

December 2, 1999

**NOTICE AO DRAFT COMMENT PROCEDURES**

The Commission has approved a revision in its advisory opinion procedures that permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 1999-32 is available for public comments under this procedure. It was requested by William C. Oldaker, on behalf of the Tohono O'odham Nation. The draft may be obtained from the Public Disclosure Division of the Commission.

Proposed Advisory Opinion 1999-32 will be on the Commission's agenda for its public meeting of Thursday December 9, 1999.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (EST) on December 8, 1999.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case by case basis in special circumstances.

4) All comments timely received will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Disclosure Division.

23-04-107-1496

**CONTACTS**

Press inquiries: Ron Harris (202) 694-1220

Acting Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copy of draft AO 1999-32 contact Public Records Office-  
Public Disclosure Division (202) 694-1120, or 800-424-9530.

For questions about comment submission procedure contact  
N. Bradley Litchfield, Associate General Counsel, (202) 694-1650.

**ADDRESSES**

Submit single copy of written comments to:

Commission Secretary  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463

23.04.107.1497



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

December 2, 1999

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon  
Staff Director

FROM: Lawrence M. Noble *LN*  
General Counsel

N. Bradley Litchfield *NBL*  
Associate General Counsel

Michael G. Marinelli *MM*  
Staff Attorney

SUBJECT: Draft AO 1999-32

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for December 9, 1999.

Attachment

23.04.107.1498

**DRAFT**

1 **ADVISORY OPINION 1999-32**

2

3 **William C. Oldaker**

4 **Oldaker & Harris, LLP**

5 **818 Connecticut Avenue, N.W.**

6 **Suite 1100**

7 **Washington, DC 20008**

8

9 **Dear Mr. Oldaker:**

10

11 **This refers to your letters dated October 29, September 29, 20 and 4, 1999,**

12 **concerning the application of the Federal Election Campaign Act of 1971 ("the**

13 **Act"), as amended, and Commission regulations to the status of the Tohono**

14 **O'odham Nation ("the Nation"), a Federally recognized Indian tribe in southern**

15 **Arizona, as a Federal contractor.**

16 **FACTS**

17 **You explain that the Nation is a non-corporate entity and is organized pursuant to**

18 **Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476. The Tohono**

19 **O'odham Nation has formed a Utility Authority ("TOUA"), a tribally chartered**

20 **unincorporated entity, which operates as a subordinate economic enterprise of the Nation.**

21 **All members of TOUA's management board are appointed by the Chairman of the Tohono**

22 **O'odham Nation and approved by the Tohono O'odham Legislative Council. Funds from**

23 **this enterprise are kept separately from other tribal funds.**

24 **You further explain that among TOUA's purposes, as detailed in its Plan of**

25 **Operation, are the provision of utility services (such as electric, gas and telephone) to all**

26 **areas and persons within the Nation, provision of utility services to the Nation's members**

27 **at the lowest possible cost, and the improvement of the health and welfare of Nation**

28 **residents. Currently, TOUA is the only provider of utility services on the Nation's**

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1 territories ("the Reservation"). TOUA's standard practice is to provide utility services for  
2 which all customers are billed on a monthly basis, using a formula of kilowatt-hours  
3 multiplied by a certain dollar amount.

4 Among TOUA's many customers are several Federal agencies with offices and  
5 facilities on the Reservation. The Federal agencies receiving utility services from the  
6 TOUA are the Bureau of Indian Affairs (the "BIA") and the Indian Health Service (the  
7 "IHS"). In addition to contract administration and implementation of various Department  
8 of Interior programs, the BIA maintains three schools for the Nation's children. The IHS  
9 runs a hospital and affiliated programs such as housing for the hospital's physicians. The  
10 BIA and IHS facilities are on the Reservation and administer programs only to the  
11 Nation's residents. These services do not extend beyond the Reservation.

12 As part of its mandate, TOUA provides services to these agencies in the same  
13 manner as the rest of its customers. TOUA has no written contract for the provision of  
14 utility services to the Federal agencies conducting business on the Reservation, just as  
15 TOUA has no written contract to provide utility services to any of its residential or  
16 commercial customers. Like all residential and business customers, these Federal agencies  
17 are billed monthly by TOUA based on actual utility usage. You explain that the billing of  
18 Federal agencies by TOUA constitutes approximately 10% of its total billing of all  
19 customers. Your request includes a sample billing form for the BIA and a copy of the  
20 TOUA's Plan of Operation.

21 The Tohono O'odham Nation requests an advisory opinion that the regular and  
22 customary provision of utility services to these Federal agencies does not cause the Nation

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1 to become a Federal contractor thereby prohibiting it, under 2 U.S.C. §441c and 11 CFR  
2 115.2(a), from making Federal election campaign contributions.

3 **ACT AND COMMISSION REGULATIONS**

4 The term "person" as defined in the Act includes an individual, partnership,  
5 committee, association, corporation, labor organization, or any other organization or  
6 group of persons, but such term does not include the Federal Government or any authority  
7 of the Federal Government. 2 U.S.C. §431(11).

8 Under 2 U.S.C. §441c, it is unlawful for any person who is a Federal contractor to  
9 directly or indirectly "make any contribution of money or other things of value, or to  
10 promise expressly or impliedly to make any such contribution to any political party,  
11 committee, or candidate for public office..." Commission regulations indicate that the  
12 prohibition bans contributions to Federal candidates and Federal political committees, but  
13 does not prohibit contributions in State and local elections. 11 CFR 115.2(a). This  
14 prohibition extends from the commencement of the contract negotiations until the  
15 completion of the contract performance or the termination of negotiations. 11 CFR  
16 115.1(b), 115.2(b). Commission regulations at 11 CFR 115.1(a) define the term "Federal  
17 contractor" to mean, in part, a person who:

- 18  
19 (1) Enters into any contract with the United States  
20 or any department or agency thereof either for--  
21 (i) The rendition of personal services; or  
22 (ii) Furnishing any material, supplies, or  
23 equipment; or  
24 (iii) Selling any land or buildings;  
25 (2) If the payment for the performance of the  
26 contract or payment for the material, supplies,  
27 equipment, land, or building is to be made in whole  
28 or in part from funds appropriated by the Congress.  
29

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1 Under 11 CFR 115.1(c) of the regulations, the term "contract" includes:

- 2 (1) A sole source, negotiated, or advertised  
3 procurement conducted by the United States or any  
4 of its agencies;  
5 (2) A written (except as otherwise authorized)  
6 contract, between any person and the United States  
7 or any of its departments or agencies, for the  
8 furnishing of personal property, real property, or  
9 personal services; and  
10 (3) Any modification of a contract.

11

## 12 APPLICATION TO NATION

13

14 As "any other organization or group of persons," the Nation would meet the  
15 definition of "person" under section 431(11). See Advisory Opinion 1993-12. The Tribe  
16 is therefore subject to the provisions of 2 U.S.C §441c and would be prohibited from  
17 making contributions if the type of agreement presented in this request was within the  
18 definition of contract under the quoted Commission regulations.

19 One element of the regulatory definitions of "contract" is the furnishing of personal  
20 property, real property, or personal services. See 11 CFR 115.1(c)(2) and (a)(1). This  
21 element is met by TOUA's non-written agreement with various Federal offices to provide  
22 utility services. Furthermore, while the agreement is not written, it may still meet the  
23 requirements of this section. The Commission notes that 11 CFR 115.1(c)(2) mentions a  
24 written contract, but also recognizes that a non-written agreement may be a covered  
25 contract if that agreement is "otherwise authorized."

26 However, even if the TOUA utility service agreement may meet the formal  
27 definition of contract, the circumstances presented here require additional analysis. Your  
28 request cites Advisory Opinion 1993-12, which the Commission agrees is relevant to your  
29 situation. In that opinion, the Commission examined various agreements entered into by a

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1 tribal entity and the Federal Government. The Commission noted that several classes of  
2 agreements would not be considered contracts for the purposes of 2 U.S.C. §441c, despite  
3 the contractual form of the agreements, since the unique relationships on which the  
4 substance of these agreements were based did not bring them within the prohibitions of  
5 section 441c.

6 The agreements discussed in Advisory Opinion 1993-12 were grants and special  
7 "self-determination" contracts by which the Federal Government gave various tribal  
8 instrumentalities the obligations to carry out functions which the Federal government itself  
9 had previously assumed, pursuant to its obligations to provide for the welfare of the tribal  
10 populations. These special types of agreements dealt with the provision of services to the  
11 Tribe itself and did not extend outside the tribal area.<sup>1</sup> The Commission determined that  
12 these agreements, because of their subject matter and the special nature of the obligations  
13 between the Tribal authorities and the Federal Government, were not meant to be included  
14 within the definition of the Federal contractor relationship in the Act and Commission  
15 regulations.

16 The Commission notes that while your request does not explicitly present a self-  
17 determination contract or grant, several of the essential factors of that opinion are present  
18 in this request. The TOUA's Plan of Operation confirms your representation that TOUA  
19 is a tribal instrumentality charged with helping to provide for the welfare of the Tohono  
20 O'odham Nation and to provide utility services to the Nation. See TOUA Plan, Section 4.

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<sup>1</sup> The agreements discussed in Advisory Opinion 1993-12 concerned the establishment of a tribal police force, a program to help tribal agriculture, and grants to further the tribal child welfare services. In addition to these contracts, the Commission also considered in the opinion a standard procurement contract to produce goods, i.e. posters and prints for the Bureau of Indian Affairs. This procurement

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1 part A1 and A2. With the single exception of providing cellular radio services to the  
2 Nation, TOUA's area of operation is limited to the Reservation. See TOUA Plan, Section  
3 4, part A4 and A5. The Nation's government oversees its operation. See TOUA Plan,  
4 Section 7, part A9 and Section 9, part A5.

5 TOUA, pursuant to this mandate, provides a portion of its services to Federal  
6 agencies on the Reservation which themselves operate exclusively for the benefit of the  
7 Nation, again pursuant to the special obligations to the Nation owed by the Federal  
8 Government. Consistent with the Commission's approach in Advisory Opinion 1993-12,  
9 the Commission believes this type of arrangement should be viewed in the context of an  
10 Indian tribe's unique relationship to the Federal government and was not contemplated by  
11 Congress as subject to the prohibitions of section 441c. Accordingly, the Commission  
12 concludes that, notwithstanding the contractual elements of the agreement, this agreement  
13 does not fall within the regulatory description of a contract for purposes of 2 U.S.C.  
14 §441c.

15 This response constitutes an advisory opinion concerning the application of the  
16 Act, or regulations prescribed by the Commission, to the specific transaction or activity set  
17 forth in your request. See 2 U.S.C. §437f.

18 Sincerely,

19  
20 Scott E. Thomas  
21 Chairman  
22

23 Enclosures (AO 1993-12)