

BEFORE THE FEDERAL ELECTION COMMISSION

In re The Boston Globe and WBZ-TV)))
MUR 5224

STATEMENT OF REASONS

COMMISSIONER SCOTT E. THOMAS
COMMISSIONER DANNY L. MCDONALD

At issue in MUR 5224 was whether The Boston Globe and WBZ-TV made corporate contributions to certain candidates invited to a debate to the exclusion of the complainant. On May 7, 2002, the Commission voted unanimously to find no reason to believe that respondents in MUR 5224 violated the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"). The General Counsel had recommended that the case simply be closed with no substantive finding because it was rated as a less significant matter under the Commission's Enforcement Priority System.

Under the Federal Election Campaign Act of 1971, as amended ("FECA"), corporations, including media corporations, are prohibited from making contributions¹ or expenditures² in connection with federal elections. 2 U.S.C. § 441b(a); *see also* 11 C.F.R. § 114.2(b).³ The Commission has promulgated a regulation that defines the term "contribution" to include: "A gift, subscription, loan . . . , advance or deposit of money or anything of value made . . . for the purpose of influencing any election for Federal office." 11 C.F.R. § 100.7(a)(1). *See also* 11 C.F.R. § 114.1(a). The regulatory definition of contribution also provides: "[u]nless specifically exempted under 11 C.F.R. § 100.7(b), the provision of any goods or services without charge . . . is a contribution." 11 C.F.R. § 100.7(a)(1)(iii)(A).

¹ FECA defines contribution to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office."

2 U.S.C. § 431(8)(A)(i); *see also* 2 U.S.C. § 441b(b)(2).

² FECA defines expenditure to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i); *see also* 2 U.S.C. § 441b(b)(2).

³ The presidential candidates of the major parties who accept public funds cannot accept contributions from any source, except in limited circumstances that are not raised herein. 26 U.S.C. § 9003(b)(2); *see also* 11 C.F.R. § 9012.2(a).

Section 100.7(b)(21) of the Commission’s regulations specifically exempts funds expended for the purpose of staging debates from the definition of contribution if such debates meet the parameters of 11 C.F.R. § 110.13.⁴ The parameters address: (1) the types of organizations that may stage such debates, (2) the structure of debates, and (3) the criteria debate-staging organizations must use to select debate participants. With respect to participant selection criteria, the regulation provides, in relevant part:

Criteria for candidate selection. For all debates, staging organization(s) must use pre-established objective criteria to determine which candidates may participate in a debate. For general election debates, staging organization(s) shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate.

11 C.F.R. § 110.13(c).

Thus, if an entity staged a debate among candidates for federal office and that debate was staged in accordance with all of the requirements of 11 C.F.R. § 110.13, then the costs incurred by the sponsoring entity would be exempt from the definition of contribution pursuant to the operation of 11 C.F.R. § 100.7(b)(21). *See also* 11 C.F.R. §§ 114.1(a)(2)(x) and 114.4(f)(1). On the other hand, if an entity staged a debate that was *not* in accordance with 11 C.F.R. § 110.13, then staging the debate would not be an activity “specifically permitted” by 11 C.F.R. § 100.7(b), but instead would constitute a contribution to any participating candidate under the Commission’s regulations. The participating candidates would be required to report receipt of the in-kind contribution as both a contribution and an expenditure pursuant to 11 C.F.R. § 104.13(a)(1) and (2). *See* 2 U.S.C. § 434(b)(2) and (4).

The Commission’s debate regulations specifically apply to media entities:

Broadcasters (including a cable television operator, programmer or producer), *bona fide* newspapers, magazines and other periodical publications may stage candidate debates *in accordance with this section and 11 C.F.R. 114.4(f)*, provided that they are not owned or controlled by a political party, political committee or candidate.

11 C.F.R. § 110.13(a)(2)(emphasis added).⁵

⁴ The exemption also requires that such debates meet the requirements of 11 C.F.R. § 114.4, which permits certain nonprofit corporations to stage candidate debates and other corporations and labor organizations to donate funds to organizations that are staging such debates. 11 C.F.R. §§ 114.4(f)(1) and (3). This section also requires the debates to be staged in accordance with the standards in 11 C.F.R. § 110.13. *Id.*

⁵ Similarly, 11 C.F.R. 114.4(f)(2) provides: “A broadcaster (including a cable television operator, programmer or producer), *bona fide* newspaper, magazine or other periodical publication may use its own funds to defray costs incurred in staging public candidate debates held in accordance with 11 C.F.R. § 110.13.” (original emphasis).

In the context of debates sponsored by media entities, the Commission also must apply the exemption in the statute at 2 U.S.C. § 431(9)(B)(i).⁶ In a general sense, the Commission must afford broad leeway to the press to cover campaigns. The statutory exemption crafted in the Act plainly is designed to allow the media to issue ‘news stories’ and provide ‘commentary’ and ‘editorials.’ 2 U.S.C. § 431(9)(B)(i). However, the courts have indicated the FEC must examine, in the first instance, whether the media entity in question actually is undertaking a “legitimate press function.” *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, 1313 (D.D.C. 1981).

To effect all of the foregoing elements – the general definitions, the debate sponsorship rules and the media exemption – one aspect of the debate regulation becomes determinative. In essence, the Commission has imposed a simple, bright-line test to satisfy itself that a media entity is staying within its legitimate press function when sponsoring and covering a debate. The entity must show that pre-established, objective criteria were applied in the process of determining which candidates to invite. 11 C.F.R. § 110.13. The particular regulatory requirements for pre-established, objective candidate selection criteria are not specific and the Commission has interpreted them in a very broad manner. According to the Explanation and Justification of the debate regulations:

Given that the rules permit corporate funding of candidate debates, it is appropriate that staging organizations use pre-established objective criteria to avoid the real or apparent potential for a *quid pro quo*, and to ensure the integrity and fairness of the process. The choice of which objective criteria to use is largely left to the discretion of the staging organization.

60 Fed. Reg. 64260, 64262 (Dec. 14, 1995).

In applying this test, the Commission has been very willing to accept the representations of media entities that such criteria, in fact, were used. *See* MURs 4956, 4962, and 4963. The factors relied upon by journalists to make ‘newsworthiness’ decisions in most respects mirror the factors the Commission has found satisfactory.

In this case, the representations by respondents were sufficient to warrant a ‘no reason to believe’ finding. Viacom, Inc., licensee of WBZ-TV Boston, contended that WBZ-TV did establish criteria which were applied in choosing to broadcast the debate that excluded the complainant. These criteria took into consideration evidence showing the amount of public support the candidate attracted and whether the candidate was likely to have a significant impact on the outcome of the election. Similar to the approach taken by The Boston Globe in making its determination, the station considered, among other factors, the candidate’s standing in the polls and the extent of his or her public recognition. In taking all the factors into consideration, the station concluded that Mr. Ferguson should not be invited to participate in the debate.

⁶ *See also* 11 C.F.R. § 100.8(b)(20).

In response to the complaint, The Boston Globe asserted that, in consultation with other debate sponsors, it took into account each candidate's public support and likely impact on the race. The judgments made were formed by opinion polls as well as other measures of public recognition including news coverage. Based on these judgments, The Boston Globe determined Mr. Ferguson was not to be invited.

The criteria used by respondents rely on objectively measurable information, such as poll results and the amount of prior news coverage. One possibly problematic factor mentioned was whether the candidate was likely to have a significant impact on the outcome of the election. This could be viewed as a subjective factor itself. In the overall context of the record, however, it appears that all the other objective factors ultimately were used to make this very evaluation.

For the foregoing reasons, we conclude there is no reason to believe respondents violated the Act.

9/16/02

Date

/ s /

Scott E. Thomas
Commissioner

9/16/02

Date

/ s /

Danny L. McDonald
Commissioner