

May 20, 2010

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

DRAFT ADVISORY OPINION 2010-05 is available for public comments under this procedure. It was requested by Stephen L. Crain, Esq., on behalf of Starchannel Communications, Inc.

Draft Advisory Opinion 2010-05 is scheduled to be on the Commission's agenda for its public meeting of Thursday, May 27, 2010.

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 12:00pm noon (Eastern Time) on May 26, 2010.

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 timely received comments 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 Records Office.

CONTACTS

Press inquiries: Judith Ingram (202) 694-1220

Deputy Commission Secretary: Darlene Harris (202) 694-1038

Other inquiries:

To obtain copies of documents related to AO 2010-05, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at www.fec.gov.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

MAILING ADDRESSES

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

Rosemary C. Smith
Associate General Counsel
Office of General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT



FEDERAL ELECTION COMMISSION
Washington, DC 20463

2010 MAY 20 P 4: 35

May 20, 2010

AGENDA ITEM

For Meeting of 05-27-10

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *PCS*
Associate General Counsel

Amy L. Rothstein *AR*
Assistant General Counsel

Joshua S. Blume *JSB*
Attorney

Subject: Draft AO 2010-05 (Starchannel Communications, Inc.)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for May 27, 2010.

Attachment

2010 MAY 20 P 4: 35

1 ADVISORY OPINION 2010-05

2
3 Stephen L. Crain, Esq.
4 Atlas & Hall, LLP
5 P.O. Box 3725 (78502-3725)
6 818 W. Pecan Blvd.
7 McAllen, TX 78501

DRAFT

8
9 Dear Mr. Crain:

10 We are responding to your advisory opinion request on behalf of Starchannel
11 Communications, Inc. ("Starchannel") concerning the application of the Federal Election
12 Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the sale
13 of advertising time on a foreign-owned television station to Federal candidates and their
14 committees. Starchannel asks whether, under the Act, it may sell airtime for political
15 advertising by Federal candidates on television broadcast stations owned by Televisa, a
16 Mexican corporation.

17 The Commission concludes that Starchannel may sell airtime for political
18 advertising by Federal candidates on Televisa-owned broadcast stations under the
19 conditions described below.

20 ***Background***

21 The facts presented in this advisory opinion are based on your letters received on
22 March 8 and 18, and April 1, 2010, and on information on Starchannel's official website.¹

23 Starchannel is a Delaware corporation that sells advertising time slots on
24 television broadcast stations in Mexico that are owned by a Mexican corporation,

25

¹ <http://www.starchannel.com>

1 Televisa,² to companies in the United States. The broadcast stations that carry these
2 advertisements broadcast into markets in areas of Texas that are located on the border
3 between the United States and Mexico (“U.S. border market”). Televisa’s Nielsen
4 Household ratings in prime time for November 2009 were 23 percent for the Rio Grande
5 Valley market, 42 percent for the Laredo market, and 13 percent for the El Paso market.
6 According to Starchannel, these ratings indicate that Televisa broadcast stations reach a
7 significant percentage of U.S. border market viewers. The two corporations are
8 independent of each other and Televisa does not exercise any ownership or control over
9 Starchannel.

10 Pursuant to a contract between Starchannel and Televisa, Starchannel acts as the
11 exclusive representative of Televisa in the sale of advertising time in the U.S. border
12 market on Televisa stations. Under the contract’s terms, Televisa establishes a minimum
13 price for air time that is based on an estimate of the number of viewers likely to see the
14 advertisement at different times of the day according to data established by Nielsen
15 ratings. The minimum prices do not vary based on the identity of the buyer.

16 Under the contract with Televisa, Starchannel may not negotiate a price with a
17 buyer for an advertising time slot that is lower than the Televisa-established minimum
18 price, but it may negotiate higher prices. Higher negotiated prices may be based on such
19 factors as: (1) the intensity of competition among multiple buyers for particular time

² Televisa is the largest media company in the Spanish-speaking world. See <http://www.starchannel.com/about-televisa> (last visited May 5, 2010).

1 slots, (2) the number of viewers during a time slot,³ and (3) the volume of advertisements
2 in a time slot. Any difference between the minimum price set by Televisa and the price
3 ultimately negotiated by Starchannel with the buyer accrues to Starchannel.

4 Once Starchannel and the buyer negotiate a mutually acceptable price, the buyer
5 sends an order for the purchase of the time slot or slots on one or more stations. The
6 buyer customarily selects the stations on which the advertisement will run, and designs
7 the placement strategy it wishes to use. The buyer also typically creates the
8 advertisement and delivers it finished and complete to Starchannel for running on the
9 station or stations. Starchannel receives the buyer's order, transmits it to the appropriate
10 station, and then sends the buyer an invoice that reflects the times during which the
11 advertisement airs, which is considered to be the contract between Starchannel and the
12 buyer. Starchannel states that this process reflects the usual and normal business practice
13 for the broadcasting industry.

14 Starchannel wishes to expand its business by selling advertising time slots on
15 Televisa's broadcasting stations to Federal candidates. In doing so, Starchannel intends
16 to follow the business model outlined above, with one modification: Starchannel plans to
17 offer Federal candidates the Lowest Unit Charge⁴ ("LUC") for the time slots on Televisa.
18 Starchannel does not believe that it is legally required to offer Federal candidates the

³ Information about the number of viewers is based on Nielsen ratings, and is calibrated to represent not only the number of viewers in the aggregate, but also numbers of demographic subgroups of viewers that a prospective ad buyer wishes to reach with the advertisement. The Nielsen ratings used for these assessments are based on viewership on the United States side of the border only, as are all resulting prices.

⁴ Under the Communications Act of 1934 (the "Communications Act"), the Lowest Unit Charge is "the lowest unit charge of the station for the same class and amount of time for the same period." See 47 U.S.C. 315(b)(1) and 47 CFR 73.1942(a)(1).

1 LUC because Televisa is a Mexican company. Nevertheless, Starchannel plans to offer
2 the LUC because in its business judgment it could not otherwise compete with American
3 television stations that offer advertising time to Federal candidates at the LUC.
4 Starchannel plans to require Federal candidates to comply with all paperwork, disclaimer,
5 and other requirements of the Communications Act and Federal Communications
6 Commission regulations, just as if the advertisements were being run on a U.S. station.
7 The Federal candidates will be responsible for the production of their own
8 advertisements, and Starchannel will exercise no control over the content of the
9 advertisements.⁵

10 ***Question Presented***

11 *May Starchannel sell advertising time to Federal candidates on a television*
12 *station owned by Televisa, a Mexican corporation?*

13 ***Legal Analysis and Conclusions***

14 Yes, Starchannel may sell advertising time on a television station owned by
15 Televisa, a Mexican corporation, to Federal candidates under the conditions described
16 below.

17 The Act and Commission regulations prohibit foreign nationals, directly or
18 indirectly, from making “a contribution or donation of money or other thing of value . . .
19 in connection with a Federal, State, or local election.” 2 U.S.C. 441e(a)(1)(A); *see*
20 *also* 11 CFR 110.20(b). The term “foreign national” includes a “foreign principal, as
21 such term is defined by section 611(b) of title 22.” 2 U.S.C. 441e(a)(1)(A). The term

⁵ Although Starchannel does have production facilities and will sometimes produce an advertisement, it does not contemplate being involved in producing advertisements for Federal candidates.

1 “foreign principal” includes “a partnership, association, corporation, organization, or
2 other combination of persons organized under the laws of or having its principal place of
3 business in a foreign country.” 22 U.S.C. 611(b)(3). The Act also prohibits a corporation
4 from making contributions in connection with any Federal election. 2 U.S.C. 441b(a).

5 A “contribution” includes “any gift, subscription, loan, advance, or deposit of
6 money or anything of value made by any person for the purpose of influencing an
7 election for Federal office.” 2 U.S.C. 431(8)(A)(i) and 11 CFR 100.52(a); *see*
8 *also* 2 U.S.C. 441b(b)(2) and 11 CFR 114.2(b)(1). “Anything of value” includes all in-
9 kind contributions, including the provision of goods or services without charge or at a
10 charge that is less than the usual and normal charge. *See* 11 CFR 100.52(d)(1). “Usual
11 and normal charge” is defined as the price of goods in the market from which they
12 ordinarily would have been purchased at the time of the contribution, or the commercially
13 reasonable rate prevailing at the time the services were rendered. *See* 11 CFR
14 100.52(d)(2).

15 Here, Televisa wishes to provide television airtime to Federal candidates through
16 its exclusive U.S. representative, Starchannel. The analysis of whether Televisa, as a
17 foreign national, would provide a prohibited contribution under 2 U.S.C. 441e is the same
18 as the analysis of whether Starchannel, as a U.S. corporation, would provide a prohibited
19 contribution under 2 U.S.C. 441b. To determine whether a prohibited contribution
20 would result from either Televisa or Starchannel, the Commission must ascertain whether
21

1 the goods or services would be provided at less than the usual and normal charge.⁶

2 Based on the information provided by Starchannel, it does not appear that
3 Televisa would be providing any goods or services at less than the usual and normal
4 charge. Under Televisa's contract with Starchannel, Televisa establishes a minimum
5 price for advertising time that does not depend upon the identity of the buyer. Thus,
6 Televisa would charge the same amount regardless of whether the buyer of the
7 advertising time is a Federal candidate or a non-political customer. Because Televisa's
8 role in the sale of the advertising time remains the same and conforms to its usual and
9 normal business practices regardless of whether the buyer is a Federal candidate, the
10 Commission concludes that no contribution from Televisa would result from the plan.

11 Although Televisa sets the minimum price, Starchannel sets the final price that a
12 U.S. customer must pay to advertise on a Televisa station. As noted above, Starchannel
13 plans to offer advertising time to Federal candidates using the same business practices in
14 which it customarily engages when offering advertising time to other customers, except
15 that it plans to offer Federal candidates the LUC even if it is not required to do so under
16 47 U.S.C. 315(b) and 47 CFR 73.1942.⁷

17 The Commission concludes that Starchannel may sell advertising time on
18 Televisa stations to Federal candidates at the LUC, consistent with the Act and

⁶ See also Advisory Opinion 2007-22 (Hurysz) (applying definition of "usual and normal charge" to ascertain whether Federal candidate's plan to obtain election materials from Canadian third-party candidates without charge would entail a prohibited foreign national contribution).

⁷ For purposes of this advisory opinion, based on the requestor's submission, the Commission assumes that advertising time on a Mexican station broadcasting into the United States would not be subject to the LUC requirement applicable to U.S. broadcasters. Questions about the application of the Communications Act and regulations promulgated thereunder by the Federal Communications Commission are outside of the Commission's jurisdiction.

1 Commission regulations, under the specific facts presented here. Because Starchannel
2 plans to offer the LUC only to Federal candidates who comply with all relevant
3 requirements of the Communications Act, these Federal candidates would be entitled to
4 receive the LUC from a U.S. broadcaster for advertisements airing in the U.S. border
5 market, even if Starchannel is not required to offer them the LUC. Thus, the LUC
6 reflects the “usual and normal charge” for FCC-compliant candidate advertising in the
7 U.S. border market. 11 CFR 100.52(d). Moreover, if U.S. broadcasters throughout the
8 market must offer the LUC to advertisements complying with the Communications Act,
9 Starchannel has concluded that it could not compete with U.S. broadcasters that offer the
10 LUC to Federal candidates unless it, too, offers the LUC. Thus, the LUC represents the
11 commercially reasonable rate prevailing for advertisements complying with the
12 Communications Act at the time the advertisements are broadcast. 11 CFR
13 100.52(d)(2).⁸

14 Starchannel intends to offer the LUC to Federal candidates whose advertisements
15 would entitle them to receive the LUC from American broadcasters. All other aspects of
16 the transactions with Federal candidates will follow Televisa’s and Starchannel’s usual
17 and normal course of business. Accordingly, the Commission concludes that no
18 contribution from Starchannel would result from its plan to sell advertising time to
19 Federal candidates on behalf of Televisa at the LUC rate for advertisements that comply

⁸ Because Starchannel intends to ensure that the Federal candidates to whom it offers the LUC comply fully with Communications Act requirements, the Commission need not address here the issue presented in Advisory Opinion 2004-43 (Missouri Broadcasters Association). In that advisory opinion, the issue presented was whether a U.S. broadcaster could offer the LUC to a candidate whose advertisement allegedly failed to comply with the disclaimer requirement in the Communications Act, 47 U.S.C. 315(b)(2).

1 with the Communications Act.⁹

2 This response constitutes an advisory opinion concerning the application of the
3 Act and Commission regulations to the specific transaction or activity set forth in your
4 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
5 of the facts or assumptions presented, and such facts or assumptions are material to a
6 conclusion presented in this advisory opinion, then the requestor may not rely on that
7 conclusion as support for its proposed activity. Any person involved in any specific
8 transaction or activity which is indistinguishable in all its material aspects from the
9 transaction or activity with respect to which this advisory opinion is rendered may rely on
10 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
11 conclusions in this advisory opinion may be affected by subsequent developments in the
12 law including, but not limited to, statutes, regulations, advisory opinions and case law.
13 The cited advisory opinions are available on the Commission's website at
14 <http://saos.nictusa.com/saos/searchao>.

15

16

On behalf of the Commission,

17

18

19

20

Matthew S. Petersen
Chairman

⁹ The sponsors of any such advertisements also must comply in full with all applicable provisions of the Act and Commission regulations.