EQUITABLE COMMUNICATIONS COMPANY

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SEC LETTER

Investment Advisers Act Sec. 202(a)(11)
Investment Company Act Sec. 3(a)

January 27, 1975

Mr. Eugene J. Wilkes, President
Equitable Communications Co.
P.O. Box 9006
Cleveland, Ohio 44137

Dear Mr. Wilkes:

This responds to your letters of November 18, 1974 and January 2, 1975. Section 202(a)(11) of the Investment Advisers Act of 1940 (the 'Act') defines the term investment adviser to mean:

> 'any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities. . . .'

Any person who falls within this definition, as your proposed activities would, must register as such under Section 203(c) of the Act unless he is excepted from registration by Section 203(b)(1), (2) or (3). If your proposed activities would consist of advising only persons who are residents of Ohio and if you would not furnish advice or issue analyses or reports with respect to securities listed or admitted to unlisted trading privileges on any national securities exchange, you could rely on Section 203(b)(1) and thus not be required to register as an investment adviser. However, based on the limited facts you have presented, we are presently unable to conclude that you would not require registration as an investment adviser. Moreover, any person who falls within the definition of investment adviser, whether or not he is required to be registered, is subject to the antifraud provisions of Section 206 of the Act.

Further, we interpret the antifraud provisions of Section 206 of the Act to apply to advisory fee arrangements; any investment adviser who charges fees which substantially exceed these charged by other investment advisers may violate Section 206 of the Act. Because our experience indicates that any fee greater than 2% of the assets under management is greater than that normally charged in the advisory industry, it is our position that an adviser who charged such fees would violate Section 206 if he did not disclose to existing and potential clients that such a fee is higher than that charged in the industry and that other advisers can provide the same or similar services at lower rates.

Additionally, you state that accounts would be in the name of individual investors or jointly with you, or in the form of a partnership from which you would receive a negotiated fee or fees. These activities may involve the creation of an investment company. Section 3(a)(1) of the Investment Company Act of 1940 (the '1940 Act') defines the term investment company to moan any issuer which:

> 'is or holds itself out as being engaged primarily, or proposes to engage primarily, in the business of investing, reinvesting, or trading in securities. . . .'

The term 'company' is defined in Section 2(a)(8) to mean:

> 'a corporation, a partnership, an association, a joint-stock company, a trust, a fund, or any organized group of persons whether incorporated or not; or any receiver, trustee in bankruptcy or similar official or any liquidating agent for any of the foregoing, in his capacity as such. . . .'

Thus the term company has a much broader meaning under the federal securities laws than in common usage, and the brokerage arrangements you describe would be companies within the meaning of Section 2(a)(8). Investment companies are required to comply with the registration provisions of the 1940 Act unless they are excluded from the definition of investment company. The only exclusion which would appear to be applicable would be Section 3(c)(1) of the 1940 Act. Section 3(c)(1) excludes from the definition of an investment company any issuer of securities which is beneficially owned by fewer than 100 persons (as computed in accordance with the attribution rules in that section) and which has not made, is not making, or is not presently proposing to make a public offering of its securities. The term 'public offering' as used in Sections 3(c)(1) of the 1940 Act and Section 4(2) of the Securities Act of 1933 has a substantially broader meaning under the Federal securities laws than in common usage since a public offering can occur, for example, in the absence of general advertising. You have not provided enough facts for us to determine whether the exemption under Section 3(c)(1) of the 1940 Act would be available. In this regard, you may wish to review the following enclosed materials (1) memorandum on the organization of investment companies; (2) Securities Act Rel. No. 4552 (Nov. 6, 1962); and (3) Securities Act Nel. No. 5487 (Apr. 23, 1974), adopting Rule 146. You should also note that Section 24(d) of the Investment Company Act makes expressly unavailable to investment companies the so-called intrastate offering exemption under Section 3(a)(11) of the Securities Act of 1933.

From the information given in your letter of November 18, your proposed activities would also raise serious questions under the broker-dealer registration provisions of the Securities Exchange Act of 1934. For this reason, we are forwarding copies of your letters to Mr. Francis R. Snodgrass, Chief Counsel, Division of Market Regulation, for his consideration. In view of the foregoing, we recommend that you consult with an attorney familiar with the federal securities laws before beginning your proposed activities.

Sincerely,

Alan Rosenblat
Chief Counsel
By: Martin E. Lybecker
Attorney

INCOMING LETTER
January 2, 1975

Mr. Alan Rosenblat
Office of Chief Counsel
Div. of Investment Management & Registration
Securities & Exchange Commission
500 N. Capitol Street,
Washington, D. C. 20549

Dear Mr. Rosenblat:

Attached is a copy of letter sent to the Commission on November 18, 1974. The response from the Commission was unsatisfactory insofar as I did not receive a written opinion regarding my proposed status as requested in the letter. After receiving Forms ADV, I had contacted the local SEC office in Cleveland. As an enforcement agency, they could not make a opinion and consequently suggested I write to you regarding this matter. In addition to the information contained in the attached letter, the proposed activities would be undertaken on an intrastate basis. Thank you for your attention to this matter.

Sincerely,
Eugene J. Wilkes, Pres.

ENCLOSURE

November 18, 1974

Securities & Exchange Commission
500 N. Capitol Street,
Washington, D. C. 20549

Dear Sir:

Requesting an opinion from the Commission as to whether registration is required as an Investment Adviser for activity as described in item #2 below.

1. Presently, the undersigned is as officer of the company and is authorized to buy and sell securities for our Corporate account. Securities are purchased and sold through registered reps in Securities Firms.

2. To buy and sell securities for individual investors. The number of investors or accounts may vary from 1 to 10 or more. Accounts would be in the name of individual investors or jointly with the undersigned, or in the form of a partnership for which the undersigned would receive a negotiated fee or fees. The undersigned is not a Broker-Dealer; is not a registered rep.; or an officer of a Security Firm; is not recommending or touting stock to buy or sell, but would engage in the purchase and sale of securities on a discretionary basis through registered reps in Securities Firms.

Please advise if registration is or is not required for such activity.

Sincerely,

Eugene J. Wilkes
Pres.