales of time -- are distributed fairly to all legally qualified candidates. That provision requires any broadcaster or cable operator that "permit[s] any person who is a legally qualified candidate for any public office to use a broadcasting television station" to "afford equal opportunities to all other such candidates for that office in the use of such broadcasting station." Thus, to the extent that section 441b of FECA is designed to prevent improper corporate favoritism or harmful skewing of election coverage, section 315(a) of the Communications Act ensures that this will not occur. Indeed, that

⁷ Section 76.207(b) applies to cable operators. The comparable rule as applied to broadcast licensees can be found at 47 C.F.R. § 73.1943(b).

⁸ 47 U.S.C. § 312(a)(7); see 47 U.S.C. § 335(a) (applying these requirements to DBS providers also).

provision reinforces the view that Congress intended the Communications Act to act as a comprehensive scheme governing the sale or gift of advertising time by broadcasters and cable operators to candidates.⁹

Although the proposal before you was submitted by a cable operator, I would like to point out that, with respect to broadcasters, who are granted the free use of the public airwaves, the public interest standard of the Communications Act provides an additional basis for concluding that the provision of free time to candidates is permissible. The Communications Act imposes only a handful of specific requirements on broadcasters. Rather than impose specific requirements, Congress instead gave the FCC considerable discretion in regulating broadcasting by providing that, to obtain or renew a broadcast license, a broadcaster must demonstrate that it has served the "public interest, convenience, and necessity." See 47 U.S.C. § 309(a) (licensing); § 309(k) (renewal); § 336(d) (makes clear that the public interest standard applies after conversion to digital broadcasting). The Supreme Court long ago described the public interest standard as a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative authority." *FCC v. Patuxent Broadcasting Co.*, 309 U.S. 134, 138 (1940). The FCC often has needed a "supple instrument" because its role as "ultimate arbiter and guardian of the public interest" requires a "delicate balancing of competing interests." *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 117 (1973). The Court has described the FCC's job of enforcing the public interest standard while preserving First Amendment values as "walk[ing] a tightrope." *Id.*

In performing that difficult task, the FCC sometimes has sought to avoid issuing specific regulations, choosing instead to permit broadcasters to exercise discretion in fulfilling their public interest obligations. At the same time, the FCC has long recognized that providing political and public affairs programming are "major elements usually necessary to meet the public interest" standard and obtain renewal. *En Banc Programming Inquiry*, 44 FCC 2303, 2314 (1960). Under this approach, a broadcaster that voluntarily implemented a plan such as the Daniels plan would, in doing so, demonstrate that it was serving the public interest and thereby advance its claim that its license should be renewed under section 309(k). Some broadcasters currently are fulfilling their obligation to serve the public interest by providing campaign coverage beyond that minimally required by sections 312(a)(7) and 315. Indeed, the National Association of Broadcasters (NAB) recently reported that, in addition to traditional news coverage, in 1996 broadcasters voluntarily devoted time valued at \$148

⁹ In addition, section 76.207 of the FCC's regulations requires that cable operators keep a political file available for public inspection that includes records of all requests for cablecast time by candidates, the disposition of any such requests, and all free time provided to candidates. 47 C.F.R. § 76.207. Thus, the FCC's regulations also ensure that the public has ready access to this information, thereby ensuring increased accountability.

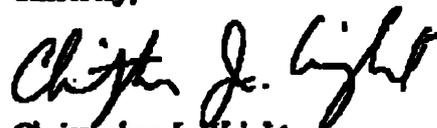
6

million to campaign coverage.¹⁰ Thus, if extended to broadcasters, a conclusion by the FEC that voluntary implementation of a plan like the Daniels plan would constitute a violation of FECA could lead to a substantial diminution in the amount of campaign-related information made available to voters. Such a conclusion also might undermine broadcasters' ongoing efforts to satisfy their public interest obligation and complicate the FCC's implementation of the public interest standard by limiting the FCC's ability to provide discretion to broadcasters. But in my view, broadcasters should not be held to have violated FECA by providing free time to candidates, when the provision of free time would help to fulfill their public interest obligation. In addition, the FCC should not be required to issue specific regulatory mandates if it believes the Communications Act is better construed to allow it to give some discretion to broadcasters under the public interest standard.

Of course, these problems would be avoided if the FEC harmonizes FECA and the Communications Act by concluding that a corporation with responsibilities under section 315 of the Communications Act does not violate section 441b(a) of FECA by providing free or discounted advertising time to candidates. However, I wanted to make clear, even though the matter before the FEC involves a cable operator, that the public interest provisions of the Communications Act would provide a basis for concluding that broadcasters may voluntarily provide free time to candidates even if the FEC should conclude that a cable operator violates FECA by doing so.

Please let me know if I can provide further assistance.

Sincerely,


Christopher J. Wright
General Counsel

Attachment

¹⁰ National Association of Broadcasters, "Bringing Community Service Home: A National Report on the Broadcast Industry's Community Service," April 1998, at 3.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

X Attachment to
Comments on
AOR 1998-17

IN REPLY REFER TO:

July 17, 1992

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92 JUL 17 PM 3:53

Lawrence M. Noble, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: AOR 1992-26

Comments On
AOR 1992-26

Dear Mr. Noble:

This is in response to your request that I comment on the validity of various representations with respect to the "reasonable access" and "lowest unit charge" requirements of the Communications Act that are made in Advisory Opinion Request 1992-26 by EZ Communications, Inc. ("EZ"). This letter presents my own legal assessment of EZ's representations under applicable FCC precedents, but does not necessarily reflect the views of the Commission. EZ proposes to offer free or substantially reduced rate announcement time to federal candidates in fulfillment of its reasonable access obligation and believes that such free or reduced rates should not be viewed as illegal campaign contributions under the Federal Election Campaign Act ("FECA").

With limited exceptions noted below, the representations made by EZ concerning the reasonable access and lowest unit rate requirements are generally accurate. I take no position as to whether EZ's proposed plan would afford reasonable access or satisfy the lowest unit charge rules, given the necessarily fact-specific nature of these assessments.

Reasonable Access Requirements. In 1972, Congress amended the Communications Act through FECA, adding the requirement in Section 312(a)(7) that stations provide "reasonable access" to federal candidates, and Section 315(b), which provides that stations cannot charge more than the "lowest unit charge" for the same class and amount of time in the same time period to any candidate for public office making a "use" of a broadcast

facility.¹ Congress added these provisions to the Communications Act for the express purpose of giving "candidates for public office greater access to the media and... to halt the spiraling cost of campaigning for public office."²

While the FCC determines whether the obligations imposed by Section 312(a)(7) have been met by licensees on a case by case basis, the Commission has articulated formal guidelines for stations to use to determine what is required to comply with the reasonable access requirement. Report and Order in the Matter of Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 FCC 2d 1079 (1978). These guidelines have recently been reaffirmed. Report and Order in the Matter of Codification of the Commission's Political Programming Policies, 7 FCC Rcd 678 (1992).

In describing these requirements, EZ states that reasonable access "can be provided by selling candidates commercial announcements or program time and by giving them access to free coverage during certain news and public affairs programming." Stations do have considerable discretion in deciding how to implement the reasonable access requirement. The FCC has recognized that the reasonable access obligation cannot be defined with detailed specificity, because what may be reasonable in one situation may not be reasonable in another.³ I would note,

1 The FCC has recently revised its definition of what specific candidate appearances constitute a "use" of a broadcast station that triggers the obligations imposed by Section 315. See Report and Order, 7 FCC Rcd 678 (1992); Memorandum Opinion and Order, 57 Fed. Reg. 27705 (June 22, 1992). In addition, Section 315(a) prohibits stations from censoring candidate "uses." The Supreme has held that, because of this prohibition against censorship of candidate "uses," a licensee is immune from liability for damages in civil actions based on allegations of libel or defamation. Farmers Educational and Cooperative Union of America v. WDAY, Inc., 360 U.S. 525, 535 (1959).

2 S. Rep. No. 96, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S. Cong. 7 Ad. News 1773, 1774.

3 In this regard, EZ states that the number of announcements offered for each race would vary with EZ's good faith judgment about the amount of access time that would be required to meet existing criteria of reasonableness, including, for example, the number of candidates in each race and the proximity of the district or election area to the station's community of license or

however, that contrary to EZ's suggestion, coverage of a federal candidate or race through news and public affairs programming alone would not be viewed as sufficient to meet a broadcaster's reasonable access obligation.⁴ [Thus, a station could not refuse to sell (or give) spot or program time to a federal candidate by arguing that it had provided sufficient coverage of the candidate through news and public affairs programming.]

EZ further states that it wishes to offer free and/or substantially reduced rate announcement time to federal candidates,⁵ and that equal amounts of time would be offered to candidates in specific races, as required by the equal opportunities provision of Section 315(a). FCC regulations implementing Section 312(a)(7) do not require the donation of broadcast time to federal candidates. The Commission has stated that "reasonable access must be provided to legally qualified federal candidates through the gift or sale of time for their 'uses' of the station." (emphasis added). 7 FCC Rcd at 681.⁶ FCC policy does require that "if a commercial station chooses to

core coverage area. Such factors have been articulated by the FCC, and affirmed by the Supreme Court, as relevant to the determination of what constitutes reasonable access. See CBS v. FCC, 453 U.S. 367 (1981).

4 Indeed, the Commission has specifically found that Section 312(a)(7) created additional access rights for federal candidates beyond the political coverage already required by the FCC prior to the enactment of FECA. See Report and Order, Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, 68 FCC 2d 1079, 1088-92 (1978). This interpretation was specifically affirmed by the Supreme Court in CBS v. FCC, supra., 453 U.S. at 377.

5 EZ is correct in its assertion that Section 312(a)(7) of the Communications Act does not require stations to sell time to state or local candidates. Under Section 315(a) of the Act, however, stations that decide to sell time to such candidates are required to afford the candidates' opponents equal opportunities to purchase time.

6 In reaffirming this requirement in the Report and Order, the Commission noted the comments filed by the FEC that concluded that the FEC was unable to offer specific guidance apart from the advisory opinion process as to whether a gift of broadcast time was an illegal "contribution" under FECA. 7 FCC Rcd at 681, n.16.

donate rather than sell time to candidates, it must make available to federal candidates free time of the various lengths, classes, and periods that it makes available to commercial advertisers."⁷

As noted by EZ, the FCC also requires that commercial stations must make prime-time spot announcements (typically 30 to 60 seconds) available (either through sale or donation) to federal candidates. 7 FCC Rcd at 681. Furthermore, both commercial and noncommercial stations must make program time (more than five minutes in length) available to legally qualified federal candidates during prime time and other time periods unless unusual circumstances exist that render it reasonable to deny such access. Id.

Lowest Unit Charge. EZ states that "although stations have a forceful incentive to comply with the [lowest unit charge] requirements of the Communications Act, such compliance may require computations and assumptions which are both complex and highly debatable." The FCC has often recognized the complexity involved in determining what constitutes the "lowest unit charge" described in Section 315(b).⁸ The difficulty of these calculations is a function of the increasing complexity of broadcast sales practices and the need for constant regulatory adaptation to enforce this obligation.⁹

7. 7 FCC Rcd at 681. In addition, because the right of access is an individualized right of each candidate, stations may not have flat bans or policies strictly limiting what time they will make available to federal candidates. See CBS v. FCC, 453 U.S. at 387. FCC policy requires that stations individually negotiate with each federal candidate seeking access to its facilities. Should a federal candidate challenge whether EZ's described practices provide reasonable access, the FCC would then evaluate EZ's actions in light of these requirements.

8. See Report and Order in the Matter of Codification of the Commission's Political Programming Policies, 7 FCC Rcd 678 (1992); see also Memorandum Opinion and Order, 57 Fed. Reg. 27705 (June 22, 1992).

9. We would obviously dispute EZ's statement that compliance with lowest unit charge rules involves "highly debatable" assumptions and calculations. To the contrary, the principles underlying these rules reasonably reflect industry sales practices. Furthermore, EZ's specific description of the necessary calculations is not entirely accurate. For example, EZ describes the difficulty of calculating the lowest unit charge when

In addition, FCC policy does not prohibit stations from selling time to candidates at a discount. Given Congress' clear intent to reduce campaign costs in enacting the lowest unit charge provision, the FCC has determined that it would not be reasonable to conclude that Congress intended to prohibit such a practice.¹⁰ Thus, stations are permitted under FCC regulations to establish a special discounted class of time to sell to candidates.

Moreover, EZ points out that current lowest unit rate requirements already provide substantial monetary benefits to candidates because they allow candidates to purchase time at rates that are only available to commercial advertisers who buy in bulk. This is correct, and in fact describes the original intent of the lowest "unit" charge provision of Section 315(b).

Finally, EZ's representations concerning the penalties for violating these rules is accurate. While the Commission has never revoked a license for lowest unit charge violations, that is an enforcement sanction available to the FCC. In addition, the FCC can (and has) impose fines, issue admonitions, and require stations to repay overcharges to candidates.

In conclusion, I would also like to point to some legislative history that may shed some light on congressional intent in this area. In 1980, in approving certain FEC regulations pertaining to candidate debates, Congress directed that a letter be sent to then FEC Chairman Tiernan which stated:

We understand that in approving these regulations, that the regulations will have no effect on present communications policy as expressed in sections 312 and 315 of the Communications Act. Under no circumstances would a

providing promotional items such as billboards, bumper stickers or other hard-to-calculate items. The Commission has recently ruled that non-cash promotional items of "hard-to-calculate" value need not be included in the calculation of the lowest unit charge, but must be offered to candidates on the same basis as they are made available to commercial advertisers, unless they are de minimis in value or imply a relationship between the advertiser and the station or product. Report and Order, supra., 7 FCC Rcd at 695; Memorandum Opinion and Order, supra., 57 Fed. Reg. at 27707.

¹⁰ Report and Order, supra., 7 FCC Rcd at 692, n.144; Memorandum Opinion and Order, supra., 57 Fed. Reg. at 27706.

broadcaster in fulfilling his obligation to provide reasonable access to candidates for public office be considered to have made an illegal contribution. Similarly, a broadcaster's coverage of a candidate which is not a "use" under Section 315 of the Communications Act would under no circumstances be considered a contribution by the broadcaster.¹¹

If you would like anything further, please let me know.

Sincerely,



Robert L. Pettit
General Counsel

¹¹ 126 Cong. Rec. 5408 (1980).



"Keeney Jr., John C."
<JCKeene@HHLAW.com>
09/10/2007 06:16 PM

To rkatwan@fec.gov
cc
bcc
Subject Additional Supporting Detail for Advisory Opinion Request
from XM Satellite Radio Inc.

Dear Mr. Katwan,

In connection with the advisory opinion request dated September 5, 2007 by XM Satellite Radio Inc., attached please find the three page POTUS '08 Access Guidelines. These contain all the additional details that were requested in your telephone call of Friday, September 7.

Thank you for your expeditious consideration of this request.

Best personal and professional regards. Jack

This electronic message transmission contains information from this law firm which may be confidential or privileged. The information is intended to be for the use of the individual or entity named above. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this information is prohibited.

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POTUS '08 Access Guidelines

POTUS '08 will present the 2008 presidential candidates on news programs, interview programs, and related content provided by XM or by third parties. In addition, POTUS will provide a platform on which national legally qualified candidates for U.S. President may present content provided by the candidate (the "Candidate Supplied Content"). XM intends that this Candidate Supplied Content will be aired in the form provided by the candidate (subject to the time and other limitations set forth below) with no editing by XM, so that the candidate's own views can be conveyed in an unfiltered manner. It is the goal of XM that POTUS will remain non-partisan and non-commercial, presenting the U.S. presidential candidates in compliance with all applicable legal requirements, including those of the Federal Communications Commission ("FCC") and the Federal Election Commission ("FEC").

1. **Daily Candidate Supplied Content Block.** XM will set aside a block of time each day for Candidate Supplied Content (the "Candidate Supplied Content Block" or "CSCB"). The initial length of the CSCB will be one hour daily.
2. **Qualified Candidates.** Candidate Supplied Content is available to legally qualified candidates for the U.S. President who have qualified for the ballot in ten or more states (a "Qualified Candidate"). For this purpose, a "legally qualified candidate" is a person who (a) has publicly announced that he or she is a candidate for U.S. President; (b) meets the qualifications prescribed by the applicable laws for the office of U.S. President (such as age and residency); and (c) meets any additional requirements that apply to candidates for U.S. President; and otherwise meets the definition of a "legally qualified candidate" under FCC Rules for election in all States, territories, and the District of Columbia. XM may ask a candidate who wishes to supply Candidate Supplied Content to demonstrate that he or she is a Qualified Candidate.
3. **Notices to Candidates.** XM will put a notice in its Political File prior to the launch of POTUS with its rules for carrying Candidate Supplied Content. XM will put a notice on its POTUS website inviting legally qualified national candidates for President to contact us if they want to supply Candidate Supplied Content. XM may also notify candidates' representatives about the rules concerning Candidate Supplied Content.
4. **Amount of Time Per Day.** Each Qualified Candidate may supply XM with content of up to five minutes in duration to broadcast on POTUS each day, during that day's CSCB.
5. **No Editing By XM.** XM will not edit the Candidate Supplied Content, but reserves the right to reject such content if it exceeds the time limits set forth herein or otherwise does not comply with these guidelines (such as the prohibition on commercials, below).

6. **No Advertisements.** Candidate Supplied Content may not be an advertisement that has been produced for commercial purposes or carried on a for-pay basis on any medium (including a commercial for that candidate).
7. **Use of Candidate's Voice.** If the candidate's voice is not heard during the Candidate Supplied Content, the candidate's campaign must acknowledge in writing that the Candidate Supplied Content it is providing satisfies the candidate's equal opportunities rights for that day's CSCB and the candidate may not later claim that it was denied equal opportunities for this time period.
8. **Rotating Broadcast Order.** XM will maintain a list of all Qualified Candidates who have expressed an interest in supplying Candidate Supplied Content, alphabetized by last name. XM will carry all of the Candidate Supplied Content received for each day's CSCB based on the alphabetized list, rotating the first candidate in the CSCB each day (starting the first day with the first candidate in the alphabet, the second day with the second candidate in the alphabet, etc.)
9. **Additional Broadcasts.** To the extent XM finds the Candidate Supplied Content is newsworthy, XM may rebroadcast Candidate Supplied Content, or portions thereof, at the times and on the XM channels (including XM channels other than POTUS) that XM determines in its sole discretion. By providing content to XM for broadcast on the XM system, a candidate consents to XM's using some or all of that content on other programming produced by XM, and providing that content to news entities or other organizations not necessarily affiliated with XM.
10. **Format and Technical Standards.** Candidate Supplied Content may be provided to XM as pre-produced material of a sound quality acceptable to XM, including (but not limited to) audio press releases and short-form programs. Subject to prior arrangement with XM, Candidate Supplied Content may also be:
 - Live interview
 - in-studio, phone, ISDN, or satellite (with appropriate lead time)
 - Recorded interview for later use
 - in-studio, phone, ISDN, or satellite (with appropriate lead time)
11. **Delivery.** A Qualified Candidate must deliver content to XM (by e-mail, voicemail message, or hand delivery) to be received by 4 p.m. each day for the content to be included in that day's CSCB. The content may be delivered using any of the following means:
 - Via e-mail attachment (subject to XM's e-mail file size limitations) sent to xxx@xmradio.com or, following notice given to Qualified Candidates, to such other e-mail address as XM may provide for such candidates.
 - Via a message left at toll-free voicemail 1-nnn-nnn-nnnn, or, following notice given to Qualified Candidates, to such other toll-free number as XM may provide for such candidates.

- Via street mail on CD or other media to the following address:

XM Satellite Radio
1500 Eckington Place, NE
Washington, DC 20002
Attn: Joe Mathieu

Questions regarding deliveries should be directed to Joe Mathieu, 202-380-4729.

12. **Sponsorship Identification.** Candidate Supplied Content must include an aural sponsorship identification, consisting of the name of the sponsor (*i.e.*, the true identity of the person, committee, or other entity furnishing the content), and a statement that the matter is "furnished by" the sponsor. All Candidate Supplied Content shall contain the identifiable voice of the candidate. The audio for the sponsorship identification should be at a level clearly audible to an average listener.
13. **Preemptions.** XM may preempt, delay, defer, reschedule or interrupt the Candidate Supplied Content, or any portion thereof, as XM deems necessary in its sole discretion, subject to FCC equal opportunities requirements.
14. **CSCB Changes/Discontinuation.** Following notice to candidates as needed to comply with FCC equal opportunities requirements, XM reserves the right to change the time or times at which it airs the CSCB, to permanently discontinue the CSCB as of any given day, or to block out certain days from airing any Candidate Supplied Content. As the number of Qualified Candidates expands or contracts during the campaign, XM may change the duration of the CSCB going forward so that it is appropriate to accommodate the candidate field. If XM does not receive enough Candidate Supplied Content to fill any given day's CSCB, XM will fill the remaining time with XM-supplied news or commentary.
15. **Liability.** The entity furnishing Candidate Supplied Content shall be solely liable for the content supplied, including any alleged or proven libel, slander, defamation, invasion of the right of privacy or publicity, violation, infringement or misappropriation of any performance right, copyright, trade name, trademark, trade secret, literary or dramatic right, or obscenity or indecency contained therein.
16. **Changes To Guidelines.** XM reserves the right to make changes to these Access Guidelines at its sole discretion, in compliance with the FCC's equal opportunities rules and other legal requirements.