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August 3, 1998

\*ADMITTED IN MASSACHUSETTS ONLY  
\*ADMITTED IN MARYLAND ONLY

AOR 1998-17

Honorable Joan D. Aikens  
Chairman  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

Re: Request for Advisory Opinion

Dear Madam Chairman:

Pursuant to 2 U.S.C. § 437f(a)(1) and 11 C.F.R. § 112.1, Daniels Cablevision, Inc. ("Daniels")-by its attorney hereby requests that the Federal Election Commission ("Commission") issue an Advisory Opinion relative to Daniels' plan to make free cable television air time available to candidates for federal office in California. A copy of Daniel's plan is appended hereto as Attachment A.

**Background**

Daniels has operated two cable television systems in southern California since the 1960's, serving the communities of Desert Hot Springs,<sup>1</sup> Encinitas, Carlsbad, Vista, Fallbrook,

<sup>1</sup> Desert Hot Springs is served by Desert Hot Springs Cablevision, Inc. ("DHI"), which, along with Daniels Cablevision, Inc. ("DCI") is wholly-owned by William R. "Bill" Daniels, Jr. For ease of reference, the instant filing will refer to DHI and DCI together as "Daniels."

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Lake San Marcos, Solana Beach, Del Mar, and other unincorporated portions of northern San Diego County and Riverside, Colorado. Starting with the purchase of three local master antenna systems, Daniels has built up its systems into modern cable television operations passing nearly a combined 85,000 homes and serving more than 69,000 subscribers. Daniels now ranks as the 70th largest cable system operator in the United States, according to the CATV CyberLab.<sup>2</sup> Daniels is a privately held corporation, and its facilities are not owned or controlled by any political party, political committee, or candidate.

Bill Daniels, owner of Daniels Cablevision, has worked on many of the key developments in the creation of the American cable television industry. Considered by many as the "Father of the Cable Industry," he was instrumental in the creation of C-SPAN, CNN, regional sports networks, and numerous other programming activities. Mr. Daniels has stressed consistently during his impressive professional and personal life three values: the importance of ethical conduct; the importance of the free market; and the importance of participating in the democratic process.

Following Mr. Daniels' leadership by example, Daniels has undertaken many efforts to be a positive presence in the communities it serves. For example, Daniels covers city council meetings for Desert Hot Springs, Carlsbad, Del Mar, and other North San Diego County communities, and produces daily local news programming for the North San Diego County area as it serves. The information included on Daniels' news programming is specific to the area Daniels serves, and Daniels provides these services voluntarily. Available broadcast news outlets, even local channels, generally choose not to cover this information. Daniels has found that its customers appreciate receiving this truly "local" news.

Daniels also produces public affairs programming about issues in the communities it serves produce and airs debates and produces and airs live local election coverage. On a local level, Daniels, in an arrangement with Palomar College, airs fifteen hours of educational (for credit) programming from the college each day. Students can obtain college credit by "attending" class over the cable system. Daniels also delivers "Knowledge TV" over its systems.

Daniels also provides free cable hookups for all local schools, public and private, (as many outlets as the school wants) and provides free basic and CST services to the schools. Moreover, Daniels provides free subscriptions to *Cable in the Classroom* magazine to teachers who request it. *Cable in the Classroom* contains features of special interest to teachers and a guide, arranged by subject matter, to commercial-free, educational programming available on

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<sup>2</sup> See <http://www.catv.org/GIP/cablesystems/top100.html> Aug. 3, 1998).

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cable networks. Daniels is offering cable modems and high-speed data services to all the schools it serves.

Daniels now wishes to continue its public-minded activities by granting to *bona fide* candidates for federal office in California the opportunity to cablecast their spot advertisements for free. This plan serves a variety of public interests, and Daniels believes its plan would not contravene the Federal Election Campaign Act ("Act"), which prohibits any corporation from making any contribution to any candidate for federal office but which allows political commentary by members of the press.

#### Description of the Daniels Plan

Daniels will make available to the group of *bona fide* candidates for the (1) United States Senate for California, and (2) United States House of Representatives for the 44th, 48th and 51st Districts of California, sufficient free time to accommodate up to 750 thirty-second spot advertisements per week for each of the eight weeks preceding the November 3, 1998 general election. During the free time made available by Daniels, candidates' thirty-second spot advertisements will run on a random basis on all commercial cable programming service tier ("CPST")<sup>3</sup> channels. Each *bona fide* candidate will be permitted to run an equal number of advertisements each week, free of charge, during the time made available by Daniels. Because each candidate will be accorded the same amount of time to run the same number of spots as her or his opponents, Daniels believes its plan complies fully with 47 U.S.C. § 315(a). Moreover, because the air time will be free, Daniels believes its plan complies fully with 47 U.S.C. § 315(b).

Daniels will consider a candidate to be *bona fide* for the purposes of this plan if she or he meets the specific requirements to run for United States Senator and United States Representative in Congress established by the State of California and enforced by the State of California Secretary of State. Additionally, each person seeking free air time from Daniels must meet the definition for "candidate" set forth at 47 U.S.C. § 431(2).<sup>4</sup> Candidates must also provide to Daniels advertisements of technical quality at least equivalent to that required of

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<sup>3</sup> For a definition of CPST, see 47 C.F.R. §76.901.

<sup>4</sup> Daniels reserves the right to require that a person requesting free air time provide a copy of her or his report(s) filed pursuant to 47 U.S.C. § 434 to verify that such person qualifies as a "candidate" under 47 U.S.C. § 431(2).

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commercial leased access and public, educational and governmental programmers.<sup>5</sup> Although it is difficult to predict today how many *bona fide* candidates will qualify for the free time made available to them, Daniels anticipates that each candidate will be permitted to run between 15 and 60 free spots per week.

Daniels believes that its plan addresses precisely the American public and federal candidates' concern about the exploding cost of federal campaigns, much of which is attributable to purchase of television advertisements. In some races, more than 60 percent of the money raised by federal candidates is used to purchase television time.<sup>6</sup> The Daniels plan will ease the financial burden placed on candidates by offering cable time whose value is approximately \$86,250. The time that Daniels is making available to *bona fide* candidates would otherwise be sold to commercial advertisers (perhaps including political advertisers).

#### The Daniels Plan and the Act

The Act prohibits corporations from making "contributions" or "expenditures" in connection with a federal election.<sup>7</sup> The Act and Commission regulations define the term "contribution" and "expenditure" to include any gift of money or anything of value made by any person for the purpose of influencing any election for federal office.<sup>8</sup> However, the Act also provides an exemption to the ban on corporate expenditures for "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political

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<sup>5</sup> 47 C.F.R. § 76.971(b) states, for example, "Cable operators may not apply program production standards to leased access that are any higher than those applied to public, educational and governmental access channels." This flexibility is granted to the cable operator to assure a minimum level of technical quality in the programming carried by the system.

<sup>6</sup> Statement of FCC Chairman William E. Kennard, "FCC Chairman William E. Kennard States Preliminary Views in support of FCC Authority to require Broadcasters to provide Free or Reduced-Rate Air Time to Political Candidates," (Feb. 2, 1998).

<sup>7</sup> 2 U.S.C. § 441b(a).

<sup>8</sup> *Id.* §§ 431(8)(A)(i), 431(9)(A)(i) and 441b(b)(2); 11 C.F.R. §§ 100.7(a)(1), 100.8(a)(1) and 114.1(a)(1).

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party, political committee, or candidate."<sup>9</sup> Daniels believes its plan meets the "commentary" exception of 2 U.S.C. § 431(9)(B)(i).

First, a "commentary" may be defined as a systematic series of explanations or interpretations, or something that serves for illustration or explanation, or an expression of opinion.<sup>10</sup> Political messages which espouse viewpoints on public issues or public candidates clearly qualify as commentary. Assuming *arguendo* that Daniels cablecast only a single commentary that happened to agree with a particular candidate's views, it is clear Daniels could claim exemption under § 431(9)(B)(i). Here, however, Daniels chooses to telecast *all* commentaries from *all* candidates. Section 431(9)(B)(i) permits Daniels to do so by allowing the distribution of *any* commentary of the distributor's choosing.<sup>11</sup> Further, the Act is silent as to who might originate (versus distribute) commentary, meaning that Daniels can distribute the opinions of others and still qualify for the § 431(9)(B)(i) exemption.

Second, while the Act specifically identifies broadcasters and print outlets as qualifying for the press exemption, there can be no doubt that Daniels is a member of the press entitled to take advantage of § 431(9)(B)(i). The Supreme Court has concluded that cable operators are members of the press,<sup>12</sup> and the Commission's regulations expressly define a cable operators as a "broadcasting station" qualifying for the press and commentary exemption.<sup>13</sup>

Third, Daniels is a privately held corporation, and its facilities are not owned or controlled by any political party, political committee, or candidate. Further, Daniels is clearly acting as a member of the press in performing the candidate activity, in that Daniels is not espousing a particular viewpoint or engaging in express advocacy, but is instead making a neutral programming decision by making free time available.

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<sup>9</sup> 2 U.S.C. §§ 431(9)(B)(i).

<sup>10</sup> See, e.g., Webster's Ninth New Collegiate Dictionary (1990).

<sup>11</sup> H. R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4 (1974) ("it is not the intent of Congress . . . to limit or burden in any way the first amendment freedoms of the press . . . [the exemption] assures the unfettered right of the . . . media to cover *and comment on* political campaigns").

<sup>12</sup> *Leathers v. Medlock*, 499 U.S. 439, 444 (1991).

<sup>13</sup> 11 C.F.R. § 100.7(b)(2) and 100.8(b)(2).

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Fourth, Daniels' proposal appears consistent with Commission precedent. In Advisory Opinion 1982-44 the Commission considered the proposal of WTBS television station owned by Turner Broadcasting System, Inc. ("Turner, Inc.")<sup>14</sup> to make two hours of program time on one of its channels available to both the Democratic National Committee ("DNC") and Republican National Committee ("RNC"). The DNC accepted Turner, Inc.'s invitation and aired a program featuring "leading Democrats," including persons who were candidates for federal office. The DNC and RNC specifically asked the Commission whether Turner, Inc.'s donation of free cablecast time would constitute a prohibited contribution. The Commission concluded "that the donation of free cablecast time by Turner, Inc. to both the DNC and the RNC would not constitute a prohibited corporate contribution." Rather, the Commission stated that it was "of the opinion that the program described is commentary and, therefore, within the news story, editorial or commentary exemption." The Daniels plan differs slightly from the Turner, Inc. scenario, in that a different press member is performing the candidate activity (cable versus superstation), and only persons who are candidates for federal office qualify for free air time from Daniels. Nonetheless, Daniels believes its plan meets the analysis conducted by the Commission in Advisory Opinion 1982-44.

Finally, the Daniels proposal offers the Commission the opportunity to interpret 441b(a) so as not to conflict with 47 U.S.C. § 315(a). "Where possible, statutes must be read in harmony with one another so as to give meaning to each provision."<sup>15</sup> Statutory provisions *in pari materia* should be construed together.<sup>16</sup>

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<sup>14</sup> WTBS is a "super station," which is defined as "a television broadcast station other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier" to cable operators outside the super station's local broadcast area. 47 C.F.R. § 76.64(c)(2). WTBS likely was carried on the basic service tier of most operators in 1982 owing to copyright considerations. The Daniels plan will make free air time available on the CPST. Daniels does not understand the commentary exemption to turn on which level of service Daniels makes free time available. Further, the distinction appears immaterial given that Daniels' buy-through rate to the CPST is 93%.

<sup>15</sup> *United States v. Caldera-Herrera*, 930 F.2d 409, 411 (5th Cir. 1991), citing *Federal Aviation Admin. v. Robertson*, 422 U.S. 255, 261 (1975).

<sup>16</sup> See *id.*, citing *United States v. Onick*, 889 F.2d 1425, 1433 (5th Cir. 1989).

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### The Daniels Plan and the First Amendment

Daniels does not challenge here the constitutionality of 2 U.S.C. § 441b(a) under the First Amendment. As the Commission considers Daniels' plan to broaden the availability of political speech during the election cycle, however, Daniels believes it important to recall that the Supreme Court has stated that the expression of opinion on matters of public concern is "entitled to the most exacting degree of First Amendment protection."<sup>17</sup> The Supreme Court further has recognized that this type of speech is "indispensable to decision making in a democracy,"<sup>18</sup> and that "speech concerning public affairs is more than self-expression; it is the essence of self-government."<sup>19</sup> Because it is the people in a democratic system who "are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments,"<sup>20</sup> the "[g]overnment is forbidden to assume the task of ultimate judgment, lest the people lose their ability to govern themselves."<sup>21</sup>

The provision of cable services, moreover, is clearly "speech" for purposes of the First Amendment.<sup>22</sup> Thus, the First Amendment protects Daniels' right to make its programming

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<sup>17</sup> *FCC v. League of Women Voters of California*, 468 U.S. 364, 375-76 (1984).

<sup>18</sup> *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). The Court explained that:

The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.

*New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964), quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931).

<sup>19</sup> *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

<sup>20</sup> *Bellotti*, 435 U.S. at 791.

<sup>21</sup> *Id.* at 792, n.31 (citations omitted); see also *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530 (1980).

<sup>22</sup> "There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broadcasting System, Inc. v. FCC* 512 U.S. 622, \_\_\_ (1994), *reh'g denied*, 512 U.S. 1278 (1994); see also *Leathers v. Medlock*, 499 U.S. 439, 444 (1991).

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decisions, its right to disseminate its speech, and its viewers' concomitant right to receive the speech.<sup>23</sup> Indeed, the Supreme Court very recently noted that "[a]lthough programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts."<sup>24</sup> The Commission could justifiably find, therefore, that Daniels' plan to make free time available to cablecast *bona fide* candidates' spot advertisements is speaking, not spending, and thus outside the jurisdiction of the Commission.<sup>25</sup>

Alternatively, the Commission could recognize that Daniels' plan is a protected programming decision under the First Amendment. Consequently, Commission consideration of Daniels' plan under the Act would then be "narrowly tailored" to implement a significant governmental purpose.<sup>26</sup> Justice Brennan has explained the rationale underlying § 441b — *i.e.*, its governmental purpose — by suggesting that "it is important to protect the integrity of the marketplace of political ideas" from "the corrosive influence of concentrated corporate wealth" that might be used to provide an unfair advantage to a corporation.<sup>27</sup>

It is difficult to imagine a proposal that better satisfies the inherent purpose of § 441b than the one Daniels offers to the Commission. Daniels is using its corporate standing and public speaker responsibilities to broaden political debate, and capture all viewpoints represented on the federal ballot in the voting districts served by Daniels. No *bona fide* candidate is left out of the opportunity to provide Daniels with a spot advertisement, and each candidate receives from Daniels the same amount of cable air time as her or his opponents to express political ideas. Because the Daniels plan expressly meets the significant governmental purpose of § 441b, and because the Commission's response to the plan should be narrowly tailored so as not to burden Daniels' First Amendment rights, Daniels respectfully suggests that even a preliminary constitutional analysis supports its plan.

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<sup>23</sup> *Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634, 638 (1990) (quoting No. PCA 85-4414/RV).

<sup>24</sup> *Arkansas Educ.*, 140 L.Ed. 2d 875, 118 S.Ct. 1633 (1998), citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 570 (1995) (a speaker need not "generate, as an original matter, each item featured in the communication").

<sup>25</sup> *Cf. FEC v. Massachusetts Citizens for Life*, 589 F. Supp. 646, 653 (1984), *aff'd* 479 U.S. 238 (1986).

<sup>26</sup> *See Turner*, 512 U.S. at \_\_\_; *Ward v. Rock Against Racism*, 491 U.S. 781, 789-90 (1989).

<sup>27</sup> *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 257 (1976).



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**CONCLUSION**

By this Advisory Opinion request, Daniels asks the Commission to find that § 431(9)(B)(i) of the Act permits Daniels to offer free cable time to *bona fide* federal candidates under the commentary exception contained therein.

Any questions regarding this matter, or requests for additional information, may be directed to the undersigned.

Respectfully submitted,

**DANIELS CABLEVISION, INC.**

By:   
John C. Dodge

**COLE, RAYWID & BRAVERMAN, L.L.P.**  
1919 Pennsylvania Avenue, N.W.  
Suite 200  
Washington, D.C. 20006  
(202) 659-9750

Its Attorney

August 3, 1998



## THE DANIELS PLAN

*A proposal allowing free campaign airtime  
for California candidates for Federal political office.*

### Overview

Daniels Cablevision operates two cable systems in Southern California serving nearly 70,000 subscribers. One system is located in the community of Desert Hot Springs. The other system covers much of North San Diego county, including Carlsbad, Encinitas, Vista, Fallbrook, Lake San Marcos, Solana Beach, Del Mar, and other unincorporated portions of northern San Diego County.

For years, Daniels Cablevision has offered programming designed to inform the public on local issues of interest to the community, including live broadcasts of local City Council meetings, the production of local news shows and live local election coverage. Cablevision has also been a leader in the cable industry by offering for-credit college courses on its systems, as well as providing free cable hookups and basic cable for all local schools.

Daniels Cablevision is now expanding its public-minded activities by creating The Daniels Plan ("Plan"). The Plan is offering free commercial airtime to "bona fide" candidates for the United States Senate in California and the United States House of Representatives in California for the Districts included in the Daniels systems. Candidates will be permitted to use this time to broadcast their campaign advertisements on the commercially supported cable services provided by the Daniels systems, including CNN, Headline News and ESPN.

The Plan has an estimated cash value of approximately \$86,250, and equates to approximately 20% of available commercial advertising time during the eight-week period.

The Plan is designed as a voluntary effort to help reduce the financial burden of running an effective campaign faced by all candidates for political office.

### Congressional Races Involved

Bona fide candidates for the United States Senate in California, as well as bona fide candidates for the United States House of Representatives for the 44th, 48th and 51st Districts of California, are covered by the Plan.

### **Description of Time Offered**

For the eight-week period leading up to the November 3rd general election, Daniels Cablevision will offer to all "bona fide" candidates free airtime in which to run their campaign advertisements. All bona fide candidates will be offered an equal amount of airtime, regardless of party affiliation.

Ads for all candidates will be run on a random basis between the hours of 6:00 a.m. and midnight. The specific time slots allocated to bona fide candidates will be developed by Daniels and made available to the public for review. Depending on the number of bona fide candidates who participate, campaigns will be permitted to run between 15 and 60 free 30-second spots per week.

### **Content of Political Advertisements**

Daniels will exercise no control over content of the political advertisement submitted by bona fide candidates, other than to ensure they meet the technical standards required of all other commercial advertisers.

### **Definition of a "Bona Fide" Candidate**

To be considered a "bona fide" candidate for the purpose of the Plan, a candidate must:

- Meet the specific requirements to run for the United States Senate or the United States House of Representatives as established by the U.S. Constitution and the election laws of the State of California; and
- Meet the definition of "candidate" as set forth in 47 U.S.C. 431(2).
  - That definition defines "candidate" as any person whose campaign organization has either raised or spent at least \$5,000 from their campaign account.

### **Creating the Campaign Advertisement**

Bona fide candidates will be responsible for the creation of their own campaign advertisement(s).

Advertisements submitted must be 30 seconds in length.

All advertisements must be "broadcast quality" in order to be aired. "Broadcast quality" is defined as advertisements, which are of a technical quality at least equivalent to that required of commercial leased access, and public, educational and governmental programmers.

Qualified candidates who have not yet produced advertisements but are interested in participating can contact Daniels Cablevision about the system's production facilities.

### **Submitting the Campaign Advertisement**

Campaign advertisements for both the Carlsbad and Desert Hot Springs systems must be submitted no later than the close of business on the Wednesday preceding the week the candidate's ads will be aired.

If a bona fide candidate does not submit the advertisement(s) in a timely fashion, their ads will not be aired and credit will not be extended toward future airtime. This will prevent candidates from stockpiling or warehousing their time for use as the election nears. Bona fide candidates who do not submit ads in a timely fashion will be free to submit ads for the following ad period, and will be included in that week's cycle of advertisements.

Ads should be submitted to John McGuinness, Ad Sales Manager for Cablevision Business Services, Inc. McGuinness is located in Cablevision's Carlsbad, CA office and can be reached at 760-438-7741 extension 252.

### **Communication with Daniels Cablevision**

Comments or questions about The Daniels Plan should be directed to Phil Urbina, Community and Government Relations Manager for Daniels Cablevision, at 760-438-7741, extension 241.

## **CERTIFICATE OF SERVICE**

I, **Connie M. Simmons**, do hereby certify that a copy of the foregoing document was hand delivered this 3rd day of August, 1998, to the following:

**Joan Aikens, Chairman**  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

**Scott Thomas, Vice Chairman**  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

**Commissioners:**  
**Lee Ann Elliott**  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

**Danny Lee McDonald**  
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**Honorable William Kennard, Chairman  
Federal Communications Commission  
1919 M Street, N.W., Room 814  
Washington, D.C. 20554**

**Commissioner Michael K. Powell  
Federal Communications Commission  
1919 M Street, N.W., Room 844  
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**Commissioner Gloria Tristani  
Federal Communications Commission  
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**Commissioner Harold W. Furchtgott-Roth  
Federal Communications Commission  
1919 M Street, N.W., Room 844  
Washington, D.C. 20554**

**Commissioner Susan Ness  
Federal Communications Commission  
1919 M Street, N.W., Room 832  
Washington, D.C. 20554**

A handwritten signature in cursive script that reads "Connie M. Simmons". The signature is written in black ink and is positioned above a horizontal line.

**Connie M. Simmons**