

CEO 05-11 – June 7, 2005

## **GIFT ACCEPTANCE AND REPORTING**

### **PUBLIC OFFICERS OR EMPLOYEES APPEARING IN PUBLIC SERVICE ANNOUNCEMENTS**

*To: Nancy B. White, (General Counsel-Florida, BellSouth Telecommunications, Inc.)*

#### **SUMMARY:**

An invitation to members of the Legislature or other public officers or employees to appear in public service announcements promoting the Lifeline and Link-Up programs would constitute a gift from BellSouth Telecommunications and the Office of Public Counsel. If the cost of the production and airtime of the advertisement amount to more than \$100, the invitation may not be extended to officials who are lobbied, or whose agencies are lobbied, by BellSouth.

#### **QUESTION:**

Would a prohibited gift exist in the event BellSouth Telecommunications, in concert with the Office of Public Counsel, invited various public officers and employees to appear in public service announcements promoting the Lifeline and Link-Up programs, where the expenses associated with the public service announcements are paid for from a fund, jointly managed by BellSouth and the Office of Public Counsel, which the Public Service Commission has ordered be used to promote the Lifeline and Link-Up programs?

Your question is answered in the affirmative.

Through your letter of inquiry and additional materials supplied to this office, you advise that the Lifeline and Link-Up programs are services through which low-income households can receive a reduction in the cost of installation of telephone service (Link-Up) and ongoing basic service (Lifeline). Telecommunications companies must offer Lifeline and Link-Up to qualified persons, and the Florida Legislature has enacted a number of provisions to facilitate and require the promotion of these services to the target population. For example, Section 364.10(3)(b), Florida Statutes, requires local exchange telecommunications companies<sup>1</sup> to provide applications and informational materials to state and federal agencies which serve persons who may be eligible, and further requires the state agencies to furnish the materials to the clients they serve. Section 364.10(3)(d) requires state agencies providing benefits to eligible persons to "undertake,

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<sup>1</sup> This was amended by Section 16 of CS for CS for SB 1322 to all "eligible telecommunications carriers" defined as "a telecommunications company, as defined by s. 364.02, which is designated as an eligible telecommunications carrier by the [public service] commission pursuant to 47 C. F. R. s. 54.201."

in cooperation with the Department of Children and Family Services, the [public service] commission, and telecommunications companies providing Lifeline services, the development of procedures to promote Lifeline participation." <sup>2</sup> The Public Service Commission ("PSC") is required to report annually to the Governor and Legislature the number of customers participating in Lifeline and the "effectiveness of any procedures to promote participation." Section 364.10(e), Florida Statutes.

You state that in 2001 the PSC ordered BellSouth to establish a Community Service Fund to be used to educate customers about and promote BellSouth's Lifeline and Link-Up services.<sup>3</sup> You advise that under the settlement agreement, the Office of Public Counsel ("OPC") and BellSouth are required to jointly determine the method of disposing of the monies in the Fund, with any disagreement to be resolved by the PSC. In November 2004, the PSC addressed the disposition of funds in the possession of BellSouth which were the result of refund<sup>4</sup> amounts of less than \$1 and returned unpaid drafts (refunds returned to the company due to inability to locate the customer). The PSC ordered that \$1,589,368 of these funds (which you advise would otherwise escheat to the state) be used jointly by the Office of Public Counsel ("OPC") and BellSouth to promote the Lifeline and Link-Up programs. Order No. PSC-04-1124-FOF-TP (November 15, 2004). As part of that same Order, the PSC required BellSouth to detail its promotional efforts to the PSC for inclusion in the PSC's annual report to the Governor and Legislature.

You state,

The Office of Public Counsel and BellSouth, with the cooperation of the staff of the Public Service Commission, determined that part of the funds (approximately \$600,000) should be used to produce and place radio and television public service announcements throughout the state. The public service announcements would be used to explain the benefits of the Lifeline and Link-Up programs in Florida and to encourage residential customers to contact their local serving telephone company to determine their eligibility.

In order to obtain media attention and attach importance to the promotion effort, the three parties determined that it would be meaningful if the public service announcements were made by legislators directly to their constituents. To that end, the Office of Public Counsel, the Florida Public Service Commission, and BellSouth are prepared to invite every Florida legislator, as well as

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<sup>2</sup> Section 16 of CS for CS for SB 1322 added the Department of Education and the Office of Public Counsel to this list.

<sup>3</sup> The order came pursuant to a stipulation between BellSouth and the Office of Public Counsel following BellSouth's self-reported failure to comply with PSC rules. The order required BellSouth to contribute \$250,000 to the fund in 2002 and \$150,000 in 2003. Order No. PSC 01-1643-AS-TL (August 13, 2001).

<sup>4</sup> The refund was the result of a PSC order finding that a tariff filing by BellSouth was in violation of the price increase limitation of Section 364.051, Florida Statutes. Order No. PSC-04-1124-FOF-TP (November 15, 2004).

other state leaders, to participate in the making of these public service announcements.

The idea of the public service announcements ("PSA's") came from a professional media and advertising company to BellSouth and was submitted by the company to the OPC and staff of the PSC for review. The use of public officials was part of the advertising company's proposal and was based on the desire to use recognizable messengers, the recognition that many public officials had expressed interest in ensuring that Lifeline education occur and be widespread, and the economics of using committed volunteers so that funds could be targeted to production and media placement, rather than compensation.

You state that it is contemplated that the invitation to appear in these PSA's would be extended to (but not limited to) all members of the Legislature, the Governor and Cabinet, the Public Counsel, and members of the Public Service Commission. No travel, meals, or other consideration would be furnished to the officials, and the content of the PSA would relate only to the Lifeline and Link-Up programs; the BellSouth logo would not appear. You inquire whether this would constitute a gift to these individuals, and if so whether such a gift would be prohibited.

Section 112.312(12)(a), Florida Statutes, states:

'Gift,' for purposes of ethics in government and financial disclosure required by law, means that which is accepted by a donee or by another on the donee's behalf, or that which is paid or given to another for or on behalf of a donee, directly, indirectly, or in trust for the donee's benefit or by any other means, for which equal or greater consideration is not given within 90 days . . . .

Under the circumstances you describe, the officials will have accepted free publicity without giving equal or greater consideration.<sup>5</sup> Therefore, we must at the outset in this question of first impression determine whether this free publicity is a "gift" as the term is defined above. In CEO 91-39, our only opinion dealing with a comparable issue, we addressed the provision of billboard space free of charge by an outdoor advertising company to a State Representative. The sign to be placed on the billboard would inform citizens that their Representative was available to help with their questions and concerns. We found there that the arrangement was a gift as the term was defined by the statute, notwithstanding the description of the sign as a "public service announcement."

Similarly here, the public official will receive free exposure, notwithstanding that it is in the furtherance of a worthy cause. Moreover, although the Lifeline and Link-Up programs and

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<sup>5</sup> An argument may be made that the members give equal or greater consideration in the contribution of their time and their stature as legislators. We reject this argument, as the contribution of time to make the spot cannot be said to be more than *de minimis*. The lending of their stature as legislators cannot be counted as consideration as our rules state, "Where the donee has used his official position to render services on behalf of his public agency, such services will not constitute any part of the consideration in determining whether a gift from a person or entity other than the donee's public agency has been received." Rule 34-13.210(1), F.A.C.

their promotion are legislatively mandated, we cannot adopt a rationale that the expenditure was somehow legislatively required. This is for several reasons: first, it is BellSouth, as a carrier, which has primary responsibility pursuant to both statute and order of the PSC, for promoting the Lifeline and Link-Up programs; second, the idea came in the first instance from the advertising company to BellSouth, which then suggested it to the OPC and staff of the PSC; finally, and most importantly, although both the Legislature and the PSC have expressed a clear intent that these programs be advanced, there has been no mandate as to the means for such promotion. Hence it cannot be said that the proposed vehicle—public officials in radio and television advertisements—is a part of that mandate. While the advertising is clearly "on behalf of" the Lifeline and Link-Up programs, it clearly is made available "on behalf of" the officials serving as spokespersons as well.

Having found that the officials will receive a "gift" as the term is defined in the statute, the next question which must be addressed is whether the gift may be accepted and if so, whether it must be reported.

Section 112.3148, Florida Statutes, states, in pertinent part:

(4) A reporting individual or procurement employee or any other person on his or her behalf is prohibited from knowingly accepting, directly or indirectly, a gift from a political committee or committee of continuous existence, as defined in s. [106.011](#), or from a lobbyist who lobbies the reporting individual's or procurement employee's agency, or directly or indirectly on behalf of the partner, firm, employer, or principal of a lobbyist, if he or she knows or reasonably believes that the gift has a value in excess of \$100; however, such a gift may be accepted by such person on behalf of a governmental entity or a charitable organization. If the gift is accepted on behalf of a governmental entity or charitable organization, the person receiving the gift shall not maintain custody of the gift for any period of time beyond that reasonably necessary to arrange for the transfer of custody and ownership of the gift.

(5)(a) A political committee or a committee of continuous existence, as defined in s. [106.011](#); a lobbyist who lobbies a reporting individual's or procurement employee's agency; the partner, firm, employer, or principal of a lobbyist; or another on behalf of the lobbyist or partner, firm, principal, or employer of the lobbyist is prohibited from giving, either directly or indirectly, a gift that has a value in excess of \$100 to the reporting individual or procurement employee or any other person on his or her behalf; however, such person may give a gift having a value in excess of \$100 to a reporting individual or procurement employee if the gift is intended to be transferred to a governmental entity or a charitable organization.

(b) However, a person who is regulated by this subsection, who is not regulated by subsection (6), and who makes, or directs another to make, an individual gift having a value in excess of \$25, but not in excess of \$100, other than a gift which the donor knows will be accepted on behalf of a governmental entity or charitable organization, must file a report on the last day of each calendar quarter, for the previous calendar quarter in which a reportable gift is made. The report shall be filed with the Commission on Ethics, except with respect to gifts to reporting individuals of the legislative branch, in which case the report shall be filed with the Division of Legislative Information Services in the Office of Legislative Services. The report must contain a description of each gift, the monetary value thereof, the name and address of the person making such gift, the name and address of the recipient of the gift, and the date such gift is given. In addition, when a gift is made which requires the filing of a report under this subsection, the donor must notify the intended recipient at the time the gift is made that the donor, or another on his or her behalf, will report the gift under this subsection. Under this paragraph, a gift need not be reported by more than one person or entity.

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(8)(a) Each reporting individual or procurement employee shall file a statement with the Commission on Ethics on the last day of each calendar quarter, for the previous calendar quarter, containing a list of gifts which he or she believes to be in excess of \$100 in value, if any, accepted by him or her, for which compensation was not provided by the donee to the donor within 90 days of receipt of the gift to reduce the value to \$100 or less, . . . .

As is clear from these provisions, whether a gift can be accepted and whether it must be reported is a function of two things: the identity of the donor and the value of the gift. Reporting individuals and procurement employees are prohibited from accepting any gift worth more than \$100 from a lobbyist or a principal of a lobbyist who lobbies their agency.

Speaking first to the identity of the donor, we find here that BellSouth and the OPC are equally the donors of the free publicity: the PSC's order requires that the monies be used jointly by the OPC and BellSouth to promote Lifeline and Link-Up, the fund is managed jointly, and the agreement of both parties is required for the proposal to become a reality. Moreover, we find that each of these two donors is responsible for 100% of the gift. Rule 34-13.510(2), F.A.C., states, "For purposes of determining whether a gift provided by multiple donors is prohibited under Section 112.3148(3) and (4), F.S., and Rules 34-13.310 and 34-13.320, the value of the gift provided by any one donor is equal to the portion of the gift's value to that donor based on the donor's contribution to the gift." This Rule contemplates co-donors contributing some pro-rata share, which is not the case here. Neither BellSouth nor the OPC can be said to have made any monetary contribution to the funds to be spent in this endeavor, as those funds come from

refund amounts of less than \$1 and returned unpaid drafts. Yet at bottom, BellSouth and the OPC are each independently and equally making it possible for legislators and other officials to receive free airtime—time they would otherwise have to purchase. Therefore, the "contribution" of each is the gift as a whole.

BellSouth is the principal of lobbyists who lobby the Legislature, so a gift to any member would be prohibited if its value is more than \$100. Clearly, the company also seeks to influence the governmental decisionmaking of the PSC, the Public Counsel, and the Governor as well. As to other intended recipients, Section 112.3148(2)(b), Florida Statutes, provides:

1. 'Lobbyist' means any natural person who, for compensation, seeks, or sought during the preceding 12 months, to influence the governmental decisionmaking of a reporting individual or procurement employee or his or her agency or seeks, or sought during the preceding 12 months, to encourage the passage, defeat, or modification of any proposal or recommendation by the reporting individual or procurement employee or his or her agency.
2. With respect to an agency that has established by rule, ordinance, or law a registration process for persons seeking to influence decisionmaking or to encourage the passage, defeat, or modification of any proposal or recommendation by such agency or an employee or official of the agency, the term "lobbyist" includes only a person who is required to be registered as a lobbyist in accordance with such rule, ordinance, or law or who was during the preceding 12 months required to be registered as a lobbyist in accordance with such rule, ordinance, or law. At a minimum, such a registration system must require the registration of, or must designate, persons as "lobbyists" who engage in the same activities as require registration to lobby the Legislature pursuant to s. 11.045.

Depending on the identity of the recipient, this section should be consulted to determine whether BellSouth is a "lobbyist" of that individual or his or her agency.

With respect to the value of the gift, Section 112.3148(7)(a), Florida Statutes, provides:

The value of a gift provided to a reporting individual or procurement employee shall be determined using actual cost to the donor, less taxes and gratuities, except as otherwise provided in this subsection, and, with respect to personal services provided by the donor, the reasonable and customary charge regularly charged for such service in the community in which the service is provided shall be used. If additional expenses are required as a condition precedent to eligibility of the donor to purchase or provide a gift and such expenses are primarily for the benefit of the donor or are of a charitable nature, such expenses shall not be included in determining the value of the gift.

You state that the advertisements will be used in the media coverage area where the individual is most likely to be recognized but that is also possible that the spots will be aired statewide and that the spots featuring statewide leaders unquestionably will be aired statewide. You also state that the individual cost of airtime cannot be anticipated, largely because some stations will air the PSA's for free while others will charge, but that \$450,000 has been budgeted to purchase airtime.

The value of the gift to an individual public officer or employee would be the cost of making and airing the spot involving that official. See, CEO 91-39. However, without knowing at least the approximate production and airtime costs, it is impossible for us to make a determination as to whether the gift has a value of more than \$100. Prior to extending an invitation to the public officials, BellSouth and/or the OPC would have to ascertain the production costs and divide by the number of officials involved and add to that the cost to air the advertisements, depending on the market. In addition, BellSouth would have to report the gift pursuant to Section 112.3148(5)(b), Florida Statutes, if its value exceeds \$25.

Accordingly, an invitation to members of the Legislature or other public officers or employees to appear in public service announcements promoting the Lifeline and Link-Up programs would constitute a gift from BellSouth and the OPC. If the cost of the production and airtime of the advertisement amount to more than \$100, the invitation may not be extended to officials who are lobbied, or whose agencies are lobbied, by BellSouth.

**ORDERED** by the State of Florida Commission on Ethics meeting in public session on June 2, 2005 and **RENDERED** this 7th day of June, 2005.

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*Chairman*