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January 29, 2009

Via Facsimile: 202-219-3923 and Regular Mail

Ms. Kim Collins  
Complaints Examination & Legal Administration  
Federal Election Commission  
999 E Street, N.W.  
Washington, DC 20463

Re: MUR 6141

Dear Ms. Collins:

I am writing in joint response to the complaint filed on behalf of the Darcy Burner for Congress Campaign against Friends of Dave Reichert and Media Plus+, Inc. The arrangement between the committee and Media Plus+ occurred in the ordinary course of the vendor's business and the terms were substantially similar to its extension of credit to its non-political clients. Both the campaign and Media Plus+ acted at arms-length. Media Plus+ did nothing for the Reichert campaign that was not part of its established business practices for its general clients.

Complainant speculates that the campaign and media consultant violated the campaign finance laws. It alleges that Media Plus+ "may not" have extended credit to other customers. That is simply not so.

The complaint also alleges that extending credit to a client who does not have the cash on hand to pay the cost of services in full before delivery is *by definition*, commercially unreasonable. Under the complaint's test of commercial reasonableness, few extensions of credit in the business world would be commercially reasonable, no loan would pass the test and a newly-formed committee would never be able to order stationery and printing for an initial major fundraising solicitation. However, the Commission's test is much different, and under the Commission's test, there is no violation.

**Commercially Reasonable Extensions of Credit by Vendors are not Contributions under the FECA.**

The Commission has recognized for many years that requiring a cash only relationship between federal committees and vendors ignored economic reality. The current regulation, 11 CFR 116.3(b), has been in effect for nearly twenty years. The regulation provides:

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A corporation in its capacity as a commercial vendor may extend credit to a candidate, a political committee or another person on behalf of a candidate or political committee provided that the credit is extended in the ordinary course of the corporation's business and the terms are substantially similar to extensions of credit to nonpolitical debtors that are of similar risk and size of obligation.

See also 11 CFR 100.55 (No contribution from extension of credit if "credit is extended in the ordinary course of the person's business and the terms are substantially similar to extensions of credit to nonpolitical debtors that are of similar risk and size of obligation.")

MediaPlus+ is an established media company, in operation for over 25 years. In 2008, it placed \$30 million in advertising, with about \$20 million of that in the Pacific Northwest market. Neukirchen Decl. ¶1. Payment for broadcast air time after the broadcast date is part of Media Plus+'s ordinary course of business. Broadcasters extend credit to the agency based on its level of activity in the marketplace and credit history. Neukirchen Decl. ¶3. Extension of credit for broadcast time is also an established part of the advertising industry. See e.g. *In re Beth Daly*, FCC Action Letter, 7 FCC RCD 1441, 1992 FCC Lexis 707 (1992) (copy attached as Attachment 1). Credit arrangements for broadcast time are part of MediaPlus+'s ordinary course of business. Neukirchen Decl. ¶¶ 3, 4, 7, 8, 9. MediaPlus+ "routinely make[s] advertising commitments on behalf of our commercial clients well in excess of the amount of the planned advertising by the Reichert campaign." Neukirchen Decl. ¶7. Friends of Dave Reichert understood the extension of credit to be similar to credit extended to clients of MediaPlus+ who were not federal candidates. Kelly Decl. ¶4. "We have never offered or granted any contract term to Friends of Dave Reichert that we do not grant to our non-political clients in the ordinary course of our business." Neukirchen Decl. ¶9.

The request for credit related to advertising for the period October 27, 2008 through the election. This time period falls within the "November" broadcast month. A broadcast month normally begins during the last week of the prior month (e.g. October) and runs to a day during the last week of the "broadcast month." For the November 2008 broadcast month, MediaPlus+ would receive invoices from the broadcasters some time during the second week of December. The MediaPlus+ payments to the broadcasters were due in January 2009. Neukirchen Decl. ¶¶7-8.

The Commission has addressed the question of "ordinary course of business" repeatedly in connection with prohibited corporate contributions in the form of discounts. The availability of discounts as a general commercial practice demonstrates that the discount is part of the "ordinary course of business" and not a contribution. See e.g. Advisory Opinion 2004-18 (Friends of Joe Lieberman), 2001-08 (Senator Specter), 1996-02 (CompuServe), 1995-46 (Friends of Senator D'Amato), 1995-47 (Representative Underwood), 1994-10 (Franklin National Bank), 1989-14 (Anthony's Pier 4 Restaurant), 1988-25 (General Motors Corp.), 1987-24 (Hyatt Corp.), 1986-22 (WREX-TV), 1985-28 (Friends of Lane Evans), 1982-30 (Sunrise-Sunset Corporation) and 1978-45 (Representative Coleman). "If the charges assessed by the corporation were the usual and normal charges offered to its non-political customers in the corporation's ordinary course of business, a contribution would not result." AO 1989-14. Friends of Dave Reichert requested no special treatment and received no special treatment from MediaPlus+ in the extension of credit. Kelly Decl. ¶5; Neukirchen Decl. ¶9.

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The Commission's Advisory Opinions on discounting are consistent with its regulations on extensions of credit. Factors in determining "ordinary course of business" include

- (1) Whether the commercial vendor followed its established procedures and its past practice in approving the extension of credit; (2) Whether the commercial vendor received prompt payment in full if it previously extended credit to the same candidate or political committee; and (3) Whether the extension of credit conformed to the usual and normal practice in the commercial vendor's trade or industry.

11 CFR116.3(e). The list of factors is not exclusive, as the Commission noted in its Explanation and Justification at the time of adoption. For example, "the Commission will also consider compliance or noncompliance with regulations issued by other Federal agencies." 55 Fed. Reg. 26378, 26381 (1990). In October 2008, an FEC spokesman synopsized the Commission's regulations, "Typically, they just need to be consistent with whatever the vendor does for any kind of customer." *Burner loans campaign \$140,000 for ads*, Seattle Times, October 21, 2008. (Attachment 2).

[http://seattletimes.nwsource.com/html/8thcongressionaldistrict/2008291156\\_8thdistrict21m.html](http://seattletimes.nwsource.com/html/8thcongressionaldistrict/2008291156_8thdistrict21m.html)

Under FCC rules, the holder of a federal broadcasting license is required to extend credit to federal candidates for broadcast advertising credit on the same terms as the broadcaster extends to other advertisers. The same requirement of equivalency applies to advertising placed through an agent. If the broadcaster extends credit to the agent's non-political clients, the broadcaster must also extend credit to the agent's political clients.

The [Federal Communications] Commission's rules also prohibit discrimination between candidates in practices or services. Thus, a station cannot discriminate between commercial advertisers and candidates, or between candidates, in the application of specific sales practices. For example, if a candidate or a candidate's agency has an established credit history (and is responsible for payment), we believe that requiring any advance payment is inappropriate if the station would not so treat commercial advertisers or their representatives under the station's customary payment/credit policies.

*In re Beth Daly*, *supra*. The broadcasters extended credit for Friends of Dave Reichert and MediaPlus+ because FCC guidelines required them to do so. MediaPlus+ simply extended the same credit to Friends of Dave Reichert as it did to its other clients. A vendor does not make a contribution where it does not deviate from its normal course of business. Advisory Opinion 1979-36 (Working Names).

Even were the regulation's factors exclusive, the extension of credit to Friends of Dave Reichert was in its ordinary course of business. MediaPlus+ screens its clients to avoid credit problems. The screening process has avoided loss with only one exception in over 20 years of business. Neukirchen Decl. ¶¶1-2. MediaPlus+ had an established relationship with Friends of Dave Reichert over two previous election cycles and the campaign had met all its financial obligations to MediaPlus+. The credit extended by MediaPlus+ was well-below what MediaPlus+ extends to commercial clients. Neukirchen Decl. ¶7. Most of the air charges were actually paid by Friends of Dave Reichert before the broadcasters even issued invoices for the time. *Id.* The extension of credit was sought because of the time lag between solicitation and receipt of funds.

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Friends of Dave Reichert expected to and is paying the bill in full. Kelly Decl. ¶3; Neukirchen Decl. ¶8. All amounts due to the broadcasters have been paid by the campaign. A small amount remains due for the vendor's commissions that will be paid this quarter.<sup>1</sup>

Extension of credit for established advertisers and their agents is the normal course of business. The KOMO-TV general manager stated, "It's not like we're doing anything unusual." See Attachment 2. Neither did MediaPlus+ do anything unusual in passing that extension of credit to its customer. "The credit arrangement with Friends of Dave Reichert on media broadcast costs were made on the same terms we make available to our similarly-situated commercial clients and nonfederal political clients." Neukirchen Decl. ¶8.

The general availability of the credit terms extended by the broadcasters for Friends of Dave Reichert and Media Plus+ is further confirmed by the willingness of the broadcasters to extend the same terms for the Darcy Burner campaign. The general manager of KOMO-TV stated, "We have extended the same offer to the Burner agency, but they declined." See Attachment 2.

#### Conclusion

A vendor's extension of credit to a campaign on the same terms that are generally available to non-political clients is not a contribution to a candidate. The Commission should find there is no reason to believe that Friends of Dave Reichert or MediaPlus+ violated the FECA.

Very truly yours,

LIVENGOOD, FITZGERALD &  
ALSKEG, PLLC

  
John J. White, Jr.

enclosures: Attachment 1  
Attachment 2

cc: Clients

<sup>1</sup> That economic conditions in December were the worst in memory does not convert a reasonable extension of credit into an unreasonable one. The vendor is undertaking efforts to collect the bill and the committee will have it paid in full.

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**ATTACHMENT 1**

7 FCC Rcd 1442; 1992 FCC LEXIS 707, \*

LEXSEE 7 FCC RCD 1442

Ms. Beth Daly, Media Director, Great American Media, Inc., 2626 Pennsylvania Avenue,  
N.W., Suite 301, Washington, D.C. 20037

8330-Q, 92010050

RELEASE-NUMBER: DA 92-165

FEDERAL COMMUNICATIONS COMMISSION

7 FCC Rcd 1442; 1992 FCC LEXIS 707

February 6, 1992

## ACTION:

[\*1]

## LETTER

## OPINION:

Dear Ms. Daly:

This is in response to your two recent letters requesting rulings with respect to the purchase of advertising time by political candidates. Specifically, you ask whether the FCC has any policies governing the extent to which broadcasters can require (1) advance payment, and (2) payment by cash, certified check, or wire transfer.

The Commission has no formal policy regarding advance payments for political advertisements. However, under Section 312(a)(7) of the Communications Act, 47 U.S.C. Section 312(a)(7), a broadcaster may not adopt policies that impede a federal candidate's reasonable access to its broadcast facilities. In response to previous inquiries from the public regarding advance payment, the Mass Media Bureau has advised informally that a broadcaster generally may not require political candidates, or entities buying time on their behalf, to submit payment more than one week in advance of the air date of the first advertisement in the schedule. We continue to believe that the Mass Media Bureau policy is appropriate insofar as it ensures reasonable access for federal candidates in instances where the candidate[\*2] or the candidate's agency representative lacks an established credit history.

In addition, as a general matter, under Section 315(b) of the Act, 47 U.S.C. Section 315(b), a station may not discriminate against candidates vis-a-vis commercial advertisers. See *Hurwitt v. FCC*, 677 F.2d 893 (D.C. Cir. 1981) (interpreting non-discrimination prohibition of Section 315(b)). The Commission's rules also prohibit discrimination between candidates in practices or services. Thus, a station cannot discriminate between commercial advertisers and candidates, or between candidates, in the application of specific sales practices. For example, if a candidate or a candidate's agency has an established credit history (and is responsible for payment), we believe that requiring any advance payment is inappropriate if the station would not so treat commercial advertisers or their representatives under the station's customary payment/credit policies.

The Commission has not previously addressed the issue of whether a broadcaster can require a candidate to pay for advertising time by cash, certified check, or wire transfer. Thus, the[\*3] establishment of payment methods is left to the discretion of broadcasters. In the absence of evidence of improper discrimination against, between or among candidates, we will not intrude in the reasonable, good faith judgment of broadcasters in this area.

Staff action is taken here under delegated authority. Application for review by the full Commission may be filed within thirty days of the date of public notice of this ruling (see Commission Rule 1.4(b) [47 C.F.R. Section 1.4(b)]) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail.

Sincerely,

29044252251

7 FCC Red 1442; 1992 FCC LEXIS 707. \*

Milton O. Gross, Chief  
Fairness/Political Programming Branch  
Enforcement Division  
Mass Media Bureau

**Legal Topics:**

For related research and practice materials, see the following legal topics:  
Administrative LawAgency RulemakingNotice RequirementsCommunications LawBroadcastingPolitical  
BroadcastingCommunications LawFederal ActsCommunications ActGeneral Overview

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**ATTACHMENT 2**



# The Seattle Times

Tuesday, October 21, 2008 - Page updated at 12:00 AM

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## Burner loans campaign \$140,000 for ads

By Emily Hefter  
Seattle Times staff reporter

Congressional candidate Darcy Burner loaned her campaign \$140,000 last week, just days after reporting record-breaking campaign fundraising numbers in her race against U.S. Rep. Dave Reichert.

Burner raised \$1.2 million in three months, according to a campaign filing last week. That's more than double what her Republican opponent raised in the third quarter of this year. The windfall attracted national media attention in one of the most competitive House races in the country.

Burner campaign spokesman Sandeep Kaushik said the campaign still has a six-figure reserve. He said Burner loaned the campaign the money to respond to a massive Reichert television-ad buy on Friday.

The big-money tit-for-tat underscores the closeness of the race for the 8th Congressional District seat Reichert has held for four years. It also suggests that both campaigns may end the election cycle in debt despite raising more than \$2 million each.

In the most recent federal filing, which included fundraising through the end of September, Reichert reported having just under \$1.2 million in cash on hand. Burner had about \$770,000.

Burner lost her first race against Reichert by about 3 percentage points in 2006. The 8th District includes eastern King and Pierce counties.

Both campaigns have raised hundreds of thousands more this year than they did two years ago, and as mail-in ballots arrive this week, they are dumping much of it into television ads.

Reichert's campaign spokeswoman wouldn't go into detail about Reichert's television-ad buys Monday, but she said the campaign updated its ad buy on Friday.

KOMO-TV sold Reichert's ad buyer, Media Plus+, the most recent TV slots on credit — a practice that is relatively uncommon for political advertising. KIRO-TV also extended credit for Reichert ads that are running this week, said Burner spokesman Sandeep Kaushik.

Most political campaigns pay for their ads upfront, but KOMO vice president and general manager Jim Clayton said the station sometimes bills buyers it has a good relationship with. He said KOMO regularly works with Media Plus+ and that the agency would be on the hook for the ad buy if the Reichert campaign doesn't pay.

"It's not like we're doing anything unusual," Clayton said. "We have extended the same offer to the Burner agency, but they declined."



Democratic congressional candidate Darcy Burner.



Republican U.S. Rep. Dave Reichert.

Kaushik disputed that Burner's campaign got the same credit offer.

"He's basically funding a huge chunk of his campaign without paying for it," Kaushik said of Reichert.

Bob Bierzack, a spokesman for the Federal Election Commission, said such arrangements are legal as long as the station isn't doing any campaign a special favor.

"Typically, they just need to be consistent with whatever the vendor does for any kind of customer," he said.

Burner noticed Reichert's updated ad buy last week and immediately loaned her campaign \$140,000 so it could buy more time, as well. That wasn't because she was out of money, Kaushik said. She just wanted to move fast.

"We've got money," he said. "She just wanted to move immediately to get some new buys in."

**Emily Heffler: 206-464-8246 or [ehaffer@seattletimes.com](mailto:ehaffer@seattletimes.com)**

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