FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 26, 1991

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1991-2

Marc J. Scheineson
Washington, Perito & Dubuc
1120 Connecticut Ave., N.W.
Washington, D.C. 20036

Dear Mr. Scheineson:

This responds to your letters dated October 29, 1990, and December 3, 1990, and February 1, 1991, requesting an advisory opinion on behalf of MCI Telecommunications Corporation ("MCI") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the disposition of funds held by MCI as a result of 900 line fundraising by a 1990 Senate campaign. Such funds are being held by MCI pending the outcome of a lawsuit brought by David Duke and his principal campaign committee, David Duke for U.S. Senate, against MCI and others.

You state that MCI is a corporation offering 900 line telephone connections, as well as related billing and collection services, to service providers who, in turn, market 900 line service packages to political campaign committees and others. On April 4, 1989, MCI entered into an "Agreement for Interim 900 Service Billing and Collection" with Iris Enterprises, Inc. of Georgia, a service provider doing business under the name "Fourth Media." That agreement provided that MCI would permit customers of Fourth Media to utilize the MCI network as a transmission medium for receiving 900 line calls.

MCI agreed to bill callers, through arrangements with local exchange carriers ("LECs"), for calls made to 900 lines provided to Fourth Media's clients. Fourth Media and its clients would determine the amount charged to callers from which MCI would subtract usage and related charges for 900 service and a discount to reflect uncollectible bad debt amounts. The net amount would be remitted to Fourth Media within 90 days of the close of the billing cycle in which the charges were incurred. On April 17, 1989, MCI entered into an agreement with South Central

Bell ("SCB") which provided that SCB would perform billing and collection services for 900 line and long distance calls made via MCI's connections.

You state that, in late June, 1990, the Duke Committee obtained 900 service through Fourth Media, pursuant to an oral agreement. The 900 numbers for the Duke Committee were advertised via television programs, in newspapers, and through the mailing of 150,000 flyers. Callers were billed either $10 or $25 per call.[1] You state that Fourth Media received magnetic tapes monthly from MCI with the telephone numbers of 900 line callers. Fourth Media then reportedly contracted with an outside firm to generate names and addresses to match those numbers and provided that information to the Duke Committee.

You explain that the MCI system records the calls using Automatic Number Identification ("ANI"), which identifies the telephone number from which the call was placed. The numbers and the time and date of the call are recorded onto magnetic tape and sent to the LECs (in this case, SCB) which then use the information to prepare customer billing statements by matching the numbers with billing names and addresses. Monthly billing statements, including the 900 charges, are sent to SCB's customers. SCB would usually pay MCI for its accounts receivable in the month following the period covered by ANI tapes sent to SCB. The amount paid to MCI is reduced by the amounts that SCB is unable to bill and collect and by adjustments for refunds, credits, and non-payments. You state that SCB generally pays MCI before the related telephone bills have actually been paid by the callers.

On or about August 15, 1990, SCB notified MCI that it would no longer provide billing and collection service for the 900 calls associated with the Duke Committee with the result that those calls would no longer appear on customer bills. SCB based this decision on a company policy against providing 900 service for political campaigns or charitable fundraisers. MCI notified Fourth Media which notified the Duke campaign of the decision. MCI responded by introducing a procedure to strip from ANI tapes the record of calls that were placed to Duke 900 numbers after SCB's termination of service.

SCB has paid MCI for the accounts receivable processed during the period from June 23 to August 22, 1990, including amounts attributable to the 900 calls made by SCB's customers. MCI was concerned that the Duke Committee's 900 line fundraising was in violation of the Act and that, if the receipt of funds by the Duke Committee violated the Act, MCI would be in violation by forwarding such funds.[2]

MCI continues to hold these funds and has segregated the amounts attributable to two Duke campaign 900 lines from its general corporate revenues. MCI has made no payments to Fourth Media.[3] On September 17, 1990, MCI sent a letter to both Fourth Media and the Duke Committee advising that MCI would not forward any funds to Fourth Media until Fourth Media provides written certification that it is in compliance with the Act. In that letter, MCI also stated that it could not forward uncertain campaign funds "based on an estimated or uncertain collection rate for 900 service" and would not forward funds "until a mechanism is worked out in compliance with FEC regulations."

On August 23, 1990, David Duke and the Duke Committee filed suit against SCB in U.S. District Court for the Eastern District of Louisiana. In January 1991, the complaint was amended to add Fourth Media and MCI as defendants. The suit alleges breach of quasi contract based on detrimental reliance, breach of contract, negligent misrepresentation, unlawful conversion of funds belonging to the Duke Committee, and violation of the Sherman Antitrust Act based on intentional discrimination against the Duke Committee.

By letter dated October 29, 1990, to the Office of General Counsel, you provided much of the information stated above and requested an advisory opinion. Subsequent letters in December 1990 and February 1991 contained additional information. Believing that neither Fourth Media nor the Duke Committee have complied with the Act as interpreted in certain advisory opinions, you ask whether, under the circumstances, payment of the 900 line funds by MCI to Fourth Media, and ultimately to the Duke campaign, would constitute a violation of the Act by MCI. You also ask how MCI should dispose of the funds if it may not forward them to Fourth Media.

The Act and Commission regulations authorize the Commission to issue an advisory opinion in response to a "complete written request" from any person, or his or her agent, with respect to a specific transaction or activity by that person. 2 U.S.C. 437f(a); 11 CFR 112.1(a). The request should set forth a specific transaction or activity that the requesting person plans to undertake or is presently undertaking and intends to undertake in the future. Inquiries presenting a general question of interpretation, or regarding the activities of third parties, do not qualify as advisory opinion requests. 11 CFR 112.1(b).

In view of these requirements, your request qualifies as an advisory opinion only with respect to the proposed or continuing activities of MCI. Furthermore, your question regarding the future disposition of funds held by MCI does not offer a separate basis for the Commission to determine in an advisory opinion whether any activity of Fourth Media and the Duke Committee is in violation of the Act or Commission regulations. If MCI wishes to seek those determinations, it may file a complaint with the Commission pursuant to 2 U.S.C. 437g and Commission regulations at 11 CFR Part 111.

Because this opinion is limited only to MCI's prospective or ongoing activity, the issues presented to the Commission are somewhat different than those posed by you. The Commission must consider whether the Act and Commission regulations would bar MCI from remitting funds to Fourth Media which are attributable to 900 line calls made to the Duke Committee and were received pursuant to MCI's contracts with SCB and Fourth Media, even though such funds may later be determined to include contributions that would constitute violations of the Act if accepted and retained by Fourth Media and the Duke Committee.

The Commission has issued three advisory opinions with respect to the use of 900 line service by political committees. In two of those opinions, Advisory Opinions 1990-1 and 1988-28, the Commission analyzed the proposed activities of service providers, and addressed the legal obligations of a common carrier, such as MCI, only with respect to the amounts charged to the service bureau for the carrier's services. The Commission stated its assumption that the service bureau would pay the common carriers the usual and normal charges for the access and services provided to it. This would ensure that there would not be corporate contributions in the form of

greater proceeds to the political committee as a result of reduced charges by the common carrier. Advisory Opinion 1990-1; see footnote in Advisory Opinion 1988-28.

The Commission was asked specifically to address the scope of a common carrier's obligations in its response to AT&T in Advisory Opinion 1990-14. The requestor presented a plan for billing and collection of call proceeds that is somewhat similar to the flow of funds discussed above. The LEC would purchase accounts receivable from AT&T, and AT&T would forward funds to the service bureau after deduction of charges by each, such as charges for uncollectible bad debts. Thus, AT&T could obtain payments on the phone calls before the payments are actually made by some of the callers, and such payments from the LEC to AT&T would be passed on to the service bureau and then to the committee. Call Detail reports, similar to the ANI tapes sent to Fourth Media, would provide the callers' telephone numbers which would be recorded by the service bureau.

The Commission, as a general matter, concluded that AT&T was obligated only to follow its usual and normal collection procedures at its usual and normal charges and that the other compliance obligations rested with the committee and/or the service bureau. The Commission cautioned that AT&T had to safeguard against situations in which an adverse event in a campaign prompts a large number of callers to decline to pay bills without even notifying AT&T or the LEC, thus resulting in substantial amounts of funds sent to the bureau (and then to the committee) that do not represent contribution proceeds but instead would be advances of corporate funds. See 2 U.S.C. 441b(a); 11 CFR 114.2(b). Advisory Opinion 1990-14.

Subject to the following limitations and based on the Commission's conclusion in Advisory Opinion 1990-14, MCI may forward the proceeds, received from the LEC, to Fourth Media, regardless of whether Fourth Media and the Duke campaign have heretofore complied with the Act and regulations in conducting their 900 line campaign fundraising venture.

You have stated that MCI has received payment for accounts receivable processed between June 23 and August 22. Thus, it appears that those who called from June to early August have been billed and MCI is holding the proceeds for those calls. Forwarding of these funds is conditioned on MCI's following its usual and normal procedures and charging usual and normal amounts. In addition, proceeds representing any calls not billed by SCB may not be sent on to Fourth Media under the Act. For reasons stated above, the Commission does not address the duties of Fourth Media or the Duke campaign under these circumstances. See 11 CFR 112.1(b).

The Commission advises that, with the exception of the funds that may now be forwarded, the funds held by MCI may not be used in connection with a Federal election at this time. The Commission acknowledges that further developments may occur as a result of the present litigation. However, it is not within the jurisdiction of the Commission to determine the obligations and rights arising under the contracts between and among the parties to the litigation. Advisory Opinions 1984-58 and 1981-42.

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

Sincerely,

(signed)

John Warren McGarry
Chairman for the Federal Election Commission

Enclosures (AOs 1990-14, 1990-1, 1988-28, 1984-58, and 1981-42)

1/ You state that one line was connected on or about June 27, 1990, and that another was connected on or about July 12, 1990. You assert that MCI learned in September that a third line available to Fourth Media was used by the Duke Committee.

2/ MCI is concerned that Fourth Media and the Duke campaign have not complied with past Commission statements as to deposits, screening calls from prohibited sources, disclaimers, segregated accounts, and other areas.

3/ Payments were made to Fourth Media for a third line which MCI was unaware had been used by the Duke Committee, but such payments have not been forwarded to the Duke Committee.