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October 12, 2006

**Mr. Lawrence H. Norton
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463**

Re: *Comments in Response to AOR 2006-31*

Dear Mr. Norton:

This letter serves as the comments of the National Association of Broadcasters, the North Carolina Association of Broadcasters, the Ohio Association of Broadcasters, and the Virginia Association of Broadcasters¹ in response to Advisory Opinion Request 2006-31 ("AOR") filed by the Bob Casey for Pennsylvania Committee and the Office of General Counsel's draft advisory opinions circulated on October 11, 2006 ("OGC Draft A" and "OGC Draft B").

The AOR asks whether a broadcast station that assesses an advertising rate equivalent to the "lowest unit charge" to a Federal candidate whose advertisement fails to comply with the disclaimer requirements of Section 315(b)(2) of the Communications Act of 1934 (47 U.S.C. § 315) is making an unlawful in-kind corporate contribution to the candidate.

It is important for the Commission to take this opportunity to state clearly and decisively that a broadcast station will not be held liable for making an unlawful corporate contribution if it offers a Federal candidate an advertising rate authorized by

¹ The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of more than 8,300 free, local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, as well as the Courts. The North Carolina, Ohio, and Virginia Association of Broadcasters are nonprofit trade associations that represent member radio and television broadcasters in those respective states.

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the Communications Act. The Commission, therefore, should adopt the substance of OGC Draft A and clarify the following points:

- * This Commission has no jurisdiction to interpret or enforce Section 315 or any other provision in the Communications Act to determine whether a broadcast station has violated FECA or any of this Commission's rules or regulations. Rather, the interpretation and enforcement of the Communications Act is vested solely and exclusively in the Federal Communications Commission ("FCC"). If the FCC determines that stations have discretion to offer the lowest unit charge to Federal candidates who fail to comply with Section 315(b)(2), this Commission would be encroaching upon the FCC's jurisdiction to regulate advertising rates through the application of its corporate contribution rules in a manner that would penalize stations for lawfully exercising such discretion.
- * A broadcast station can never be deemed to have made an unlawful contribution by offering political candidates the lowest unit charge, or an equivalent rate, in compliance with the Communications Act. This conclusion is compelled both by Congress's decision to set a special statutory rate for all political candidates and by this Commission's own precedents that establish a broadcast station's lowest unit charge is, by definition, the usual and normal rate offered to certain non-political advertisers in the ordinary course of business.

Issuance of OGC Draft A, together these clarifications, will give much needed guidance to broadcasters that compliance with the Communications Act's lowest unit charge rules cannot constitute a prohibited corporate contribution under FECA. To hold otherwise would create a conflicting—and ultimately untenable—regulatory regime that would undermine Congress's clear intent to subject political broadcast rates to the sole jurisdiction of the FCC.

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BACKGROUND

Political broadcasting is the subject of comprehensive regulation under the Communications Act and FCC rules. Among other requirements, broadcasters must offer the "lowest unit charge" to all legally qualified candidates for public office, they must offer Federal candidates "reasonable access" to broadcast facilities and services, they must offer "equal opportunities" to competing candidates, and they must generally act in a fair and nondiscriminatory manner. See 47 U.S.C. §§ 312, 315; 47 C.F.R. § 73.1942. These requirements are subject to numerous FCC interpretative opinions and decisions which, together with guidance from FCC staff, govern broadcasters' rights and obligations concerning the use of their facilities by candidates for public office.

Of principal concern in the AOR is Section 315 of the Communications Act, which requires broadcast stations to offer the lowest unit charge to all candidates for public office in a nondiscriminatory manner during the 45 days before a primary election and 60 days before a general election. The statute was amended in 2002 to provide that a Federal candidate who airs an advertisement that directly references an opponent and fails to include the required sponsorship disclaimers will lose his or her entitlement to the lowest unit charge. See 47 U.S.C. § 315(b)(2), added by P.L. No. 2002-155, § 315.

For the television advertisements at issue in the AOR, the disclaimers required by Section 315(b)(2) must include (i) a clearly identifiable photographic or similar image of the candidate, and (ii) a clearly readable printed statement identifying the candidate and stating that he has approved the broadcast and that his authorized committee paid for the broadcast. 47 U.S.C. § 315(b)(2)(C). The disclaimers must appear at the end of the advertisement for at least four seconds. See *id.*²

If a candidate's advertisement fails to comply with these requirements, the candidate "shall not be entitled" to receive the lowest unit charge for that broadcast or for any other broadcast during the remainder of the election cycle. 47 U.S.C. § 315(b)(2)(A). The statute does not, however, expressly prohibit stations from exercising their discretion to offer non-complying Federal candidates the lowest unit charge or an equivalent rate.

² The Federal Election Campaign Act ("FECA") imposes its own disclaimer requirements on political broadcasts in 2 U.S.C. § 441d that differ from the disclaimer requirements of the Section 315 of the Communications Act. A principal difference, as pointed out in the AOR, is that Section 315(b)(2) requires that the visual image of the candidate be displayed for four seconds at the beginning of the advertisement, while the FECA disclaimer requirements permit the visual image to be displayed at any time and with no minimum duration. Significantly, the AOR does *not* allege any potential disclaimer violations under FECA, but rather seeks an opinion based on the interpretation and enforcement of Section 315(b) of the Communications Act.

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Instead, the statute speaks only to the loss of the candidate's "entitlement" to the special statutory rate.

The Federal Election Campaign Act ("FECA") prohibits corporations from making any corporate contributions in connection with a Federal election. *See* 2 U.S.C. § 441b(a). A "contribution" is any gift of money or anything of value for the purpose of influencing a federal election, including the provision of goods or services free of charge or at a charge that is less than the usual and normal charge for such goods or services. 2 U.S.C. §§ 431(8)(A)(i), 431(9)(A)(i); 11 C.F.R. §§ 100.52, 100.111. The "usual and normal charge" means the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution. 11 C.F.R. § 100.52(d)(2). The Commission has determined, however, that the purchase of goods or services at a discount does not result in a contribution when the discounted items are made available in the ordinary course of business to the vendor's other customers that are not political organizations or committees. *See, e.g.*, AO 1987-24, AO 1994-10.

* * * * *

DISCUSSION

I. THE OGC DRAFT OPINIONS CORRECTLY CONCLUDE THAT THE FCC HAS EXCLUSIVE AUTHORITY TO INTERPRET AND ENFORCE SECTION 315 OF THE COMMUNICATIONS ACT

The FCC is the expert federal agency charged to administer Congress's "unified and comprehensive regulatory system" for the broadcast industry. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940). Within this unified regulatory system, the rules by which broadcast stations are required to air political programming are embedded in multiple and complementary statutes and regulations. *See* 47 U.S.C. §§ 312(a)(7) (requiring reasonable access to broadcast station facilities for Federal candidates), 315(a) (equal opportunities for candidates and prohibition on censorship of candidate advertisements), 315(b) (lowest unit charge and comparable use provisions), 317 (sponsorship identification requirements); *see also* AO 2004-43 (Mason, concurring) (recognizing that other Communications Act provisions "may interact with and affect" broadcasters' responsibilities under Section 315(b)(2)).

Federal courts have made it plain that the FCC is the "the primary and exclusive forum in which to institute and prosecute alleged violations of 47 U.S.C. § 315 by broadcast licensees." *Maier v. Sun Publications, Inc.*, 459 F. Supp. 353, 356 (D. Kan. 1978) (declining to exercise jurisdiction to enjoin asserted violation of Section 315 and recognizing FCC's jurisdiction); *see also Belluso v. Turner Communications Corp.*, 633 F.2d 393, 397 (5th Cir. 1980) (refusing to recognize private right of action to address asserted violations of Section 315 and recognizing that "enforcement of the statute and

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vindication of the public interest are vested in the Federal Communications Commission"). The D.C. Circuit has held that rulemaking authority granted to Congress in Section 315 "amounts to a Congressional direction to the FCC to recognize the importance of this particular section of the statute and to prescribe separate rules and regulations to deal with the multitudinous situations that arise in applying it to all federal, state, and local candidates for office throughout the nation." *Kay v. FCC*, 443 F.2d 638, 643-44 (D.C. Cir. 1970).

The FCC has expressly recognized its exclusive authority to enforce the lowest unit charge provision in Section 315(b). In a 1991 Declaratory Ruling, the FCC determined that "the sole forum for adjudicating" the lowest unit charge provision "shall be the [FCC]." *In re 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*, 6 FCC Rcd 7511, ¶ 1 (1991), *aff'd*, 7 FCC Rcd 4123 (1992). In its Declaratory Ruling, the FCC cited the "narrowly focused directive" in Section 315 requiring the Commission to issue rules and regulations to carry out Section 315. *Id.* at ¶ 8; *see also Kay*, 443 F.2d at 644 (FCC possesses the "workable knowledge" to administer Section 315) (quoting S. Rep. No. 562, 86th Cong. 1st Sess. 12 (1959)).

Exclusive FCC enforcement of Section 315(b)(2) enables the FCC to fully and efficiently implement its other rules and policies relating to political broadcasting. For example, the FCC's rules regarding equal opportunities require broadcast stations to treat all candidates in a non-discriminatory manner:

In making time available to candidates for public office, no licensee shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage.

47 C.F.R. § 73.1941(e). To ensure that broadcast stations can fulfill this goal of non-discrimination among candidates, the FCC must determine the scope and extent of broadcasters' ability to grant the lowest unit charge (or an equivalent rate) to candidates that fail to comply with the disclaimer requirements in Section 315(b)(2).

Given that the FCC possesses exclusive jurisdiction to interpret and enforce Section 315(b)(2) of the Communications Act, the OGC Drafts properly conclude that this Commission cannot render an advisory opinion concerning a broadcaster's obligations under Section 315(b)(2). *See also* AO 2004-43 (Mason, concurring) (a policy regarding the interaction of Section 315(b)(2) with FECA "cannot be crafted by this Commission independently of the Federal Communications Commission or without regard to the several statutory and regulatory provisions involved . . .").

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II. THE TERMS OF SECTION 315(b)(2) IMPOSE NO MANDATORY OBLIGATION UPON BROADCASTERS

Because it is the FCC's province to interpret Section 315(b)(2), this Commission should not assume, for purposes of this AOR, that broadcast stations do not have discretion to extend the lowest unit charge to a Federal candidate who loses his or her "entitlement" to the lowest unit charge. Indeed, the plain language of Section 315(b)(2) indicates that Congress chose to revoke an entitlement of the candidate rather than to impose a prohibition on the broadcast station. To say that "such candidate shall not be entitled" to the lowest unit charge is wholly different from saying that "a broadcast station shall be prohibited from offering a non-complying candidate the lowest unit charge." The former does not directly regulate the conduct of the broadcast station and, therefore, clearly implies that the station could still choose to offer the lowest unit charge in its discretion. The latter, by contrast, would specifically regulate the broadcast station's conduct in a manner that the text of the statute does not do.

The legislative history is sparse and does not address what duty, if any, Congress intended to impose upon broadcast stations. During the floor debate on the amendment Senator Levin explained that

[I]f you [referring to a Federal candidate] want that lowest unit rate provided for in this law that we are guaranteeing to you, then you must put your name and your face at the end of this ad for a few seconds so that people know who is paying for this ad It is a very reasonable kind of requirement in exchange for that lowest unit rate.

Cong. Rec. S2694 (daily ed. Mar. 22, 2001)

Senator Collins, a cosponsor, added:

Under our proposal, the candidate's picture would appear at the end of the ad and the candidate would have to have a statement saying he or she approved the ad in order to get the lowest broadcast rate.

Id. at S2695

Because the limited floor debate of this provision does not specifically address *broadcasters'* obligations under Section 315(b)(2), it offers no support for the position urged by the AOR to impose a specific obligation on broadcasters. Certainly in composing and adopting the text of Section 315(b)(2), Congress plainly did not impose any mandatory obligation upon broadcasters to guarantee that result.

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III. THE COMMISSION SHOULD CONCLUDE THAT A BROADCASTER'S ASSESSMENT OF A RATE TO A FEDERAL CANDIDATE EQUIVALENT TO THE "LOWEST UNIT CHARGE" DOES NOT CONSTITUTE AN UNLAWFUL CONTRIBUTION

Although this Commission has no jurisdiction to determine whether a broadcaster may lawfully offer the lowest unit charge to a Federal candidate who is not "entitled" to the lowest unit charge under Section 315(b)(2), the Commission nevertheless should take this opportunity to clarify that a broadcast station's assessment of a rate equivalent to the lowest unit charge cannot constitute a prohibited campaign contribution because (1) the lowest unit charge is a special statutorily defined rate that is, as a matter of law, the usual and normal charge available to qualified Federal, state, and local political candidates, and (2) the lowest unit charge also is a rate that is, by definition, the usual and normal rate charged to a class of non-political commercial advertisers (*viz.*, a station's most favored commercial advertisers) in the ordinary course of business.

A. The Lowest Unit Charge Is the Usual and Normal Statutory Rate Available on Equal Terms to All Legally Qualified Candidates.

OGC Draft A properly determines that because the lowest unit charge is a special statutory rate that is made available to a specific class of customers—political candidates—the lowest unit charge cannot constitute a corporate contribution as long as it is offered on equal terms to political candidates. The special statutory rate and the special class of customers eligible for that rate distinguishes the lowest unit charge from the more traditional corporate "charges" that are at issue in most of this Commission's advisory opinions and enforcement matters. For that reason, a broadcast station's decision to offer the lowest unit charge to a political candidate can never constitute a corporate contribution if the rate is offered to political candidates in a non-discriminatory manner consistent with the requirements of the Communications Act. It is important to recognize, however, that any questions regarding what constitutes equal treatment among political candidates with respect to the lowest unit charge must be resolved by the FCC rather than this Commission.

B. The Lowest Unit Charge Also Is the Usual and Normal Charge Available to Commercial Clients.

The lowest unit charge also is, by definition, the "usual and normal" rate offered to the station's most favored non-political advertisers. The LUC provision, enacted in 1972, was intended to "place the candidate on par with a broadcast station's most favored commercial advertiser." *Codification of the Commission Political Programming Policies*, 7 FCC Rcd 678, ¶ 51 (1991). In crafting the LUC provision, Congress specifically chose to tie political rates to rates already offered to non-political clients rather than imposing a special "arbitrary" or "fixed" discount for candidates. See

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Hernstadt v. FCC, 677 F.2d 893, 898 (D.C. Cir. 1980). The rates for political candidates are not intended to allow stations to discriminate in favor of political candidates, but to provide candidates with a special rate based upon the rates actually charged their most favored commercial advertisers. See *Hernstadt v. FCC*, 667 F.2d at 895 (explaining that legislative history behind the original 1952 provision requiring "comparable rates" for political and non-political advertisements reveals that Congress attempted to protect candidates from "discriminatory rates" that could run up to twice the amount charged to non-political advertisements). The lowest unit charge, therefore, simply reflects a Congressional guarantee that political candidates will be treated on equal terms with certain commercial advertisers, and assessment of this statutory charge, therefore, should never constitute a corporate contribution.

Although the lowest unit charge is not offered to *all* commercial advertisers, it still qualifies as the "usual and normal" advertising rate because it is the rate offered to specific classes of commercial clients in the ordinary course of business. The FEC has determined that the "usual and normal" charge for services may reflect discounts or rebates based on business volume or other profitability factors. For example, a hotel may offer complimentary services to candidates who order blocks of rooms or hold events in the hotel where the hotel provides similar complimentary services to other guests who order room blocks or hold events in the hotel. See AO 1987-24. A bank that waives service fees for customers based upon the potential profitability of the account—i.e., amount of the deposits or the length of time the account has been maintained—may offer such waivers to political candidates based on the same considerations. See AO 1994-10. A publisher may sell books to candidates at bulk rates as long as those rates are available to other persons wishing to buy similar volumes. AO 2006-1; see also AO 2004-18 (candidate allowed to purchase excess copies of book at discounted "remainder price" so long as price was available to other purchasers). And a corporation may sell coupon books to candidates at a volume-based price so long as that price is offered to non-political consumers purchasing similar volumes. See AO 1982-30.

The fact that a political candidate and a commercial advertiser may not be purchasing precisely the same volume of advertisements does not change the application of the precedents discussed above. Although AO 1994-10 allowed a bank to waive service fees based on the size of the deposit or other profitability factors, there will of course be discrepancies between the size of the deposits made by candidates and corporate customers. And while AO 1987-24 allowed a hotel to offer complimentary services to both candidates and commercial clients who book a block of rooms, there will often be a difference in the number of rooms booked by candidates and commercial clients. As long as the broadcast station is offering the candidate a rate that is equivalent

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to a rate available to a commercial advertiser, the Commission should not determine that there has been any unlawful corporate contribution.³

This construction of this Commission's precedents gives effect both to the special statutory scheme governing political rates under the Communications Act and also to the Commission's rules allowing political candidates to receive the usual and normal rate for services offered in the ordinary course of business. To hold otherwise would create an untenable "whipsaw" effect in which broadcasters' compliance with the FCC's political broadcast rules could constitute a violation of FECA. Such a result would present an inconsistent and wholly unworkable regulatory regime that would conflict with Congress's clear intent to subject a broadcast station's political advertising rates to the exclusive jurisdiction of the FCC.

* * * * *

CONCLUSION

For the foregoing reasons, the Commission should adopt the substance of OGC Draft A, as modified as described herein. OGC Draft A properly concludes that the Casey campaign will not receive an unlawful corporate contribution if it receives the lowest unit charge from a broadcast station even if the campaign has lost its "entitlement" to the lowest unit charge, subject to the following clarifications:

The Commission should clearly recognize that the FCC has exclusive jurisdiction to interpret and enforce Section 315 of the Communications Act, and, therefore, it should decline to issue advisory opinions regarding a broadcaster's obligations under Section 315(b)(2).

This Commission also should not assume, much less determine, that Section 315(b)(2) prohibits broadcast stations from exercising their discretion to offer the lowest unit charge to Federal candidates—even those who may fail to comply with the technical requirements of Section 315(b)(2). By its plain terms, violation of that statute only removes a federal candidate's "entitlement" to the lowest unit charge but does nothing to remove a broadcaster's underlying discretion to offer the lowest unit charge—or an equivalent charge—to a Federal candidate.

³ The assessment of a rate equivalent to the lowest unit charge also differs dramatically from those cases finding a prohibited contribution where free service was offered to a candidate. See, e.g., AO 1996-2.

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Finally, the Commission should take this opportunity to give clear guidance that the assessment of a rate equivalent to the "lowest unit charge" under the applicable FCC rules and regulations cannot constitute a prohibited campaign contribution under FECA.

This guidance is necessary to eliminate the existing confusion concerning whether broadcasters who comply with the Communications Act may nevertheless be subject to liability under FECA.

Respectfully submitted,



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