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Ms. Mary Dove, Secretary
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Mr. Lawrence H. Norton, Esq.
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Re: AOR 2006 - 31 - Comments to Proposed Drafts A & B

Dear Ms. Dove and Mr. Norton:

The undersigned serves as counsel to Santorum 2006, the principal authorized committee of Rick Santorum, Republican nominee for the United States Senate from Pennsylvania. We have previously submitted comments to the above-referenced Advisory Opinion Request ("AOR") proffered by Bob Casey for Pennsylvania Committee ("Casey"). We hereby resubmit those comments and additional comments related to the proposed drafts A & B released yesterday by your office.

1. Upon review of the alternative drafts A & B of the Proposed Advisory Opinion AOR 2006-31, we reiterate that the Advisory Opinion process is not a proper forum for addressing the issue(s) raised in the AOR. Accordingly, the Commission should not answer the Casey question because it is not a proper AOR.

A request for an Advisory Opinion from the Federal Election Commission can only be based upon the application of the Federal Election Campaign Act of 1971, as amended ("FECA"), chapters 95 or 96 of the Internal Revenue Code of 1954 or any regulation prescribed by the Commission. See 2 U.S.C. §437f(a)(1), and 11 C.F.R. §112.1.

Here, Casey seeks the Commission's interpretation of provisions of the Federal Communications Act, specifically 47 U.S.C. §315(b)(2)(C). See page 5 of AOR 2006-31.

FECA further requires (as do Commission regulations) that an advisory opinion relate only to "a specific transaction or activity that the requesting person plans to undertake or is presently undertaking and intends to undertake in the future. Requests...regarding the activities of third parties, do not qualify as advisory opinion requests." See 11 C.F.R. §112.1(b). Here, Casey seeks the Commission's 'advice' as to the impact on him if a third party (a broadcast licensee) provides the LUC to him upon delivery of television ads with intentionally erroneous disclaimers

The 'advisory opinion' requested by Casey sets forth no actual facts which would qualify as an appropriate basis for an advisory opinion under FECA.

The AOR relies in its entirety on a set of facts related to a television spot recently produced and aired on various broadcast stations in Pennsylvania on behalf of Santorum 2006 ("the Santorum Ad") which allegedly contained a slightly erroneous disclaimer¹. Santorum 2006 disputes the Casey campaign's characterization of the disclaimer(s) in the Santorum Ad.

Casey unsuccessfully demanded of all stations airing the Santorum Ad that Santorum 2006 be denied the Lowest Unit Charge ("LUC") for the duration of the 2006 election cycle. Casey admits on page 5 of the AOR in his 'Factual Background' that the basis and genesis of his AOR arises entirely from the Santorum Ad.

The entire 'factual record' attached to the AOR includes *not* a single fact related to the Casey campaign. All 'facts' are entirely related to third parties:

- o The pages and pages of media buys / reserved airtime submitted by Casey do not, in fact, reflect *any* reservation of air time by the Casey campaign. Rather, the reservations of time submitted as support for the Casey AOR include only reservations or purchase of broadcast time by the Democratic Senate Campaign Committee ("DSCC").
- o The other attachments of 'factual background' all refer to either Santorum 2006 or correspondence between Casey and KDKA regarding the Santorum Ad, together with the KDKA political advertising policy

Casey singles out a particular station, KDKA in Pittsburgh, in his AOR because of its written response(s) advising Casey of its preliminary and then final decision(s) regarding the Santorum Ad and the LUC. After initially determining that it would not provide LUC to Santorum 2006 the station subsequently concluded and advised Santorum 2006 that it had further considered and reviewed additional legal authority and that the broadcaster was *not* precluded from offering the LUC, in part, because the Santorum Ad substantially complied with the disclaimer requirements.

¹ The ad's disclaimer had the required photo of the candidate at the beginning, rather than the end, of the Ad. The Santorum 2006 clearly complied with the requirements to 'stand by' the advertisement at issue.

KDKA referenced in its second letter other provisions of law governing broadcasters such as the non-discrimination provisions and, further, that in reliance on FEC Advisory Opinion 2004-43, the continuation of the LUC to Santorum 2006 was not improper. The station further stated that it did not wish to be placed in the position of adjudicating disputes between candidates in enforcing an ambiguous statute in such a way that would inject the station into the political process. See September 15, 2006 letter from KDKA to Santorum 2006, attached to Casey AOR.

The determination by KDKA to rely on AO 2004-43 was well-placed under Commission regulations which provide that an advisory opinion rendered by the Commission under 11 CFR Part 112 may be relied upon by "...any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered." See 11 C.F.R. §112.5(a)(2).

Casey, however, is disgruntled and dissatisfied with the broadcaster's response which failed to grant his wish that it disallow Santorum 2006 the LUC for the remainder of the 2006 election cycle. He now seeks to improperly utilize the advisory opinion process to obtain a result which is neither contemplated by nor appropriate for a Commission advisory opinion.

Casey's dissatisfaction with the station's decision regarding the Santorum Ad is not a justification for allowing him to misuse the Commission's only expedited procedure for his own political purposes.

To craft a purported 'immediate need', Casey has advised the Commission of his desire to create advertising that deliberately ignores the FCC disclaimer requirements and seeks the FEC's 'blessing' to do so. However, the Commission's advisory opinion process does not authorize an opinion to be rendered on provisions of law outside the jurisdiction of the Federal Election Commission nor should it be used to authorize knowing and willful disregard of any provision of law.

The Commission, in AO 2004-43, reviewed the identical question² related to the PCC disclaimers and the availability of the LUC. Specifically, the question posed in AO 2004-43 was "whether, under ... FECA, a broadcaster would be making a corporate in-kind contribution by selling advertising time at the LUC to a candidate who ay failed to include a fully compliant Communications Act Statement in one of his advertisements." (citing 47 U.S.C. §315(b)).

The Commission concluded that the broadcaster's decision to offer the candidate the LUC under 'these circumstances' did *not* result in an in-kind contribution under FECA.

The Commission further advised that there was no violation of any disclaimer requirement "over which the Federal Election Commission has jurisdiction." See AO 2004-43

² OGC staff in Draft B states that the facts here are materially different from those in AO 2004-43 because the Casey AOR states that he intentionally plans to disregard the Communications Act disclaimer requirements. Casey's purported intention to deliberately violate the Communications Act should be frowned upon rather than simply being accepted as a 'stipulated' fact by the Commission and its staff.

The Commission rightly concluded that it had no authority to enforce the provisions of Title 47 and noted that the FCC had failed to promulgate regulations under 47 U.S.C. §315(b).

The FCC has had almost two years since AO 2004-43 was issued by the FEC to provide additional guidance to broadcasters on this subject but has failed to do so. Nothing has changed statutorily to now permit the Commission to opine on the FCC's area of authority.

Casey's request to the Commission for permission to deliberately violate the FCC disclaimer statutes is interesting but does not fall within the scope of authority for the Commission's advisory opinion procedures.

2. Should the Commission determine to issue an advisory opinion in response to the flawed Casey request, only Draft A comports with the longstanding opinions of the Commission regarding 'discounts' offered in the ordinary course of a vendor's business. Thus, only Draft A should be considered by the Commission for adoption.

As recognized in Draft A, the Commission has for decades recognized that it is not an illegal corporate contribution for a commercial vendor to provide to political campaigns and candidates discounts offered to other customers in the ordinary course of the corporation's business.³

There is good reason for the Commission to abide by its own regulations governing jurisdiction for rendering advisory opinions, namely, to insure that the Commission is not promulgating or offering opinions on subject areas outside the scope of the Commission's expertise. Here, the Commission is being asked to make a determination about pricing of television broadcast rates with *no* factual basis about the structure of rates, the availability of various types of rates, the ratemaking process, how rates are determined by broadcasters, and so forth. The AOR *presumes* (incorrectly) that there are "two rates" – the lowest unit charge and another rate which is higher than the lowest one.

³ AO 1994-10, permitting discounted banking fees ("In the past, the Commission has concluded that the receipt of complimentary items or the purchase of goods or services at a discount does not result in a contribution if the discounted or complimentary goods were available to others on equal terms or as part of a pre-existing business relationship. See Advisory Opinions 1992-24, 1989-14 and 1987-24"); AO 1988-25 ("Other opinions have similarly allowed corporations to give volume discounts or rebates to candidates for Federal office who purchase the corporate vendors' services or goods if these discounts or rebates are offered in the ordinary course of the corporation's business to non-political customers or clients, and if offered on the same terms and conditions to the candidate or political committee. Advisory Opinions 1986-22, 1985-28, 1982-30, and 1976-86. Applying the usual and normal charge standard to a corporation's offer of a reduced billboard advertising rate to a Federal candidate's campaign committee, the Commission concluded in Advisory Opinion 1978-45 that the discounted rate would represent a prohibited corporate contribution. The Commission reasoned that because this rate was not routinely offered in the ordinary course of business to the corporation's commercial customers, it could not be offered to the Federal candidate"). AO 1986-22 permitted a broadcaster to offer incentive(s) and discount(s) on the price of broadcast airtime to political candidates who accepted the station's offer to advance purchase airtime.

As acknowledged by the language of Draft A, the Commission staff felt compelled to communicate with staff of the Federal Communications Commission, because the AOR seeks an interpretation *not* of FEC regulations but of provisions of federal law outside of the FEC's jurisdiction and expertise.

The provisions of the Federal Communications Act cited in the AOR (47 U.S.C. §315(b)(2)(C)) do not state that failure to follow the exact specifications of the 'stand by your ad' provisions require a broadcaster to thereafter *deny* the LUC. Rather, the statute clearly states that "...such candidate shall not be *entitled* to receive the [LUC]..."

If Congress intended for the LUC to be unavailable or prohibited to any political candidate (even if the candidate substantially complies with the disclaimer provisions), Congress could and should have said that.

However, the statute does *not* say that: rather, the remedy for failure to incorporate the "stand by your ad" provisions is that a candidate is not 'entitled' to LUC. Nowhere does the statute mandate denial of a particular rate or charge, nor has the FCC indicated through any formal or binding legal authority or guidance that a station is precluded or prohibited from offering the LUC under those circumstances. As with any statutory or regulatory framework, §315(b) is not the only part of Title 47 that must be considered, as broadcasters have noted in interpreting this provision.

Such was the response of the Missouri Broadcasters Association in a similar situation involving another US Senate campaign and another similar "stand by your ad" disclaimer issue August, 2006.

In that situation, it was the Democratic US Senate nominee, Claire McCaskill, who failed to abide by the 'stand by your ad' provisions by failing to include in a radio spot the office she is seeking and failing to file a proper notice with the station that her ad reference(d) her opponent, both of which are required by 47 U.S.C. §315(b).

Counsel to the Missouri broadcasters, Gregg Skall, determined that the 'opposing candidate' was not the Republican candidate during the period preceding the primary election (an odd conclusion since the McCaskill advertisement attacked the Republican candidate, Sen. Talent by name). Relevant for these purposes, however, was his conclusion that if the applicable candidate(s) and time period *had* been in force, the denial of the LUC was nonetheless optional with the broadcaster and was/is not mandated by federal law. Mr. Skall stated in his memorandum to the Missouri Broadcasters Association:

"As a practical matter, the Federal Election Commission, in prior rulings, has indicated that the loss of LUC entitlement is not binding upon broadcast stations, and the FCC has not spoken to this issue. In other words, the candidate that violates the disclaimer provisions of the Act loses the entitlement to the lowest unit charge. However, any station that continues to provide advertising to the candidate at lowest unit charge does not violate of the Act, provided they do not discriminate among all candidates.

Further, please be aware that, because it is the FCC that oversees and has jurisdiction with regard to LUC, any candidate who is denied access to LUC, on the basis of a violation of the Campaign Reform Act, could file a complaint with the FCC." See Summary from Missouri Broadcasters Association, August 30, 2006, based on Memorandum from Gregg Skall, Counsel to Missouri Broadcasters Association. (Memorandum attached to Comments to AOR 2006-31 filed on October 10, 2006)

The Federal Election Commission has previously noted the complexities of the statutes governing broadcast licensees and the rates charged to political candidates.

In FEC Advisory Opinion 1998-17, the Commission sought and received guidance from the General Counsel to the Federal Communications Commission ("FCC") regarding two key provisions of the Communications Act in order to ascertain whether a station providing *free* air time to candidates would violate the prohibitions of 2 U.S.C. §441b.

Congress, in enacting the Bipartisan Campaign Reform Act of 2002 ("BCRA") and amending Section 315(b) to add the "stand by your ad" disclaimer provision(s), did not repeal *other* provisions of the Communications Act. Specifically, Congress did not repeal §312(a)(7) of the Communications Act, the "reasonable access" rule, which was enacted in 1972 as part of FECA and which mandates 'non-discrimination' by broadcast licensees among advertisers. "The 'reasonable access' rule directs the FCC to revoke a broadcaster's license "for willful or repeated failure to allow reasonable access to or permit purchase of reasonable amounts of time" by Federal candidates. Congress added these provisions for a twofold purpose: first, to give candidates "greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters"; secondly, "to halt the spiraling cost of campaigning for public office." S. Rep. No. 92-96, 92d Cong., 1st Sess. 20 (1971)". See FEC AO 1998-17

Because Congress did not repeal the 'reasonable access' requirements of the Communications Act when adding the 'stand by your ad' language of §315(b), it is reasonable for a broadcast licensee to presume that the 'stand by your ad' language must be interpreted in tandem with pre-existing law.

And as FCC Counsel advised the Commission at the time of the Commission's consideration of AO 1998-17, "due to the complexity of broadcasting and cable advertising practices, the calculation of the lowest unit charge may be difficult, and has led to complaints by candidates that they were charged more than the lowest unit charge.FCC regulations permit a station to establish a special discount rate to sell time to candidates which is even lower than the lowest unit charge."

Accordingly, *only* Draft A recognizes the well-established approval by the Commission of vendor discounts offered in the ordinary course of business and the reality that LUC is not different in any material respect from any other discount.

3. Draft B should not be adopted by the Commission because it is wholly outside the Commission's expertise, its jurisdictional authority for rendering advisory opinions and would invite significant abuse of the Commission's enforcement procedures by partisan adversaries, similar to the situation which gave rise to the Casey AOR.

Draft B requires the Commission to interpret federal law (the Communications Act) which is not within the Commission's jurisdiction to interpret. It is for good reason that the FEC is precluded by law from rendering advisory opinions interpreting statutes other than FECA. The Commission lacks both the expertise and jurisdiction to render such opinions which involve statutes within the jurisdiction of other agencies. BCRA did not enlarge the Commission's jurisdiction or authority for issuing advisory opinions.

Further, for the Commission to commit itself to the path envisioned by Draft B would create political mischief and add yet another avenue for partisan abuse of the Commission's enforcement procedures. Every political adversary seeking advantage in a campaign would be invited to file a complaint against campaigns and broadcasters, alleging illegal corporate contributions. The OGC would then be required to engage in intensive fact finding of every rate offered to every advertiser and the manner in which the rates charged were determined – knowledge and expertise of which is wholly lacking at the Federal Election Commission.

The Casey AOR was sought to further his immediate political objectives during his current campaign for the US Senate. Adoption of Draft B would invite myriad similar filings with the Commission for similar political motives from now on.

The Casey AOR process is inappropriate – and it is inconceivable that the Commission would adopt Draft B in this truncated process where so many would be adversely impacted and virtually none of whom are even aware of the pending Casey AOR.

There is no expertise at the FEC regarding broadcast advertising rates. Such rates are established in some instances on a moment by moment, real time, virtually auction basis. The Commission staff has confirmed that it consulted with FCC staff on the issues related to FCC interpretation of the Communications Act.

Notwithstanding the admission by OGC of the Commission's lack of knowledge and expertise on the central issue of the AOR, namely, provisions of the Communications Act, Draft B nonetheless proposes to vest authority in the Commission to subsequently determine the propriety of rates charged by broadcasters to political campaigns and committees in case-by-case enforcement actions.

The Commission surely will not approve such a departure from the Commission's authority and expertise. Surely the Commission will not adopt Draft B.

Conclusion

The Commission should dismiss the Casey AOR for the reason that it is outside the parameters of the Commission's jurisdiction for rendering advisory opinions. Should the Commission determine to issue an advisory opinion notwithstanding the lack of jurisdiction to do so, the Commission should adopt Draft A as the only version which is in keeping with the Commission's authority and longstanding application of FECA related to discounts offered in the ordinary course of business.

Sincerely,



Cleta Mitchell, Esq.
Counsel to Santorum 2006