

March 20, 2019

**BY HAND DELIVERY**

Office of General Counsel  
Attn: Lisa J. Stevenson, Acting General Counsel  
Federal Election Commission  
1050 First Street NE  
Washington, DC 20463

**Craig Engle**

Partner  
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**Re: Advisory Opinion Request**

Dear Ms. Stevenson:

This firm represents System73<sup>®</sup>, an incorporated communications technology network seeking to expand its commercial media product line to political committees. Pursuant to 52 U.S.C. § 30108, we request an advisory opinion on behalf of System73 (or the “Company”) for guidance on the permissibility of its proposed business activities under the Federal Election Campaign Act of 1971, as amended (the “Act”), and Federal Election Commission (“FEC” or the “Commission”) regulations.

Over the past four years, System73 assembled a team of dozens of scientists and engineers to develop and patent technology which can forecast internet congestion and create an optimal overlay topology to provide uninterrupted broadcast quality streaming, with the interactive functionality of the internet. The Company has been awarded several patents in the U.S. and globally and has commercial relationships to provide its live stream media services to several Fortune 500 companies.

System73 believes it can achieve far greater margins and earn more revenue by developing audiences and broadcasting content directly to consumers on its own channels, rather than simply being a service provider to existing broadcasters. Essentially, System73 has created a virtual global media company with unlimited capacity for channels and viewers. Just as with

traditional media companies, System73's revenue is derived from the sale of commercial advertising time or space during or between programming.

The Company broadcasts live and linear streaming video and also provides content in a video on demand format. In certain circumstances, System73 shares the advertising revenue it receives with its clients. For example, System73 is currently creating and broadcasting content on two streaming channels, bloxlive.tv and iconicsports.tv (finance & technology and sports, respectively)<sup>1</sup>. Both channels air a mix of original content, live events and content acquired from other creators for which the producer is paid an upfront negotiated fee, the value of which is generally reflective of the projected advertising revenue the content will generate. In the future, System73 may decide to split its advertising revenue with its clients on a percentage basis, or by some other formula.

System73 wants to expand its business to political committees by offering its same broadcast quality online streaming service to candidates and parties so they can more broadly broadcast their campaign appearances, rallies, debates and related events. In talking with the political community, System73 has heard concerns raised by candidates that the traditional networks do not adequately cover their campaign events; that rallies of national interest are only covered in the immediate geographic market; that the quality of the video or streaming service is too low to make high quality continuous viewing desirable; or that certain constituents, such as millennials, prefer to watch political events on line, at the time they choose to, without paying a fee.

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<sup>1</sup> The content of these channels is primarily about business, finance and investment news, analysis of technology issues, and coverage of sporting events. The entity paying for the creation of the content will vary by show, over time: in some cases independent studios will create the content, and in other cases System73 creates the content (just as CBS broadcasts a mix of their own programming and programming that they purchase or is licensed to them). System73 makes the decision which commercial programs may be most attractive to its advertisers and its audiences.

System73 wants to make its services available to political committees in a manner that does not constitute making a prohibited corporate contribution or engaging in fundraising activity. To do so, System73 will structure its political business model around two separate and distinct transactions. First, System73 will negotiate and pay a fixed license fee to a political committee for the right to be the exclusive livestream provider of a political event. Second, the Company will separately sell commercial advertising time, and retain all the revenue for itself without sharing any proceeds with its political client. The negotiations of these two transactions may run concurrently to ensure that System73 does not over pay for the broadcast rights and can generate a reasonable profit net of costs (including the license fees, its investment in its technology and the operational costs associated with streaming the events)<sup>2</sup>.

License fees will not be a direct function of advertising revenue, i.e., no ad revenue will be automatically divided on a percentage basis. Accordingly, 100% of the revenue generated from the advertisements will be deposited in the general treasury of System73 and therefore will not be fundraising revenue received by a political committee<sup>3</sup>.

Advertisers are likely to be corporations in the consumer retail (or similar) sectors but could also include ideological groups or even other political committees. System73, however, will not provide its political clients any listing of the advertisers who are considering advertising on its live stream, any data showing how much revenue was generated by advertiser or any other mechanism to coordinate with advertisers.

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<sup>2</sup> For example, System73 may approach a candidate's committee to be the exclusive livestream provider of the candidate's appearances in Iowa or New Hampshire. System73 would, at the same time, gauge the interest of commercial advertisers to buy time on those broadcasts. Once it determines it can make a profit, System73 will offer the committee an upfront license fee of a set amount. If the committee accepts, System73 would pay the fee and then begin to book the advertising time and revenue.

<sup>3</sup> At this time System73 has not reached a decision whether it will license campaign events one at a time or will instead try to purchase a series of campaign events for one price. In either event, it will reserve the right to suspend paying licensing fees if the live-streaming of any particular candidate's appearances are proving unprofitable.

System73 does not intend to create political content for its political clients. System73 will, however, create promotional materials for upcoming live streams through direct and social channels<sup>4</sup>. The promotional material will not advocate for or against any candidate. Instead, the promotional material may include a title card for the content, standard introductory music that System73 creates for its broadcasts, possibly an announcer to put the upcoming event into context and links where a viewer can go to for more information. In all cases, this content would be owned and trademarked by System73. System73 will also encourage committees to promote the content within their own networks, e.g., a tweet, website post or email reminder to “go to System73 at 8:00 p.m. to watch Senator Smith’s rally live.”

System73 is a privately-held company and is not owned or controlled by any candidate or political party and plans on making its services available on a non-partisan basis. System73 will not exert any editorial control over the content of any candidate’s broadcast or assist candidates in creating content for advertisers. Also, System73 does not presently provide any fundraising functionality with its live streaming technologies: its political committee customers will need to continue to use their existing systems to generate contributions.

System73’s main consideration in deciding whether to broadcast an event is profitability, which depends on the event’s newsworthiness and popularity. To ensure broadcast quality, however, System73 does reserve the right not to broadcast content if the broadcast fails to meet System73’s high technical standards for audio and video quality.

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<sup>4</sup> In fact, Advertisers will expect System73 to promote its upcoming programming. The objective of promoting content is to increase viewership, which increases advertising revenue, regardless of the content being shown. The creation and promotion of events, however, will affect the licensing fee paid to political clients in that they are additional corporate expenses that must be considered in order to ensure System73 earns a profit from its net advertising revenue. These expenses would already be factored in before a license fee is offered to a political committee.

System73 may arrange for the filming of a political event in any of the following ways:

- A political committee may provide its own video of the event to System73.
- System73 may acquire the rights to content created by an independent camera operator unconnected to any political committee.
- System 73 may utilize its own or engage a third-party camera crew to film the event.

If System73 produces the video itself or pays to obtain content from a source other than the political committee, or hires a third-party to assist in the production of content, the licensing fee to the committee would likely be less than if the committee provides the content, because of the added expense to System73. System73 will retain all rights to content that it produces or acquires either by itself or through a third party in accordance with media industry standards. System73 may license the use of its video to third parties in the future but has made no decisions at this time.

The licensing fee that System73 would pay to a political committee would be estimated before System73 begins negotiating advertising revenue. However, System73 would reserve the right to renegotiate or withdraw from a pending licensing agreement if there were insufficient advertiser interest in the event for System73 to cover its costs and earn a profit.

And last, System73 may offer its candidate committee clients several innovative data gathering opportunities for a fee. For example, candidate committees may wish to pay for access to interactivity data, on-line polling and the ability to test messages. System73 may, in the future offer production assistance to its political clients, such as advice on staging, lighting, videotaping and other non-content related production services as it does for its commercial clients. There will be a fixed price schedule for these vendor services regardless of the license fee paid.

**Question Presented:**

*May System73® provide a political committee with an upfront license fee to broadcast a campaign event in expectation of making a profit by selling advertising time on the live-streaming of the event?*

In our opinion, the answer is yes because System73 is a media company exempt under the Federal Election Campaign Act and the amounts paid by it to political committees, and received by it from advertisers, are not contributions to any federal campaign committee. Additionally, System73 is acting as a *bona fide* commercial vendor to campaigns and is not engaging in fundraising activity for its political committee clients.

**System73® is an Exempt Media Corporation**

Although the Federal Election Campaign Act (the “Act”) defines the term “contribution” to include “anything of value” 52 U.S.C. § 30101(8)(A)(i) and prohibits corporations from making any contribution to a federal campaign, 52 U.S.C. 30118(a), (b), it also exempts from these definitions and prohibitions “any cost incurred in covering or carrying a news story... [by any] internet or electronic publication.” 11 CFR § 100.73, 100.132. See also 52 U.S.C. § 30101(9)(B)(i). In our opinion, the licensing fees System73 proposes to pay for the exclusive right to provide the live-streaming of campaign events are precisely the sort of production costs covered under the media exemption.

The Commission has long used a two-step analysis to determine whether the media exemption (also known as the “press exemption”) applies to a particular corporation. First, the Commission determines whether the entity engaging in the activity is a press entity within the meaning of the Act and Commission regulations. *See, e.g.*, Advisory Opinion 2005-16 (Fired Up). Second, in determining the scope of the exemption, the Commission considers (1) whether the press entity is owned or controlled by a political party, political committee or candidate; and

(2) whether the press entity is acting as a press entity in conducting the activity at issue (i. e., whether the entity is acting in its “legitimate press function”). See *Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); *FEC v. Phillips Publishing*, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981); Advisory Opinion 2004-07 (MTV); Advisory Opinion 2005-16 (Fired Up). In applying this analysis, the Commission considers whether the entity’s materials are available to the general public and whether they are comparable in form to those ordinarily issued by the entity. See *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 251 (1986); Advisory Opinion 2000-13 (iNEXTV) (concluding that website covered by media exemption was “viewable by the general public and akin to a periodical or news program distributed to the general public”). Advisory Opinion 2016-01 (Ethiq).

Congress enacted the media exemption to ensure the Act would not “limit or burden in any way the first amendment freedoms of the press” and would protect “the unfettered right of the newspapers, TV networks, *and other media* to cover and comment on political campaigns.” H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4 (1974) (emphasis added). Thus, even though the statutory media exemption applies to “any broadcasting station, newspaper, magazine, or other periodical publication,” 52 U.S.C. § 30101(9)(B)(i), the Commission’s regulations now extend the exemption to qualified internet activities. 11 CFR §§ 100.73, 100.132.

When it amended its regulations to reflect this more modern definition of media entities, the Commission noted “the media exemption applies to media entities that cover or carry news stories, commentary, and editorials on the Internet, just as it applies to media entities that cover or carry news stories, commentary, and editorials in traditional media.” Internet Communications, 71 Fed. Reg. 18589, 18608 (Apr. 12, 2006).

The Commission has gone further to state that in the Commission’s media exemption regulations “[t]he terms ‘website’ and ‘any Internet or electronic publication’ are meant to encompass a wide range of existing and developing technology, such as websites, podcasts; etc.”

Internet Communications, 71 Fed. Reg. at 18608 n.52; see also, e.g., Advisory Opinion 2000-13 (iNEXTV) (concluding that company providing news and information online with limited original content qualified as media entity despite lacking traditional offline media presence); Advisory Opinion 2005-16 (Fired Up) (concluding that requestor's websites that provided original news content and links to and commentary on other sites' content qualified for media exemption). Advisory Opinion 2012-01 (Ethiq).

System73's business plan is similar to the business the Commission found to be an exempt media corporation in Advisory Opinion 2016-01 (Ethiq). The Ethiq company planned to produce and distribute political news and commentary to its users through its app and website. This included rebroadcasting "candidates' campaigns and speeches" and it planned to "generate income by selling advertising space on the app.... All advertisers will pay the same rates for ad space, and the advertising purchases will not affect the use of Ethiq's algorithm to provide news content..." AO 2016-01 (Ethiq) at page 2. See also Advisory Opinion 2000-13 (iNEXTTV) and 2005-16 (Fired Up). The Commission concluded that Ethiq's distribution of news content is the core of its operations as its "business model involves the regular and continued production and distribution of news and political commentary." Advisory Opinion 2016-01 (Ethiq) at page 4.

This is essentially the same as System73's business plan: to provide the general public and advertisers access to the live stream broadcast of campaign events and to broaden the reach of candidates' appearances. It will be System73's regular course of business, just as it does with its commercial clients, to continually seek out customers who want their content to be more widely disseminated to the general public and to find advertisers willing to purchase air-time on these broadcasts. It truly combines core first amendment activity: broadcasting political speech, with core economic liberty: to do so for a profit.

As further proof that System73 is a media entity, it will also be providing this service to for-profit corporations, political committees and non-profit organizations. The Company is not

owned or controlled by any candidate or political committee and will not edit or enhance any particular candidate's appearance on its live streaming network. Because System73 operates over the internet, its live-streaming is available to the general public in the same way other content on the internet is provided. And finally, the Commission has repeatedly noted that the broadcasting of political events, speeches and news conferences is clearly a legitimate press function.

The fact that System73 proposes to pay a candidate's committee a license fee to secure the exclusive right to live stream their appearances does not change the conclusion that System73 is a media company. The media exemption statute exempts from the definition of contribution "any cost" incurred by a media company to cover... political campaigns. 52 U.S.C. 30101 (9)(B)(i) H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4 (1974). Just as this exempts payments made by a media company to a campaign committee for the cost of a seat on the candidate's airplane, System73 is a media company paying for access to live-stream a particular event<sup>5</sup>. Additionally, the Commission has specifically included the "costs of producing" films, including paying a fee to a movie theatre, is covered by the press exemption and any proceeds generated from the distribution of films are not contributions. Advisory Opinion 2010-08 (Citizens United) at page 3<sup>6</sup>. Next, and as more fully described below, any license payments are paid irrespective of any advertising revenue System73 may receive to avoid making, or facilitating the making, of a corporate contribution to a political committee.

***System73® is engaged in bona fide commercial activity.***

Although the Commission has held that the question of whether an activity is a *bona fide* commercial activity is moot when the media exception applies, Advisory Opinion 2010-08

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<sup>5</sup> This is in contrast to a proposal by a media company that wanted to give awards to, or provide personnel to, support a political campaign which the Commission held was not a legitimate press function. Advisory Opinion 2008-14 (Melothe) at page 6.

<sup>6</sup> See also, by analogy, Advisory Opinion 2010-08 (Citizens United) at Page 7: "[T]he very act of paying a broadcaster to air a documentary on television, rather than receiving compensation from a broadcaster can distinguish an electioneering communication from an exempt media activity."

(Citizens United), System73 may also be considered a commercial vendor engaging in bona fide commercial activity and therefore permitted to pay its political committee customers a license fee for the rights to be the exclusive, live stream provider of their events.

Most likely, the content System73's political clients will want to be live-streamed will contain express advocacy messages<sup>7</sup>. The Commission has specifically approved the distribution of express advocacy messages to the general public if done as a "bona fide commercial activity" by an entity organized for commercial purposes, and not for the purpose of influencing any elections, and the activities themselves are for commercial purposes. Advisory Opinion 2008-10 (VoterVoter.com)

System 73's business plan for political committees is purely for commercial purposes. As stated earlier, System73 plans to pay a license fee to the political committee for the right to broadcast their appearances and separately charge advertisers for any commercial time that can be sold during the live stream and on the video on demand assets. The two transactions are purely commercial and completely separate: System73 will estimate the amount of advertising revenue it may generate during the broadcast and keep that as its general revenue; it will also determine the amount that it can pay the political committee up front and still earn a profit after all expenses.

Further, the Commission has held that corporations may have different rate structures between their political committee and commercial clients without creating a prohibited in-kind contribution as long as the rate structure "reflects commercial considerations and does not reflect considerations outside of a business relationship." Advisory Opinion 2012-31 (AT&T) at 4; *see*

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<sup>7</sup> We assume that all candidate supplied content will constitute a public communication made by a political committee and therefore must carry the appropriate disclaimer. Advisory Opinion 2007-20 (XM).

also Advisory Opinion 2012-26 (m-Qube *et al.*) at 8-9, Advisory Opinion 2018-11 (Microsoft). System73's rate structure will be entirely consistent with this principle.

Because both the payment *to* the political committee and the payments *from* the advertisers are separate commercial transactions, neither are contributions made for the purpose of influencing an election.<sup>8</sup> System73 has no interest in influencing any election. It merely wants to provide a service that is asked for by candidates, commercial advertisers and the general public. System73 will sell its service to any advertiser or political committee<sup>9</sup> and literally has no stake in the outcome of any election.

This is similar to the commercial transaction approved by the Commission in Advisory Opinion 2008-10 (VoterVoter.com). In that Opinion a company proposed to offer a variety of internet-based products including a service to allow individuals to create advertisements and purchase airtime for them to be broadcast. The company would “charge each purchaser a ‘licensing fee’ and will receive an airtime commission that it believes will be sufficient to make a profit on each discrete transaction.” Advisory Opinion 2008-10 (VoterVoter.com) at 2, 3.

The Commission has also stated that in the context of the manufacture, advertising and sale of political paraphernalia containing express advocacy that whether certain commercial activity results in an expenditure or contribution depends upon a number of factors including: (1) whether the activity is engaged in by the vendor for genuinely commercial purposes and not for the purpose of influencing an election; (2) whether the sales of the merchandise involve fundraising activity for candidates (e.g., resulting in the transfer of *proceeds* to candidates) (emphasis added) or solicitations for political contributions; (3) whether the items are sold at the

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<sup>8</sup> The System73 business plan is different from other commercial services the Commission has found to have had a fundraising element to it. See e.g. Advisory Opinion 2005-32 (Jorgensen) (proposal to enter into agreements with political committees to sell prints from its customers.). Advisory Opinion 1989-21 (Create-a-Craft)

<sup>9</sup> System73 and its candidate clients do, however, reserve the right to reject any particular type of advertiser on the basis of its taste, topic or morality.

vendor's usual and normal charge; and (4) whether the purchases are made by individuals for their personal use. See Advisory Opinions 1994-30 (Conservative Concepts/Pence) and 1989-21 (Create-a-Craft). Other factors considered in concluding that a business entity's activities were bona fide commercial activities, rather than corporate expenditures, have included whether the entities: (1) were owned, controlled, or affiliated with a candidate or political committee; (2) were "in the business" of conducting the type of activity involved; and (3) followed usual and normal business practices and industry standards. See MURs 5474 and 5539 (Dog Eat Dog Films/Michael Moore), First General Counsel's Report, dated May 25, 2005; MUR 5485 (Conversagent), First General Counsel's Report, dated October 25, 2005.

Here, the facts set out in the request indicate the Company will be acting as a commercial vendor engaging in the proposed activity for genuinely commercial purposes and not for the purpose of influencing any Federal election. System73 is not owned or controlled by any candidate, political party or political committee. The Company's business model does not involve fundraising for, or the transfer of *proceeds* to<sup>10</sup>, any candidate or political committee. The Company will sell airtime to the purchasers at a usual and normal charge, and the advertisers will pay System73 separately from any payment System73 makes to secure the rights to the content. This is similar to the usual and normal industry practice of media companies who pay for 3<sup>rd</sup> party content and then recoup the expense through advertising revenue and subscription fees<sup>11</sup>.

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<sup>10</sup> The Commission's use of the words "proceeds" is instructive. Although System73 will be making a payment to a candidate's committee for the right to broadcast an upcoming appearance, its business model ensures that none of the money it pays are literally the "proceeds" of any future advertising revenue. *See* definition of "proceeds" as "... The total amount derived from a sale... The profits or returns from an investment...". Webster's Encyclopedia Unabridged Dictionary, 1996 Edition. Because the license fee precedes the receipt of the advertising revenue (which is kept in its entirety by System73), the fee cannot be considered proceeds under Webster's common-usage definition.

<sup>11</sup> The paying of a license fee is also not inconsistent with the Commission's conclusion in Advisory Opinion 2001-20 (XM Satellite Radio). There, the Commission approved the providing of free air time to qualified candidates but did not state it based its approval on whether the service was for free, for a fee or if the candidate received a stipend for appearing. Advisory Opinion 2007-20 (XM) pages 2, 5.

And as further evidence supporting the conclusion that System73 is acting as a commercial vendor, it does plan on charging campaigns, as it does its commercial clients, a fee for interactivity data, on-line polling, message testing and possibly production assistance.

## **Conclusion**

System73 is giving the public what it wants: access to candidate committee events across the country. System73 is also giving political committees what they want: better and more direct access to the voting electorate. And finally, System73 is giving commercial advertisers what they want: access to highly motivated political consumers who could favorably respond to retail messages at the same time.

To do this, System73 will pay a license fee to political committees to be the sole live stream provider of their campaign events: after all, *the content of these events has value* and its creators should be compensated just as in commercial live streaming contracts. In further exchange, a candidate committee has the opportunity to purchase some very sophisticated evidence data from System73 after their event. This data is only available, however, if the committee accepts the license fee and makes System73 its sole provider.

System73 will be frequently testing the market to gauge the amount of advertising interest there is and hopes to make a variety of advertising packages available in the future. Regardless of how the business model evolves, System73 will not commingle advertising revenue with license fees and will remain in this business as long as it is economically viable to do so<sup>12</sup>.

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<sup>12</sup> It is important to remember that, at least initially, System73's daily operating expenses far exceed the license payments it will make: it has a large variety of fixed corporate costs it needs to recoup with each transaction it enters into.

System73 admits that it has disruptive technology and a unique business plan. The Commission has seen these sort of political entrepreneurial advisory opinion requests in the past and has frequently and unanimously opened its interpretation of the Act to accommodate modern technology. *See especially* Advisory Opinion 2012-26 (m-Qube *et al.*)

The traditional networks may not like these advancements: but candidates, advertisers and the voting public are clamoring for more information because they are not getting the content they want. And finally, it is no surprise that System73's design is being considered the best methodology to reach Millennials: something that social scientists, the political parties and the press want to encourage.

Please contact me at the above address if you have any questions about this request. Because presidential campaigns are already making live appearances in early primary states (but getting narrow coverage), System73 is anxious to get its products into the political marketplace as soon as possible.

Best regards,

A handwritten signature in blue ink, appearing to read "Craig Engle". The signature is fluid and cursive, with a long horizontal stroke at the end.

Craig Engle

cc: Paul Koches

## Joanna Waldstreicher

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**From:** Engle, Craig <Craig.Engle@arentfox.com>  
**Sent:** Thursday, March 21, 2019 5:45 PM  
**To:** Joanna Waldstreicher  
**Subject:** RE: advisory opinion request

1. Correct
2. Correct
3. Correct

**Craig Engle**  
Partner

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**From:** Joanna Waldstreicher <JWaldstreicher@fec.gov>  
**Sent:** Thursday, March 21, 2019 5:31 PM  
**To:** Engle, Craig <Craig.Engle@arentfox.com>  
**Cc:** Heather Filemyr <HFilemyr@fec.gov>  
**Subject:** advisory opinion request

Mr. Engle:

Thank you for speaking with us on March 21 about the advisory opinion request you submitted on behalf of System 73®. You have provided additional factual information in addition to the information contained in your request. Below is our understanding of this additional information:

1. No promotional materials created by System 73, including materials related to announcer statements that put the upcoming broadcast into context, would be provided to or approved by any political committee.
2. While System 73 has not yet made a decision about whether it will license its video of political events, any licensing agreements System 73 enters into with political committees or third parties for the use of video footage would be consistent with terms and license rates used for System 73's commercial clients.
3. There are two possible models System 73 may use to compensate its commercial (non-political) clients. System 73 may either (1) negotiate to pay its client a fixed upfront license fee, and the fee will generally reflect the projected advertising revenue expected, or (2) negotiate to pay its client a fixed percentage of the advertising revenue System 73 receives for broadcasting the content.

Please send us an email that either confirms the accuracy of these statements or corrects them. Your response may be considered to be part of the advisory opinion request; if so, it will be posted as such on the Commission's website.

Sincerely,

Joanna S. Waldstreicher  
Office of the General Counsel, Policy Division

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