

BEFORE THE FEDERAL ELECTION COMMISSION

In re The Boston Globe, et al.

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MUR 5224

STATEMENT OF REASONS

On May 7, 2002, the Commission voted unanimously to find no reason to believe the Respondents in MUR 5224 violated the Federal Election Campaign Act (“FECA” or “Act”) as a result of the activities described in the complaint.¹

In MUR 5224, the Complainant alleged that The Boston Globe and WBZ-TV made corporate contributions to the campaigns of William Sinnott, John Taylor, Cheryl Jacques, Brian Joyve, Mark Pacheco and Stephen Lynch by sponsoring a debate on August 3, 2001, from which the Complainant was excluded.

As a matter of law, the respondent media entities were bona fide news organizations that were operating within FECA’s media exemption when they sponsored the debate at issue. Moreover, there is no indication that the respondent media organizations failed to use “pre-established, objective criteria” in conducting the debates. Therefore, as a matter of law there is no reason to believe the Respondents violated the Act.

Analysis and Conclusions

When considering complaints against media entities, courts have insisted that the Commission restrict its initial inquiry to whether the media exemption applies. MURs 5110 (KBHK Channel 45) and 5162 (ABC News); *see also Readers Digest Ass’n, Inc. v. FEC*, 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981), *FEC v. Phillips Publishing, Inc.*, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981). Only after concluding that the media exemption does not apply may the Commission commence an inquiry under its otherwise applicable “in connection with” (2 U.S.C. § 441b(a)) or “purpose of influencing” (2 U.S.C. § 431(8)(A),(9)(A)) standards. *Id.*

¹ The General Counsel had recommended that this matter be dismissed as less significant relative to other matters pending before the Commission.

This two-stage process is mandated because the media exemption represents a fundamental limitation on the jurisdiction of this agency, and investigation of publishers can trespass on the First Amendment:

[F]reedom of the press is substantially eroded by investigation of the press, even if legal action is not taken following the investigation. Those concerns are particularly acute where a governmental entity is investigating the press in connection with the dissemination of political matter. These factors support the interpretation of the statutory exemption as barring even investigation of press activities which fall within the press exemption.

Readers Digest, 509 F. Supp. at 1214.

The FECA media exemption excludes from the definition of “expenditure” “any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.” 2 U.S.C. § 431(9)(B)(i); *see also* 11 CFR 100.7(b)(2) and 100.8(b)(2) (terms “contribution” and “expenditure,” respectively, do not include “[a]ny cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), newspaper, magazine, or other periodical publication . . . unless the facility is owned or controlled by any political party, political committee, or candidate . . .”).

In determining whether the media exemption is applicable, the courts have held two questions to be relevant: whether the entity is owned or operated by a political party, candidate or political committee, and whether the entity is operating within its “legitimate press function.” *Readers Digest*, 509 F. Supp. at 1214; *see also Phillips Publishing*, 517 F. Supp. at 1313.

There is no doubt that the media respondents here are not owned or controlled by any candidate, political party or political committee. Thus, as a matter of law, The Boston Globe is a *bona fide* news organization that meets the press exemption in § 431(9)(B). In addition, a news organization’s presentation of a candidate debate is a “news story” within the meaning of this provision of the FECA. The content of the broadcast is irrelevant to the determination of whether the media entity is exercising its valid press function. *Readers Digest Ass’n, Inc. v. FEC*, 509 F. Supp. 1210, 1216. The statutory language of 2 U.S.C. § 431(9)(B) is categorical, and therefore precludes the Commission from creating requirements which a debate must meet in order to qualify for the press exemption. This plain application of the press exemption is consistent with MURs 5110, 5162 and *Readers Digest*.

Separately, the debates at issue here were conducted in accordance with the Commission’s debate regulations. Section 110.13 of the FEC’s Regulations require that a news organization select debate participants in accordance with “pre-established, objective criteria to determine which candidates may appear in a debate” in order to avoid its sponsorship of a candidate debate from being considered a prohibited contribution or expenditure.²

² On May 9, 2002, the Federal Election Commission published a Notice of Availability of Petition for Rulemaking on Candidate Debates, and the comment period ended on June 10, 2002. The Commission has not decided whether

The record indicates that The Boston Globe and WBZ-TV used pre-established, objective criteria in determining who to include in the debate at issue here. WBZ-TV's response stated the criteria it applied "were the same as those that typically go into journalistic determinations as to the extent of news coverage merited by a particular candidacy." WBZ-TV Response at 2. WBZ-TV looked to "the amount of public support that a candidate has attracted, and whether the candidate is likely to have a significant impact on the outcome of the election . . . [t]he candidate's standing in the polls and the extent of his public recognition, the coverage he has received from other news outlets, the extent of his campaign activities, and other indications of public support, such as attendance at campaign rallies." *Id.* Peter Brown, news director of WBZ-TV, Boston, submitted a sworn affidavit confirming that he, as the person responsible for staging the debate, applied these criteria.

For the foregoing reasons, the Commission concludes that as a matter of law there is no reason to believe the respondents violated any provisions of the FECA.

September 3, 2002

David M. Mason, Chairman

Karl J. Sandstrom, Vice Chairman

Bradley A. Smith, Commissioner

Michael E. Toner, Commissioner

to issue a Notice of Proposed Rulemaking on this matter. In the meantime, however, the Commission's debate regulations remain in effect.