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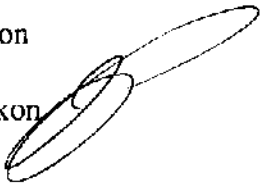
February 8, 2005


## AGENDA ITEM


For Meeting of: 2-14-05

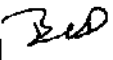
### MEMORANDUM


TO: The Commission

THROUGH: James A. Pehrkon   
Staff Director

FROM: Lawrence H. Norton   
General Counsel

Rosemary C. Smith   
Associate General Counsel

Brad C. Deutsch   
Assistant General Counsel

Cheryl A.F. Hemsley   
Staff Attorney

Subject: Draft AO 2004-43

Attached is a proposed draft of the subject advisory opinion revised in light of the Commission's discussion at the December 16, 2004, Open Meeting, and the requestor's letters dated January 21 and February 8, 2005. We request that this draft be placed on the agenda for February 14, 2005.

Attachment

1 ADVISORY OPINION 2004-43

2  
3 Gregg P. Skall, Esq.  
4 Womble, Carlyle, Sandridge & Rice, P.L.L.C.  
5 Seventh Floor  
6 1401 Eye Street, N.W.  
7 Washington, D.C. 20005

REVISED BLUE DRAFT

8  
9 Dear Mr. Skall:

10  
11 We are responding to your advisory opinion request on behalf of the Missouri  
12 Broadcasters Association (“MBA”) regarding whether, under the Federal Election  
13 Campaign Act of 1971, as amended (“FECA”), a broadcaster would be making a  
14 corporate in-kind contribution by selling advertising time at the Lowest Unit Charge  
15 (“LUC”)<sup>1</sup> to a candidate who fails to include the required Communications Act  
16 Statement<sup>2</sup> in one of his advertisements and, therefore, is not “entitled” to the LUC under  
17 the Communications Act of 1934, as amended. 47 U.S.C. 315(b).

18 As long as a broadcaster offers the LUC to all other Federal candidates, including  
19 those who did not include the required Communications Act Statement, the LUC is a  
20 discount offered in the ordinary course of business and is not an in-kind contribution.

21 ***Background***

22 The facts of this request are presented in your letter of October 29, 2004, as  
23 supplemented by your letters of November 19, 2004, January 21, 2005, and February 8,  
24 2005.

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<sup>1</sup> The LUC is the lowest advertising rate that a station charges other advertisers for the same class and amount of time for the same period. See 47 U.S.C. 315(b)(1) and 47 CFR 73.1942(a)(1).

<sup>2</sup> As discussed in detail below, the Bipartisan Campaign Reform Act of 2002, P.L. 107-155, 116 Stat. 81 (March 27, 2002) (“BCRA”), amended section 315 of the Communications Act of 1934, 47 U.S.C. 315(b), such that a Federal candidate “shall not be entitled” to the LUC if any of his advertisements makes a direct reference to his opponent and fails to contain a statement both identifying the candidate and stating that the candidate has approved the communication (the “Communications Act Statement”).

1 MBA is a voluntary association of broadcasters who are Federal Communications  
2 Commission ("FCC") licensees of radio and television stations throughout Missouri.  
3 Your request was prompted by a letter sent to some of MBA's members by the campaign  
4 committee of Nancy Farmer, a 2004 Democratic candidate for the U.S. Senate from  
5 Missouri.<sup>3</sup> The Farmer campaign's letter alleges that the MBA members were charging  
6 Ms. Farmer's opponent, Senator Christopher Bond, the LUC even though, under the  
7 Communications Act, the Senator was no longer *entitled* to such a discount because one  
8 of his advertisements did not contain the required Communications Act Statement.

9 As indicated in note 2, above, a Federal candidate must include the required  
10 Communications Act Statement in advertisements that mention the candidate's opponent.  
11 For radio broadcasts, the Communications Act Statement must consist of a personal  
12 audio statement by the candidate identifying himself, the office sought and stating his  
13 approval of the message. In the case of television advertisements, for a period of no less  
14 than four seconds at the end of the ad, there must appear simultaneously (i) a clearly  
15 identifiable photographic or similar image of the candidate; and (ii) a clearly readable  
16 printed statement, identifying the candidate and stating that he has approved the  
17 broadcast and that his authorized committee paid for the broadcast.<sup>4</sup>

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<sup>3</sup> A copy of one of the letters sent by the Farmer campaign to an MBA member is attached to your request.

<sup>4</sup> BCRA also amended section 441d of FECA to include a similar, though not identical, required statement in political advertisements (the "FECA Statement"). The FECA Statement for any radio advertisement, whether or not the ad mentions a candidate's opponent, requires the candidate to identify himself, and state that he approved the message. The FECA Statement does not require a candidate to state the office he is seeking. For any television advertisement, the FECA Statement requires a candidate to identify himself and that he approved the communication in a statement that is either (1) an unobscured, full-screen view of the candidate, or (2) a voice-over by the candidate, accompanied by a clearly identifiable photographic or similar image of the candidate. The statement must also appear in writing at the end of the communication in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least four seconds. 2 U.S.C. 441d(d)(1); *see also* 11 CFR 110.11(c)(3).

1           Although the Communications Act generally requires broadcasters to charge  
2 candidates the LUC for a candidate's political advertisements in the 45 days preceding a  
3 primary election and the 60 days preceding a general election, BCRA amended 315(b) of  
4 the Communications Act to provide that a Federal candidate "shall not be *entitled*"  
5 [emphasis added] to receive the LUC if any of his advertisements have failed to include  
6 the required Communications Act Statement. 47 U.S.C. 315(b). Specifically, once a  
7 broadcaster airs a Federal candidate's political advertisement that does not contain the  
8 Communications Act Statement, that candidate is no longer guaranteed the LUC for any  
9 advertisement aired in the remaining days leading up to the election.

10           In order to respond to your inquiry, the Commission must address two  
11 preliminary issues. First, the Commission must address whether Senator Bond had lost  
12 his entitlement to the LUC advertising rate. Because our statutory jurisdiction does not  
13 extend to the Communications Act, the Commission does not have the jurisdiction to  
14 determine whether one of Senator Bond's advertisements in fact failed to contain a fully-  
15 compliant Communications Act Statement. Your request is premised upon such an  
16 assumption, stating that some MBA members "charged Senator Bond the [LUC] for  
17 campaign advertisements *after he lost his entitlement*" [emphasis added] to receive such a  
18 discount. Accordingly, the Commission assumes, for the purposes of this opinion, that  
19 Senator Bond ran an advertisement without an adequate Communications Act Statement  
20 and therefore was not entitled to the LUC, but we make no independent judgment as to  
21 this issue.

22           Second, the Commission must address whether your statement of the  
23 Communications Act is correct as to whether it is permissible for a broadcaster to

1 continue to offer the LUC to a candidate who is no longer “entitled” to it. As you  
2 acknowledge, the FCC is the agency with jurisdiction to interpret the Communications  
3 Act. Although the FCC has not yet promulgated regulations implementing the BCRA  
4 amendments to the Communications Act, you argue that despite a candidate’s lack of  
5 entitlement to the LUC, under section 315(b)(1) of the Communications Act, a  
6 broadcaster is still permitted to *offer* the LUC discount to such a candidate.<sup>5</sup> You argue,  
7 therefore, that the lack of entitlement does not create a requirement for a broadcaster to  
8 charge a rate higher than the LUC to such an “unentitled” candidate. As this issue is  
9 within the jurisdiction of the FCC rather than the FEC, for purposes of this opinion, the  
10 Commission presumes that your statement is correct and makes no independent judgment  
11 as to that issue.

#### 12 ***Questions Presented***

13 *Does a broadcaster make an in-kind contribution by charging a Federal candidate*  
14 *the LUC for advertising time when the candidate is not “entitled” to the LUC under*  
15 *the Communications Act? If the LUC is an in-kind contribution, must the broadcaster*  
16 *re-bill the candidate for the difference between the LUC and some higher rate?*

#### 17 ***Legal Analysis and Conclusions***

18 FECA prohibits corporations from making any contributions or expenditures in  
19 connection with a Federal election. 2 U.S.C. 441b(a). FECA and Commission  
20 regulations define the terms “contribution” and “expenditure” to include any gift of  
21 money or anything of value for the purpose of influencing a Federal election. 2 U.S.C.

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<sup>5</sup> Informal conversations between Federal Election Commission (“FEC”) and FCC staff members confirm that the FCC staff interprets the BCRA amendments to the Communications Act to allow a station to offer the LUC to a candidate who has failed to include an adequate Communications Act Statement in one of his advertisements, as long as it treats all Federal candidates in a consistent, non-discriminatory manner.

431(8)(A)(i) and 431(9)(A)(i); 11 CFR 100.52(a) and 100.111(a); *see also* 2 U.S.C. 441b(b)(2) and 11 CFR 114.1(a)(1) (providing a similar definition for “contribution and expenditure” with respect to corporate activity). Commission regulations further define “anything of value” to include all in-kind contributions and state that, unless specifically exempted under 11 CFR 100.71(a), the provision of any goods or services (including advertising services) without charge, or at a charge which is less than the usual and normal charge for such goods or services, is a contribution. 11 CFR 100.52(d)(1); *see also* 11 CFR 100.111(e)(1).

The Commission has held, however, that discounts that are less than the usual and normal charge are not contributions if such discounts are offered in the ordinary course of business. *See, e.g.*, Advisory Opinions 2004-18, 1996-2, and 1989-14. Since the LUC is a statutorily-guaranteed discount available to all candidates whose advertisements contain the required Communications Act Statement, it is a discount offered in the ordinary course of business to those candidates. Additionally, because the LUC itself is calculated based on the rates available to certain commercial advertisers,<sup>6</sup> it is by definition, offered to *some* customers in the ordinary course of business. Accordingly, because a broadcaster must offer the LUC to all candidates whose advertisements contain the required Communications Act Statement and because certain commercial advertisers also receive a discount amounting to the LUC, the Commission concludes that a broadcaster may offer the LUC to a Federal candidate whose advertisement did not include the required Communications Act Statement without making an in-kind contribution, so long as the broadcaster provides the LUC to all similarly situated Federal candidates, thereby ensuring that the discount does not favor any particular candidate.

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<sup>6</sup> *See* note 1, above.

Therefore, based on your representation that no MBA member who offered the LUC to Senator Bond failed to make the LUC available to any other Federal candidate, whether or not the candidate was “entitled” to the LUC, the offer of the LUC to Senator Bond did not constitute a prohibited in-kind contribution. Finally, because the Commission has concluded no in-kind contribution was made, we do not need to reach your question regarding re-billing.

The Commission expresses no opinion regarding the applicability of the Communications Act of 1934, or of regulations promulgated by the FCC, to the activities in this request because those questions are outside the Commission's jurisdiction.

This response constitutes an advisory opinion concerning the application of FECA and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

Scott E. Thomas  
Chairman

Enclosures (AOs 2004-18, 1996-2, and 1989-14)