FEDERAL ELECTION COMMISSION
Washington, DC 20463

November 18, 2005

CERTIFIED MAIL
RETURN RECEIPT RQUESTED

ADVISORY OPINION 2005-18

The Honorable Silvestre Reyes
Member of Congress
The Reyes Committee, Inc.
1011 Montana
El Paso, Texas 79901

Dear Representative Reyes:

We are responding to your advisory opinion request concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to payments by your principal campaign committee for a proposed weekly radio program in El Paso, Texas. The Commission concludes that the payments for the proposed radio program are a permissible use of campaign funds, and that other Members of Congress may appear as guests on the show.

Background

The facts presented in this advisory opinion are based on your letters received on July 12, 2005 and September 19, 2005.

You are the United States Representative for the 16th Congressional District of Texas, and are currently a candidate for reelection in 2006.[1] Your principal campaign committee, the Reyes Committee, Inc. ("the Committee"), intends to purchase time on an El Paso, Texas radio station for a weekly 30-minute radio program that you intend to host. The content of the show, conducted in Spanish, will include commentary and discussion about Congressional, campaign, and local issues.

The program will air on Mondays on KAMA-AM, a commercial radio station in El Paso. It will be broadcast live from KAMA-AM's studio in El Paso and will feature

[1] You filed a Statement of Candidacy with the Commission on July 29, 2005.

guest participation and audience call-ins. The Committee will pay $375 per week for each week that the program airs, which includes the cost of the airtime and the use of the studio. While this program is the first of its kind to air on KAMA-AM, $375 per week is the amount that KAMA-AM charges for airing similar types of programming. All costs will be paid by the Committee using campaign funds. Each broadcast will include a disclaimer indicating that the program was paid for by the Committee.

You intend to begin broadcasting this program as soon as possible and continue to broadcast throughout the primary season. In addition, you may invite other Members of Congress onto the show as guests. These Members of Congress do not represent districts within KAMA-AM's listening area. The program will not advocate the reelection of these other Members of Congress and will not rebroadcast their campaign materials.

Questions Presented

1. May the Committee pay for the radio program with campaign funds?

2. If other Members of Congress who represent districts outside KAMA-AM's listening area appear on the radio program, would payment by the Committee for the program result in coordinated communications and in-kind contributions to those Members?

3. What is the proper disclaimer that the Committee must include on all broadcasts?

Legal Analysis and Conclusions

1. May the Committee pay for the radio program with campaign funds?

Yes, the Committee may use campaign funds to purchase time on a radio station for a weekly radio program addressing Congressional, campaign, and local issues as indicated in your request.

The Act identifies six categories of permissible uses of contributions accepted by a Federal candidate. Two of these permissible uses are (1) otherwise authorized expenditures in connection with the candidate's campaign for Federal office, and (2) ordinary and necessary expenses incurred in connection with the duties of the individual as a holder of Federal office. 2 U.S.C. 439a(a)(1) and (a)(2); 11 CFR 113.2(a). You are currently a candidate for reelection to the House of Representatives. Accordingly, the Committee may use campaign funds to purchase time on a radio station because the radio program would address Congressional, campaign, and local issues and therefore would be in connection with both your reelection campaign and your duties as a Federal officeholder. *See* 2 U.S.C. 439a(a)(1) and (a)(2). These expenditures must be reported by the Committee in accordance with 2 U.S.C. 434(a)(2).

The Commission next considers whether the provision of airtime by KAMA-AM is a contribution to the Committee under 2 U.S.C. 431(8). The definition of "contribution" includes "anything of value made by any person for the purpose of

influencing any election for Federal office." 2 U.S.C. 431(8)(A)(i); 11 CFR 100.52(a). Commission regulations further define "anything of value" to include "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services." 11 CFR 100.52(d)(1). The usual and normal charge for goods and services is determined by the price of the goods in the market from which they ordinarily would be purchased at the time of the contribution and the prevailing commercially reasonable rate for services at the time the services were rendered. 11 CFR 100.52(d)(2). Based on your statement that $375 per week represents the "normal amount" that KAMA-AM charges for this kind of program, and assuming that this is in fact the prevailing commercially reasonable rate, KAMA-AM would not be making a contribution to you or the Committee if the Committee pays this rate for airtime and studio time.

Finally, the Commission notes that the broadcasts would refer to a clearly identified Federal candidate, would be broadcast within 30 days of a primary election,[2] and would be targeted to the relevant electorate of the Federal candidate. Nevertheless the radio broadcasts would not be electioneering communications under 2 U.S.C. 434(f)(3) or 11 CFR 100.29(c)(3) because payments for these communications would be reported as expenditures by the Committee. The communication therefore falls under an exemption to the definition of "electioneering communication." 2 U.S.C. 434(f)(3)(B)(ii); 11 CFR 100.29(c)(3).

2. If other Members of Congress who represent districts outside KAMA-AM's listening area appear on the radio program, would payment by the Committee for the program result in coordinated communications and in-kind contributions to those Members?

No, the appearance of other Members of Congress who represent districts outside the KAMA-AM listening area on the radio program would not result in coordinated communications, and payment by the Committee would not be in-kind contributions to those other Members of Congress.

The Act defines as an in-kind contribution an expenditure made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 2 U.S.C. 441a(a)(7)(B)(i). The Commission implemented this statutory provision as it applies to communications in the "coordinated communication" regulation at 11 CFR 109.21. This regulation specifies that a communication is a "coordinated communication" if it satisfies the following three-pronged test: (1) the communication is paid for by a person other than the Federal candidate or the candidate's authorized committee in question; (2) one or more of the four content standards set forth in 11 CFR 109.21(c) is satisfied; and (3) one or more of the six conduct standards set forth in 11 CFR 109.2l(d) is satisfied. The regulation also specifies that a payment for a coordinated communication is made for the purpose of influencing a Federal election, and is an in-kind contribution to the candidate or

[2] Your letter indicates that the program will air "during the primary season." The Commission notes that the relevant primary date of your candidacy is March 7, 2006.

authorized committee with whom or which it is coordinated, and must be reported as an expenditure made by that candidate or authorized committee. 11 CFR 109.21(b)(1).

The proposed program does not satisfy the content prong of 11 CFR 109.21(c).[3] This prong may be satisfied if the communication (1) is an electioneering communication under 11 CFR 100.29; (2) is a public communication that disseminates, distributes, or republishes campaign materials prepared by a candidate at any time; (3) is a public communication that expressly advocates the election or defeat of a clearly identified candidate at any time; or (4) is a public communication that refers to a clearly identified Federal candidate, is made within 120 days of an election, and is directed to voters in the jurisdiction of the clearly identified candidate.

As discussed above, the radio program is not an electioneering communication, and therefore does not satisfy 11 CFR 109.21(c)(1). For the purposes of 11 CFR 109.21(c)(2), (3), and (4), the program is a public communication as defined in 2 U.S.C. 431(22) and 11 CFR 100.26 because it is a communication by means of a broadcast facility. You indicate that the radio program would not disseminate, distribute, or republish campaign material, and therefore the communication does not satisfy 11 CFR 109.21(c)(2). You also indicate that the program would not expressly advocate the election or defeat of other Members of Congress, and therefore the communication also does not satisfy 11 CFR 109.21(c)(3).

In order to satisfy the "120 day public communication" content standard, a program must meet all three elements of 11 CFR 109.21(c)(4). One of the elements is that the program be directed to the voters of the clearly identified candidate's jurisdiction. 11 CFR 109.21(c)(4)(iii). Because the other Members of Congress's districts are not within the listening area of the station broadcasting the program, the radio program would not be directed to voters in the jurisdiction of the clearly identified Members who are also candidates. Therefore, the "120 day public communication" content standard cannot be met because the communication does not satisfy 11 CFR 109.21(c)(4)(iii).

Thus, the proposed communication would not satisfy any of the content standards of 11 CFR 109.21(c). The fact that the content prong would not be met establishes that the proposed communication would not constitute a coordinated communication. *See*

[3] The content prong of the "coordinated communication" test has been the subject of litigation in *Shays v. FEC*, 337 F. Supp. 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir 2005), petition for rehearing *en banc* denied Oct. 21, 2005. Although the United States Court of Appeals for the District of Columbia Circuit held that it was permissible for the "coordinated communication" regulation to contain a content standard, it found that the one promulgated by the Commission did not meet the requirements of the Administrative Procedure Act in that the Commission failed to provide a sufficient justification for it. 414 F.3d at 102.

Prior to the Court of Appeals ruling, the Commission decided to initiate a rulemaking to determine whether to amend the coordinated communication regulation, or to provide a new explanation and justification for the current regulation. Please note that pending a change in the regulation, or a new explanation and justification, the Commission's current regulation in 11 CFR 109.21 defining "coordinated communication" remains in full force and effect. Accordingly, the guidance in this advisory opinion may be relied upon while the current coordination rule remains in effect. *See* 2 U.S.C. 438(e).

11 CFR 109.21(a) (requiring that all three prongs must be satisfied for a communication to be a coordinated communication). It is not necessary, therefore, to analyze whether the payment and the conduct prongs of the coordinated communication test are met. Consequently, the payments by the Committee to broadcast the radio program would not constitute in-kind contributions to other Members of Congress.

3. What is the proper disclaimer that the Committee must include on all broadcasts?

BCRA expanded the Act's disclaimer requirements applicable to radio communications paid for by political committees and authorized by Federal candidates. *See* 2 U.S.C. 441d(d)(1)(A); 11 CFR 110.11. Because the radio program would be paid for by your principal campaign committee and authorized by you, the communications would require a disclaimer that complies with the "general content requirements" of 11 CFR 110.11(b)(1), the "specifications for all disclaimers" in 11 CFR 110.11(c)(1), and the "specific requirements for radio communications authorized by a candidate" in 11 CFR 110.11(c)(3). Radio communications authorized by a candidate are required to include an audio statement by the candidate that identifies the candidate and states that he or she has approved the communication. 11 CFR 110.11(c)(3)(i).

You inquire about the permissibility of a disclaimer that states, "The preceding program was paid for by the Reyes Committee, Inc., Ron Pate, Treasurer." This disclaimer satisfies the "general content requirements" of 11 CFR 110.11(b)(1). However the disclaimer must also satisfy the additional requirements for radio communications approved by a candidate contained in 11 CFR 110.11(c)(3)(i). Two examples of disclaimers that would satisfy these regulations are:

(1) "I am Silvestre Reyes, a candidate for the House of Representatives, and I approved this advertisement." 11 CFR 110.11(c)(3)(iv)(A).

(2) "My name is Silvestre Reyes. I am running for the House of Representatives, and I approved this message." 11 CFR 110.11(c)(3)(iv)(B).

While these are examples of acceptable statements, they are not the only statements that would meet the requirements of the Act. 11 CFR 110.11(c)(3)(iv).

Any other Member of Congress who appears on the show need not also make a disclaimer. You do not indicate that any other Member of Congress would have any editorial control over the content of the program or the statements of yourself, other guests, or callers. They will not pay for or authorize the communication, and therefore would not be required to make a disclaimer under 2 U.S.C. 441d.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any

of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Scott E. Thomas
Chairman

Enclosures (AOs 2004-1 and 2003-25)