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June 26, 1992

By Hand Delivery

Bradley Litchfield, Esquire
Federal Election Commission
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999 E Street, N. W.
Room 657
Washington, D. C. 20463

AOR 1992-26

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FEDERAL ELECTION COMMISSION
OFFICE

Dear Mr. Litchfield:

This letter is written on behalf of EZ Communications, Inc. (EZ), the owner of radio stations WHQT(FM), Coral Gables, Florida; WBZZ(FM), Pittsburgh, Pennsylvania; WMXC(FM), Charlotte, North Carolina; KYKY(FM), St. Louis, Missouri; KMPS AM/FM, Seattle, Washington; WIOQ(FM), Philadelphia, Pennsylvania; KRAK AM/FM, Sacramento, California and WEZB(FM), New Orleans, Louisiana,^{1/} for the purpose of requesting an advisory opinion from the Commission pursuant to 11 C.F.R. 112.1.

As the Commission knows, the Communications Act requires that EZ's stations provide "reasonable access" to candidates for federal office. That access can be provided by selling candidates commercial announcements or program time and by giving them access to free coverage during certain news and public affairs programming. However, the Federal Communications Commission (FCC) has long held that "reasonable access" requires a station to make spot announcement^{2/} time available to a candidate. (See, e.g., Public Notice, 43 RR 2d 1353, 1396 (1978)).

1/ EZ also owns AM and FM stations in Jacksonville, Florida, which are in the process of being sold.

2/ Spot announcements typically last 30 to 60 seconds while programs may be 5 to 30 or more minutes in length.

In providing access for spot announcements, broadcast stations are prohibited during certain pre-primary and pre-general election periods from charging more than the "lowest unit rate" charged for the same period and class of time to commercial advertisers. Because of the complexity of sales practices in the broadcast field, including, for example, the provision of free bonus spots or guaranteed audience plans or non-broadcast incentives³ for some purchases, it is often difficult, if not impossible, to determine a rate which is precisely the lowest one for a specific kind of announcement at a specific time during a broadcast day. However, a station's penalty for failing to devine that lowest rate can be as severe as the loss of its license or the imposition of a substantial fine. Thus, although stations have a forceful incentive to comply with the requirements of the Communications Act, such compliance may require computations and assumptions which are both complex and highly debatable.

The broad purpose of the "reasonable access" provision was obviously to insure that candidates had the opportunity to present their views on issues of concern to them and to the electorate, i.e. to encourage robust debate. For the dual purpose of meeting "reasonable access" requirements of the Communications Act and avoiding the risks associated with incorrect lowest unit rate calculations,⁴ EZ wishes to offer free and/or substantially reduced rate announcement time to federal candidates. Equal amounts of time would be offered to candidates in specific races--and such candidates would be entitled to equal amounts of time in any event. The time offered would not be pre-emptable, that is, subject to sale to regular commercial advertisers, and would probably be formatted in a fashion that would describe the provision of time as part of the station's public service responsibilities to provide "reasonable

3/ These may include promotional items such as billboards, bumper stickers and the like or other items of hard-to-calculate value.

4/ Those risks may well be substantial whether a charge is too high or too low. If it is too high, the FCC's lowest unit rate provisions have been violated. If it is too low, it may well be argued--if the broadcasters is a corporation as is the case with EZ--that an illegal campaign contribution has been made to a candidate.

access" to candidates for federal office.^{5/} EZ would require that candidates "appear" in some fashion in the spots so that they constituted a "use." As a "use," EZ would have no ability to control (nor would it be liable for) whatever the candidate wished to present. The number of announcements offered for each race would vary with EZ's good faith judgment about the amount of access time that would be required to meet existing criteria of reasonableness including, for example, the number of candidates in each race and the proximity of the district or election area to the station's community of license or core coverage area.

The Commission, in September, 1986, issued an advisory opinion No. 1986-35 in Cobble For Congress which disapproved of the granting of free spot announcement time to a federal candidate but that opinion was vacated following a request for reconsideration and never reissued. As a result, it is currently unclear whether a corporation's furnishing of free or reduced rate announcement time would constitute an illegal campaign contribution under the provisions of the Federal Election Campaign Act of 1971. However, the EZ plan as outlined in this request, differs significantly from the plan outlined in the Cobble case since the time which would be offered would not be subject to pre-emption by, or sale to, commercial advertisers and would be preceded by a uniform station-imposed introduction of the type described previously. Moreover, EZ believes that approval of the provision of free or reduced rate announcement time would be consistent with current broadcast practices and not a "contribution" in any normal sense of the term.

Because the FCC's lowest unit rate requirements are applicable to state and local candidates if time is sold to them, it is EZ's current plan to sell no time to them since they are not entitled to "reasonable access" under the Communications Act. Instead, EZ will provide without cost news and other program coverage if it believes this is warranted by the significance of, and public interest in, specific state and local races. Free or reduced-rate spot announcement time would be made available to federal candidates only because of the requirements of the "reasonable access" provision of the Communications Act. Since EZ might not offer any spot announcement time to federal candidates in the absence of being compelled to do so by the Communications Act, we

^{5/} For example, each spot announcement might be preceded by: "The following message is presented by KYKY to help inform the public about current campaign issues."

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do not see how its proposed offer can be construed as a "contribution."

Moreover, current applicable lowest unit rate requirements already effectively require a broadcaster to "donate" units of substantial value to federal candidates. To take the simplest of examples, it has long been established by the FCC that a candidate must be allowed to purchase even one spot announcement at the lowest rate that announcement is sold to any commercial advertiser, even though that commercial advertiser may not "earn" his rate unless he purchases a minimum of 100 spots in a given period. For example, if a fixed 30 second spot is normally sold for \$100 if from one to five spots are purchased, but the rate is reduced to \$50 if 100 spots are purchased, the political candidate is entitled to the \$50 rate even if he only buys one announcement, which effectively deprives the broadcaster of \$50. There are many similar benefits to federal candidates under existing lowest unit rate interpretations of the FCC. Thus, current lowest unit rate requirements with respect to paid announcements already provide substantial benefits to federal candidates but no one has suggested that those benefits be construed as illegal contributions since to do so would gut the whole purpose of the "reasonable access" and lowest unit rate provisions.

In view of the foregoing, we request that the Commission issue an opinion advising EZ that its proposed method of providing "reasonable access" to federal candidates--by offering them free or reduced-rate announcement time--would not constitute an illegal campaign contribution under the Federal Election Campaign Act.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Rainer K. Kraus". The signature is written in a cursive, slightly slanted style.

Rainer K. Kraus