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FEDERAL ELECTION COMMISSION
WASHINGTON DC 20463

**STATEMENT OF
COMMISSIONER AIKENS
AND
COMMISSIONER ELLIOTT
TO ADVISORY OPINION REQUEST 1992-26**

On August 13, 1992, the Commission was unable to answer an advisory opinion request submitted by EZ Communications, Inc. ("EZ") concerning application of the Federal Election Campaign Act to its proposed donation of free broadcast time to candidates for federal office.

EZ Communications owns several radio stations across the United States. In an effort to comply with the "reasonable access" and the "lowest unit rate" provisions of the Communications Act, EZ proposes to provide free time segments to federal candidates. According to the request, EZ would offer equal amounts of time to federal candidates in specific races. The number of spot times offered for each race would "vary with EZ's good faith judgment about the amount of access time ... required to meet existing criteria of reasonableness including, for example, the number of candidates in each race ..."

EZ contends broadcast stations are finding it increasingly difficult to comply with the FCC's "lowest unit rate" rule. Because broadcast sales practices are often complex, EZ states it is hard, if not impossible, to precisely determine the lowest rate for a specific kind of announcement at any given time. To simplify its compliance with FCC requirements, EZ asked whether the FECA permits EZ to donate a limited amount of free time to candidates.

The Federal Election Campaign Act prohibits any corporation from making any contribution to any candidate for federal office. 2 U.S.C. §441b. Commission regulations define "anything of value" to include all in-kind contributions or the provision of goods and services without charge, or at a charge which is less than the usual and normal charge for such goods or services. 11 CFR 100.7(a)(1)(iii). At first blush, it seems EZ's proposal to give, rather than sell, air time to candidates would violate the Act.

The Commission, however, sought comments from the General Counsel of the Federal Communications Commission concerning the FCC's regulation of the sale of broadcast time to federal candidates. The FCC Counsel stated that "reasonable access must be provided to legally qualified federal candidates through the gift or sale of time for their 'uses' of the station." Report and Order in the matter of Codification of the Commission's Political Programming Policies, 7 FCC Rcd 678, 681 (1992). (Emphasis added.) The FCC Counsel also stated that broadcast stations have considerable discretion in deciding how to implement the reasonable access requirement.

After evaluating the FCC General Counsel's detailed summary of the extensive regulations already governing broadcasters in this area, we concluded the FECA's general prohibition against corporate contributions would not prohibit EZ's donation of free time to federal candidates. We reached this decision in appreciation of a coequal federal law which requires broadcast corporations to offer broadcast time specifically to political committees at reduced rates. Further, we recognize the FCC has detailed rules on what constitutes equal opportunity and reasonable access to broadcast time. This insures candidates are not favored in their access to the media.

Accordingly, we believe §441b would not prohibit EZ's proposal on the conditions that EZ's arrangement would comply with the FCC's lowest unit charge rule; that EZ's proposal would constitute reasonable access and that its implementation would satisfy equal opportunity requirements. 47 U.S.C. §§ 312(a)(7), 315(a), 315(b).

We disagree with the assertion that not applying §441b to this case constitutes a "waiver" of that prohibition to broadcasting. In support of this waiver theory, it was argued that the Commission did not "waive" application of §441b when we had a conflict with FAA regulations on candidate travel on corporate jets, or "waive" application of §441b when our bank loan rules were different from the banking regulatory agencies. See 11 CFR 114.9(e) and 100.7(b)(11).

What separates this case from those examples is that broadcasters are operating under a requirement to give candidates discounted broadcast time. There is no similar requirement that corporations put candidates on their airplanes or that banks must lend money to political committees. Air travel and lending are optional conduct for which §441b is fully in force. But we believe the FECA's broad prohibition on corporate contributions has lesser application when another law actually singles out political candidates and specifically requires broadcasters give them air time at substantially reduced rates. This is especially true since §441b's general prohibition and the specific exceptions of §312(a)(7) and 315(b) were enacted together in the Federal Election Campaign Act of 1971. In our opinion, these laws should be read together to reach a harmonious result, instead of playing them off each other to reach an impasse.

We were not persuaded by numerous hypotheticals on how free air time could be manipulated by broadcast stations to one candidate's advantage. Most of these hypotheticals would violate existing FCC equal access regulations, or are contrary to EZ's promise to use its "good faith judgment" on the amount of access time available in any particular race. The factors EZ would consider in granting free time (such as the number of candidates in a race) have been acknowledged by the FCC and affirmed by the Supreme Court as relevant to determining what constitutes reasonable access. See CBS v. FCC, 453 U.S. 367 (1981); see also Political Programming Policies, 7 FCC Rcd at 681.

Other critical hypotheticals failed to recognize the situation as it currently exists: because broadcast sales practices are exceedingly complex, candidates are already getting air time at rates corporations could not get. Even the FCC has acknowledged the Communications Act requires stations to give candidates the benefit of a commercial advertiser's bulk rate even if the candidate purchases only a few spots. Political Programming Policies, 7 FCC Rcd at 694-95.

In our opinion, the Commission has missed a wonderful opportunity to harmonize provisions of the FECA with the Communications Act.¹ We encourage coordination of our regulations with other agencies that also supervise political conduct, especially in the area of political broadcasting. We worry that the Commission's reclusive independence may make our standards unresponsive, or worse, irrelevant to current practices. The more our regulations have in common with other agencies, the higher rates of compliance the entire government will receive.


Joan D. Aikens
Commissioner


Lee Ann Elliott
Commissioner

September 28, 1992

1. See also AO 1986-35 (Coble for Congress), Agenda Documents 86-109, 109-A, 109-B, 109-C.