BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Dave Ross	)	
Friends of Dave Ross	)	MUR 5555
Philip Lloyd, in his official capacity as treasurer	)	
Entercom Seattle, LLC d/b/a KIRO-AM	)	

STATEMENT OF REASONS OF CHAIRMAN MICHAEL E. TONER AND COMMISSIONERS DAVID M. MASON AND HANS A. von SPAKOVSKY

The Washington State Republican Party filed the complaint in this matter alleging that Respondents violated the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq.* The Commission voted unanimously to adopt the Office of General Counsel ("OGC") recommendation to (1) find no reason to believe Respondents violated FECA and (2) close the file.[1]

Although we agree with the OGC recommendation, we write separately to clarify why the press exemption applies in this matter, because the standard is easier to meet than the analysis[2] accompanying the recommendation might suggest and does not require any content analysis of the radio shows.

I. BACKGROUND

Respondent Dave Ross has a radio talk show on Respondent KIRO-AM in Seattle, Washington,[3] that "discusses news, current events, politics, entertainment, technology, and a range of other subjects."[4] Ross also provides occasional short commentaries on CBS News Radio, which KIRO carries.[5] The station is owned by Respondent Entercom Seattle, LLC, which

[1] First General Counsel's Report ("GCR") at 13 (Jan. 10, 2006). Voting affirmatively were Chairman Toner, Vice Chairman Lenhard, and Commissioners Mason, von Spakovsky, Walther, and Weintraub.

[2] *Id.* at 4-12.

[3] *Id.* at 2, 4.

[4] *Id.* at 2 (citing Resp. of Dave Ross and Friends of Dave Ross at 4; Resp. of Entercom and KIRO-AM at 2).

[5] *Id.*

is owned by Entercom Communications Corporation.[6] No political party, political committee, or candidate owns or controls the station.[7] KIRO's signal reaches a district[8] where Ross ran for the United States House of Representatives in the 2004 primary and general elections.[9]

Ross discussed the possibility of his candidacy on the air and later, on a show other than his own, acknowledged he was running.[10] KIRO asked its audience – both on the air and via its website – whether Ross should run.[11] After Ross won the primary, KIRO interviewed him[12] on the Dave Ross Show. During the campaign, the show kept the Ross name,[13] and KIRO believes Ross continued doing commentaries on CBS Radio.[14]

In addition, the complaint makes unsubstantiated[15] implications that KIRO heralded Ross's candidacy on the KIRO website and provided a prominent link to the Ross campaign website.[16]

The complaint has multiple allegations of illegal contributions, expenditures, and electioneering communications.

II. DISCUSSION

In this matter, all of the allegations involve (1) a "cost incurred in covering or carrying a news story, commentary, or editorial" (2) carried or covered by a radio station, and (3) the facilities are not "owned or controlled by any political party, political committee, or candidate … ." 11 C.F.R. § 100.73.

Under 2 U.S.C. §§ 431(9)(B) and 434(f)(3)(B), all of the allegations (1) involve a "news story, commentary, or editorial" (2) distributed through a radio station's facilities, and (3) the facilities are not "owned or controlled by any political party, political committee, or

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[6] *Id.* at 2 n.1, 5.

[7] *Id.* at 5, 10.

[8] *Id.* at 2, 3.

[9] *Id.* at 3, 4.

[10] *Id.* at 3 n.2, 7.

[11] *Id.* at 8; *see id.* at 2.

[12] *Id.* at 7-8.

[13] *See id.* at 4.

[14] *Id.* at 10.

[15] *See id.* at 9.

[16] *Id.* at 3.

candidate ….” Once those facts were established, this should have ended the investigation of this matter.

As to the law, the final factor listed in FECA and the regulations does not look to whether a *press entity* is *independent* of a political party, political, committee, or candidate.[17] Instead, the inquiry is whether the *facilities* are *owned or controlled* by one. 11 C.F.R. § 100.73; 2 U.S.C. §§ 431(9)(B), 434(f)(3)(B).

A number of factors are irrelevant in determining whether the press exemption applies. The content of a news story, commentary, or editorial is irrelevant. *In re CBS Broadcasting, Inc., et al.,* MURs 5540, 5545, 5562 and 5570, Statement of Reasons (“SOR”) of Comm’rs Mason and Smith at 8 (Fed. Election Comm’n July 12, 2005), *available at* http://eqs.sdrdc.com/eqsdocs/0000457E.pdf (visited Feb. 10, 2006) (citing *In re CBS News, et al.,* MUR 4946, SOR of Chairman Wold and Comm’r Mason at 2 (Fed. Election Comm’n June 30, 2000), *available at* http://eqs.sdrdc.com/eqsdocs/000025B0.pdf (visited Feb. 10, 2006)).[18] This principle applies to broadcasts, including broadcasts featuring candidates. *See In re Robert K. Dornan,* MUR 4689, SOR of Vice Chairman Wold and Comm’rs Elliott, Mason and Sandstrom at 4 (Fed. Election Comm’n Dec. 20, 1999), *available at* http://eqs.sdrdc.com/ eqsdocs/000038E3.pdf (visited Feb. 10, 2006).

Moreover, for the press exemption to apply, the press need not:

- Be fair, provide equal access, *id.* SOR of Comm’r Mason at 7 & n.6 (Fed. Election Comm’n Feb. 14, 2000), *available at* http://eqs.sdrdc.com/eqsdocs/000038E4.pdf,
- Be balanced, *In re ABC, CBS, NBC, New York Times, Los Angeles Times, Washington Post et al.,* MUR 4929, 5006, 5090, 5117, SOR of Chairman Wold, Vice Chairman McDonald and Comm’rs Mason, Sandstrom and Thomas at 3 (Fed. Election Comm’n Dec. 20, 2000), *available at* http://eqs.sdrdc.com/eqsdocs/000011BC.pdf (visited Feb. 10, 2006),
- Avoid express advocacy, or avoid solicitations. *Dornan,* SOR of Comm’r Mason at 11.

Nor are the press entity’s editorial policies relevant. *Id.* at 6, 9. After all, it “is difficult to imagine an assertion more contrary to the First Amendment than the claim that the FEC, a federal agency, has the authority to control the news media’s choice of formats, hosts, commentators and editorial policies … .” *Id.* at 6. When it comes to candidate debates, for example, “the press exemption allows the press to use whatever criteria it deems appropriate to select candidates, regardless of how slanted the debate may be.” *CBS Broadcasting,* SOR of Commr’s Mason and Smith at 8 (July 12, 2005) (citing *In re Union Leader Corp., et al.,* MURs 4956, 4962 and 4963, SOR of Comm’r Mason at 2 (Fed. Election Comm’n Feb. 13, 2001), *available at* http://eqs.sdrdc.com/eqsdocs/00001280.pdf (visited Feb. 10, 2006)). The press

[17] *Id.* at 5 (citations omitted).

[18] The same MUR has another SOR by the same authors but with a different date. *CBS Broadcasting,* SOR of Comm’rs Mason and Smith (Fed. Election Comm’n July 15, 2005), *available at* http://eqs.sdrdc.com/eqsdocs/00004580.pdf (visited Feb. 10, 2006).

exemption even covers express advocacy in debates. *Id.* (citing *Union Leader,* SOR of Comm'r Mason at 3).

For these reasons, part of the OGC analysis[19] accompanying the OGC recommendation in this matter[20] is unnecessary to holding that the press exemption applies.

The misunderstanding appears substantially due to a statement in a previous SOR. That statement indicated the press exemption applied in *Dornan,* because there was "no indication that the formats, distribution, or other aspects of production were *any different* when Mr. Dornan was a guest host than they were when the regular host was present." *Dornan,* SOR of Vice Chairman Wold and Comm'rs Elliott, Mason and Sandstrom at 2 (emphasis added) (citing *MCFL,* 479 U.S. at 250-51). Indeed, the OGC analysis accompanying the recommendation relied on this statement,[21] and Respondents appeared to have relied on it as well.[22]

However, this statement merely explained how the law applied in *Dornan.* It did not establish the boundary between when the press exemption applies and when it does not. Or, to put it more generally, if one begins solely with the premise that the government lacks authority to act under one narrow set of circumstances at one end of the spectrum, it does not follow that the government has authority to act under all other circumstances, along all the rest of the spectrum. *See United States v. Lopez,* 514 U.S. 549, 594 (1995) (Thomas, J., concurring) (quoting *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 194 (1824)).

Moreover, *Dornan* is different from this matter in that in *Dornan,* the issue was the use of a political figure who may or may not have been a candidate at various times as a guest or substitute host. Thus, some inquiry into having guest hosts, Dornan's professional background, and consistency with normal programming was in order to determine whether the radio show was "news, commentary, or editorial," as opposed to advertising for a candidate. By contrast, the Dave Ross Show is a regular KIRO program, so it qualifies as "news, commentary, or editorial," and no inquiry is needed into whether the host is or may become a candidate.

For the press exemption to apply, respondents need not demonstrate that there were no differences at all from what a press entity usually does. This would be a difficult standard to meet, and it is not what the law requires. For example, *MCFL* itself held that the press exemption did not apply to a special edition of a newsletter, because it was not "comparable to *any* single issue of the newsletter." 479 U.S. at 250 (emphasis added). To illustrate why, the Court noted that it "was not published through the facilities of the regular newsletter, … was not distributed to the newsletter's regular audience," and no "characteristic of the [special e]dition associated it in any way with the normal MCFL publication." *Id.* Nor was the special edition "akin to the normal business activity of a press entity … ." *Id.* at 251 n.5 (citing *FEC v. Phillips*

[19] GCR at 4-12.

[20] *Id.* at 13.

[21] *Id.* at 6.

[22] *See id.* at 6-7.

Publishing, Inc., 517 F. Supp. 1308, 1313 (D.D.C. 1981); *Reader's Digest Ass'n, Inc. v. FEC,* 509 F. Supp. 1210 (S.D.N.Y. 1981)). The Court did not hold that, for the press exemption to apply, there must be no differences from what the press entity usually does. *See id.* at 250-51 & n.5. Indeed, *MCFL* could be interpreted to mean that *any* similarity to the regular newsletter, in facilities, distribution, or format, might have placed the publication within the press exemption.

With this in mind, the inquiry in this matter is not whether "anything about" Ross's talk show "changed after Ross became a candidate and stayed on the air."[23] Moreover, it is immaterial that:

- The show "has long been" on the air.[24]
- Ross said he would not use his show "for electioneering" and "promised station management that he would not use his show for campaigning or for discussing issues that would be of unique interest to voters … ."[25]
- Ross kept his promise by not discussing his candidacy, and by not soliciting or answering questions about his candidacy from Dave Ross Show listeners.[26]
- KIRO gave "strict directives" to others not to refer to the Ross campaign on the air.[27]
- Ross referred to his candidacy or potential candidacy on the air.[28]
- KIRO interviewed Ross's potential primary opponents.[29]
- The format for the interview of Ross after his primary victory was like the format would have been for any candidate.[30]
- KIRO interviewed Ross's general-election opponent and hosted a debate between the general-election candidates.[31]
- Ross did not mention his candidacy on CBS Radio.[32]
- KIRO did not run Ross's CBS Radio commentaries during the campaign.[33]
- Ross took a leave of absence from KIRO during the campaign.[34]

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[23] *Id.* at 6.

[24] *Id.*

[25] *Id.* at 7 (quoting Compl. Exhs. 9, 11 (Oct. 4. 2004)).

[26] *Id.* (quoting KIRO Resp. at 3).

[27] *Id*.

[28] *Id*.

[29] *Id.* at 7-8.

[30] *Id.* at 7.

[31] *Id.* at 8.

[32] *Id.* at 8, 10.

[33] *Id.* at 10.

[34] *Id.*

We would not want broadcasters or others to conclude from an application to particular facts in the *Dornan* matter, and the repetition of that analysis in the GCR in this matter, that these or similar restrictions on regular programming or hosts are required as conditions of the press exemption.

III. CONCLUSION

For the foregoing reasons, the Commission was correct in finding no reason to believe and closing the file in this matter.

March 17, 2006

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Michael E. Toner
Chairman

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David M. Mason
Commissioner

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Hans A. von Spakovsky
Commissioner