FEDERAL ELECTION COMMISSION
Washington, DC 20463

September 10, 1998

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1998-17

John C. Dodge
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006

Dear Mr. Dodge:

This responds to your letter dated August 3, 1998, on behalf of Daniels Cablevision, Inc. ("Daniels"), concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to a plan to provide free cable television air time to Federal candidates in California.

Daniels has operated two cable television systems in southern California since the 1960s, serving the communities of Desert Hot Springs, Encinitas, Carlsbad, and other portions of northern San Diego County and Riverside County.[1] You state that Daniels serves more than 69,000 subscribers and is the 70th largest cable system operator in the U.S. Daniels is a privately held corporation, and its facilities are not owned or controlled by any political party, political committee, or candidate.

You note the many news programming services and other public services that Daniels provides for the local communities, including city council meetings and coverage of local news in a manner not available on local channels. You state that Daniels now wishes to continue such activities by granting to Federal candidates the opportunity to cablecast their spot advertisements for free. Daniels will make available, to all *bona fide* candidates for the United States Senate from California and for the U.S. House of Representatives from the 44th, 48th, and 51st Districts of California, sufficient free time to accommodate up to 750 thirty-second spot advertisements for each of the eight weeks preceding the general election of November 3, 1998. Daniels will consider a candidate to be *bona fide* if she or he: (1) meets the specific requirements to run for the U.S. Senate

[1] Desert Hot Springs is served by Desert Hot Springs Cablevision ("DHI") which, along with Daniels Cablevision, is wholly owned by William R. "Bill" Daniels, Jr. You state that, for ease of reference, DHI and Daniels Cablevision are together referred to as "Daniels."

or House established by the State of California and enforced by the California Secretary of State; and (2) meets the definition of candidate set forth in 2 U.S.C. §431(2).[2]

During this free time, the spot advertisements will run on the commercial cable programming channels provided by Daniels, including CNN, Headline News, and ESPN. Each candidate will be permitted to run an equal number of advertisements during the time that Daniels makes available. The ads will appear on a random basis between the hours of 6:00 a.m. and midnight. The specific time slots allocated to the candidates will be developed by Daniels and made available to the public for review. Depending on the number of candidates who participate, each candidate will be permitted to run between 15 and 60 free spots a week. The time that Daniels is making available would otherwise be sold to commercial advertisers (perhaps including political advertisers). The monetary value of the total of the free time made available is approximately $86,250 and is approximately 20 percent of the commercial advertising time generally available during the eight-week period.

Daniels will also require that the advertisements submitted by the candidates will be of technical quality at least equivalent to that required of commercial leased access and public, educational, and governmental programmers.[3] The candidates will be responsible for the production of their own advertisements, and Daniels will exercise no control over the content of the ads. A candidate's advertisements must be submitted by the close of business on the Wednesday preceding the week in which they will be aired. If a candidate does not submit the ads in a timely manner, the ads will not be aired that week. This will prevent candidates from "stockpiling" their time for use as the election nears. Candidates who do not submit their ads in a timely manner may submit ads for the following ad period, and will be included in that week's cycle of ads.

In support of the proposal, you cite the "equal opportunities" and "lowest unit rate" provisions of the Communications Act. 47 U.S.C. §315(a) and (b). In a public comment letter dated August 14, 1998, which was submitted for the record on this advisory opinion request, the General Counsel of the FCC summarized the relevant statutory provisions.[4]

The FCC General Counsel points to two key provisions of the Communications Act at 47 U.S.C. §315, i.e., the requirements for "equal opportunities" and "lowest unit charge." Section 315(a) of the Communications Act requires a broadcaster or cable operator to "afford equal opportunities" to all candidates for an elective office if one candidate for that office is permitted to advertise on the facilities of the broadcaster or cable operator. Section 315(b) provides that, during the 45 days preceding a primary

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[2] Under this section, an individual qualifies as a candidate if she and her authorized committees (and anyone else authorized by her) have received contributions aggregating in excess of $5,000 or has made expenditures aggregating in excess of $5,000. See 11 CFR 100.3(a).

[3] You indicate that this requirement is derived from Federal Communications Commission regulations and is meant to ensure at least a minimum level of technical quality for the advertisements.

[4] The Commission notes that these comments are submitted by the General Counsel and do not necessarily reflect the views of the Federal Communications Commission. This opinion's references to and reliance on the FCC General Counsel's legal analysis of FCC statutes and rulings omits some of his citations to FCC materials. The omitted citations are found in the full text of Counsel's comments, which are part of the public record for this opinion.

election and the 60 days preceding a general election, a candidate is entitled to pay for advertising at no more than "the lowest unit charge of the station for the same class and amount of time for the same period."[5]

Section 315(b) was enacted in 1972, along with the "reasonable access" rule at section 312(a)(7), as part of the Federal Election Campaign Act of 1971. The "reasonable access" rule (which does not apply to cable operators) 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).*

FCC Counsel recognizes that, 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. He states that a provision of free time would avoid such litigation and would be consistent with Congressional intent behind enacting the lowest unit charge rule, i.e., the reduction of campaign costs. Counsel also notes that 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. Moreover, FCC regulations contemplate the provision of free time to candidates, stating that when free time is provided for use by candidates, the cable operator or broadcaster must place a record of the free time in "the political file." The political file is available for public inspection and includes records of all requests for cablecast time by candidates, the disposition of any such requests, and all free time provided to candidates.

Given the foregoing summary of the applicable Communications Act provisions and FCC rules which govern cable operators such as Daniels, this advisory opinion request poses the issue of whether donations by Daniels of free advertising spot time to candidates for Federal office would be prohibited corporate contributions under the Act and Commission regulations. For the reasons set forth herein and subject to conditions stated herein, the Commission concludes that Daniels' proposal would not entail contributions and would be permissible under the Act.

The Act prohibits "any corporation whatever" from making any contribution or expenditure in connection with a Federal election. 2 U.S.C. §441b(a). The Act and Commission regulations define the terms "contribution" and "expenditure" to include any gift of money or anything of value for the purpose of influencing a Federal election. 2 U.S.C. §431(8)(A)(i) and (9)(A)(i); 11 CFR 100.7(a)(1) and 100.8(a)(1); see also 2 U.S.C. §441b(b)(2) and 114.1(a)(1) (providing a similar definition for "contribution or expenditure" with respect to corporate activity). Commission regulations further define "anything of value" to include all in-kind contributions and state that, unless specifically exempted under 11 CFR 100.7(b), the provision of any goods or services (including

[5] That section also provides that, during times other than those periods, candidates cannot be charged more than "the charges made for comparable use of such station by other users thereof."

advertising services) without charge, or at a charge which is less than the usual and normal charge for such goods or services, is a contribution. 11 CFR 100.7(a)(1)(iii)(A); see also 11 CFR 100.8(a)(1)(iv)(A).

> The Act specifically exempts from the definition of "expenditure": 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 party, political committee, or candidate.

2 U.S.C. §431(9)(B)(i).[6] Commission regulations similarly exempt from the definitions of contribution and expenditure "[a]ny cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer, or producer), newspaper, magazine, or other periodical publication . . . unless the facility is owned or controlled by any political party, political committee, or candidate …" 11 CFR 100.7(b)(2) and 100.8(b)(2).

Several factors must be present to conclude that the proposed activity falls within the media exemption of 2 U.S.C. §431(9)(B)(i). First, the entity engaging in the activity must be a press entity as described by the Act and regulations. See Advisory Opinions 1996-48, 1996-41, 1996-16 and opinions cited therein. Furthermore, in previously applying the media exemption, the Commission cited two criteria, based on the statutory exemption, that would be relevant to determining the scope of the exemption. These are (1) whether the press entity is owned by a political party, political committee, or candidate,[7] and (2) whether the press entity is acting as a press entity in performing the media activity. Advisory Opinion 1982-44 (citing *Reader's Digest Association v. Federal Election Commission*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981)).

In analyzing a proposal from a corporation that operated an on-line computer information service, the Commission concluded that the corporation's donation of free on-line accounts to candidates would be an in-kind contribution and prohibited by 2 U.S.C. §441b(a). Advisory Opinion 1996-2. The Commission noted that neither the corporation nor its described services qualified for the press exemption. Advisory Opinion 1996-2, n.2.

Advisory Opinion 1982-44 provides a contrast. There, the Commission determined that the prohibition on corporate contributions applies equally to media corporations unless their activities fall within the news story, commentary or editorial exemption. The Commission decided in that opinion that the commentary exemption

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[6] According to the House report on the 1974 amendments to the Act, this exception made plain the Congressional intent that the Act would not "limit or burden in any way the first amendment freedoms of the press …" and would assure "the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns." *H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 4 (1974).*

[7] Commission regulations provide that, in the event the facilities are owned or controlled by a political party, political committee, or candidate, the exemption would still apply to the cost of a news story "(i) which represents a bona fide news account communicated in a publication of general circulation or on a licensed broadcasting facility, and (ii) which is part of a general pattern of campaign-related news accounts which give reasonably equal coverage to all opposing candidates in the circulation or listening area ..." 11 CFR 100.7(b)(2) and 100.8(b)(2).

would permit an incorporated broadcasting station to donate free time in two-hour blocks to each of the two major political parties for campaign-related messages without the donation of such time being treated as a contribution under the Act. The Commission recognized that the commentary exemption would allow third persons access to the broadcast media to discuss issues from a highly political and partisan perspective. It also noted that the Act's commentary exemption did not define the format for the commentary or its length.

Although the Communications Act and FCC rules were not addressed in Advisory Opinion 1982-44, the Commission views those provisions as a framework for the implementation of Daniels' proposal. Daniels is not owned or controlled by a candidate, political party, or political committee. It is a media entity covered under the exemption at 11 CFR 100.7(b)(2) and 100.8(b)(2), and it will be performing a function that is contemplated as a public service function of such an entity under the Communications Act. The Communications Act provisions indicate that the entities covered should provide reasonable access to candidates on an equal opportunity basis to more fully inform the voters during the defined pre-election periods.[8]

Congress has shown a clear, statutory interest in providing Federal candidates with reasonably priced air time. This requirement was imposed by the same public law which included the 1971 Act. *Public Law 92-225, 86 STAT. 3*. While the Federal Election Commission cannot surrender jurisdiction, nor simply defer to the FCC when our statutes conflict, in this instance, the Communications Act provides important guidance in interpreting the Federal Election Campaign Act by illuminating the policy Congress intended to foster.

The Commission views the proposed activity as falling within the category of commentary, which includes the concept of guest commentary. In implementing its proposal, Daniels must, of course, comply with all applicable provisions of the Communications Act and FCC regulations. Absent these laws and regulations ensuring that Daniels will provide equal opportunities to all qualified candidates, the Commission might disapprove a similar request. The Commission cautions, however, that activities by Daniels which reflect an intent to advance one candidate over another, or to give any preference to any candidate, will be deemed to fall outside the Act's media exception. These equal access assurances take the Daniels proposal outside the realm of mere in-kind contributions of advertising space.[9] Given these features, the Daniels proposal constitutes the performance of a media function encouraged and required under the

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[8] Although cable operators are not subject to the "reasonable access" requirements, they are still governed by the equal opportunities and lowest unit charge provisions which are themselves designed to encourage use of the public media by candidates to inform the voters before the election. The Commission notes that its regulations extend to cable operators the same news media (or press) exemption that is explicitly given in the Act to any broadcasting station. That regulatory approach at least implies that the Commission will not narrowly condition its views as to the scope of the media exemption on the differing application of the Communications Act to cablecasters on the one hand, and broadcast licensees on the other, in circumstances such as those presented by the Daniels proposal.

[9] Thus, the Commission does not agree with your statement in the request to the effect that making free advertising time available to only one candidate would constitute commentary and be permissible under the Act's media exemption.

Communications Act, and, in its similarity to the activity in Advisory Opinion 1982-44, it is considered to be commentary.[10]

The Commission notes Daniels' constitutional arguments asserting that the First Amendment requires approval of its proposal. However, the Commission does not undertake a constitutional analysis in this instance, since its interpretation of the media exemption at 2 U.S.C. §431(9)(B)(i), itself clearly drawn with the First Amendment in mind, provides sufficient guidance.

Although not explicitly posed in Daniels' request, the Commission notes the disclaimer requirements of the Act and Commission regulations. 2 U.S.C. §441d and 11 CFR 110.11. In general, these requirements apply to any person who makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or to solicit contributions, through the use of any broadcasting station and other specified public media. The Act and regulations do not apply these requirements to Daniels when it donates (or sells discounted) time to a candidate for Federal office or the authorized campaign committee of such a candidate. The requirements would apply, however, to the Federal candidate and her campaign committee who is the donee (or purchaser) of the spot time. Of relevance here are the following requirements: (1) if the communication is paid for and authorized by candidate or her committee, the communication shall state that it has been paid for by such candidate or committee; and (2) if such a communication is authorized by a candidate or her committee, but paid for by any other person, the communication shall state that it is paid for by that person and authorized by the candidate or her committee. 2 U.S.C. §441d(a)(1) and (2); 11 CFR 110.11(a)(1)(i) and (ii).

Each candidate who advertises under the proposed program should be advised by Daniels of the necessity for a disclaimer in compliance with the above provision. Assuming that the costs for producing candidate X's advertisements will be paid for by X's committee (X for Congress), examples of such a disclaimer include: (1) "Paid for by X for Congress"; (2) "Paid for by X for Congress and time provided free by Daniels Cablevision"; or (3) "Time for the following message is provided free by Daniels Cablevision to help inform the public about the current House campaign and other costs are paid by X for Congress."[11]

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[10] Given the basis for the conclusion of this opinion, the Commission notes that the underlying rationale for Advisory Opinion 1986-22 is modified. That opinion concluded that a broadcaster's proposal to give discounts on media purchases by Federal candidates was permissible because the same discounts were available to its commercial advertisers. This advisory opinion issued to Daniels is based instead upon compliance with FCC requirements that apply to the provision of cable advertising time to Federal candidates.

[11] The Commission notes that in the document entitled "The Daniels Plan" submitted by you, Daniels states that "[q]ualified candidates who have not produced advertisements but are interested in participating can contact Daniels Cablevison about the system's production facilities." If Daniels provides the use of such facilities, the campaign must pay Daniels the usual and normal charge for the use of such facilities and must make payment within a commercially reasonable period of time. 11 CFR 100.7(a)(i)(iii)(A) and (B), 114.9(c), and 116.3(b), (c), and (d).

This response constitutes an advisory opinion concerning application of the Act and Commission regulations to the specific transaction or activity set forth in your request. 2 U.S.C. §437f.

Sincerely,

(signed)

Joan D. Aikens
Chairman

Enclosures (AOs 1996-48, 1996-41, 1996-16, 1996-2, 1986-22 and 1982-44)