FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Commissioners
Acting General Counsel Lerner
Staff Director Pehrkon

FROM: Office of the Commission Secretary VFV

DATE: February 13, 2001

SUBJECT: Statement of Reasons for MURs 4956, 4962 and 4963

Attached is a copy of the Statement of Reasons for MURs 4956, 4962 and 4963 signed by Commissioner David Mason.

This was received in the Commission Secretary's Office on February 13, 2001 at 9:59 a.m.

cc: Vincent J. Convery, Jr.
Press Office
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Attachments

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In re* Union Leader Corp., *et al.	)	**MURs 4956, 4962 and 4963**

STATEMENT OF REASONS OF COMMISSIONER DAVID M. MASON

On November 28, 2000, the Commission decided unanimously, pursuant to an amended pre-meeting tally, to find no reason to believe the Respondents, Union Leader Corp., New Hampshire Public Television, New England Cable News, WMUR-TV, Cable News Network, Los Angeles Times, Gore 2000, Inc. and Jose Villarreal, as treasurer, and Bill Bradley for President, Inc. and Theodore V. Wells, as treasurer, violated 2 U.S.C. § 441b. While I agree that the Respondents did not violate the Federal Election Campaign Act's (FECA) ban on corporate contributions, I disagree with the rationale in the First General Counsel's Report. I write separately to set forth my view that the Commission's regulation of media entities in their sponsorship of candidate debates is beyond the authority of the FECA.

Complaint and Response

The Complainant alleges the Respondents violated regulations implementing the FECA's ban on corporate contributions because Lyndon LaRouche was excluded from televised debates sponsored by the respondent media entities. The regulations at issue, 11 CFR 114.4(f)(2), effectuate the FECA's prohibition on corporate contributions and expenditures, and permit incorporated media entities to stage candidate debates so long as they are held "in accordance with 11 CFR § 110.13." This provision, in turn, regulates the staging of candidate debates by nonprofit organizations and broadcasters. Under 11 CFR 100.13, the structure of a candidate debate is left to the discretion of the staging organization provided that (1) the debate includes two candidates; (2) the debate structure does not promote or advance one candidate over another; and (3) "pre-established objective criteria" are employed to select the participating candidates. 11 CFR 110.13(b)(c). The Complainant asserts the Respondents violated this last parameter.

With respect to the candidate-selection criteria employed, the various media entity responses indicate that they generally used what amounted to a reasonable, though

undeniably, subjective criteria such as the "degree and volume of [] activities . . . and of the candidate's campaign organization," whether the candidate had a "significant personal presence" or a "significant campaign organization presence." Moreover, none of the Respondents could document that the criteria used was pre-established. The General Counsel's Report finessed these issues to the benefit of the Respondents, rendering the "pre-established Objective criteria" requirement virtually meaningless. While this lax reading was justified by the General Counsel's Report as supported by the media exemption, in my opinion, the Respondents were free under the FECA's media exemption to employ whatever candidate-selection criteria they deemed appropriate.

Analysis

The FECA 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 . . . .").

When considering complaints against media entities, courts have insisted that the Commission restrict its initial inquiry to whether the media exemption applies. *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.

In this matter, there is no doubt that none of the media Respondents is owned or controlled by any candidate, political party or political committee. There is also no question that, even were the staging of the debates in question doubtlessly designed to help or hinder particular candidates, the costs incurred would be indistinguishable in substance from the expenses involved in disseminating press exemption-covered *editorial* endorsements, biased reporting of *news stories*, *see* MUR 4946 (CBS News) SOR, or partisan *commentary*, *see* MUR 4689 (Dornan) SOR, pertaining to particular candidates. There would be no legitimate complaint against a media entity for merely "covering or carrying" a debate, *see* 11 CFR 100.7(b)(2) and 100.8(b)(2), even were the coverage edited so as to obviously favor or disfavor particular candidates. Likewise, there should be no FECA controversy where a media entity sponsors a debate for the purpose of creating news to be covered, however slanted the creation.

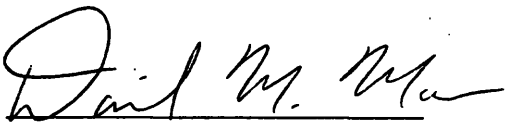
This straightforward reading of the media exemption is notably consistent with our unanimous treatment of it in MUR 4863. There, the Complainant alleged that a radio talk show host "*expressly or implicitly advocated* the reelection of Senator D'Amato and/or the defeat of Representative Schumer." First General Counsel's Report at 8-9. Nonetheless, the Commission concluded that the "commentary apparently broadcast on the [radio talk show] would appear to be squarely within the 'legitimate press function' of [the radio station]." *Id.* at 9. Moreover, this conclusion was "not altered by the possibility that D'Amato advertisements may have been rebroadcast . . . within the context of [the talk show host's] commentary on them." *Id.* (citing AO 1996-48). If the media exemption covers such express advocacy within a traditional press format, it surely covers media-sponsored debates, where a press entity merely provides another format for express advocacy, however exclusive the candidate-selection criteria.

To conclude that the Commission's debate regulations (11 CFR 110.13) give the Commission authority to review and police the formats of media-sponsored debates (extending in this matter to a debate held in the headquarters building of a newspaper) is a startling claim. This reading is urged based on a supposedly significant distinction between "covering or carrying" a debate on the one hand (11 CFR 110.13) and "staging" (11 CFR 114.4(f)(2)) the debate on the other. Neither the media exemption nor the general corporate expenditure ban supports such a distinction. More directly, no such distinction can reasonably be applied in the practical operations of news media entities. Media entities inevitably incur costs in producing news stories. In many instances they rent facilities, equipment and transmission capacity. If a traveling news crew rents a hotel room in which to conduct an interview of a candidate, the Commission does not consider the rental fee to be a "contribution" to the candidate but an integral cost of producing the news story. Likewise, the costs of "staging" a media-sponsored debate are integral to the production and coverage of that story.

To conclude that debates (to the extent that any identifiable expenses were incurred in their production) are subject to FEC format review would lead to a truly bizarre result. One-on-one interviews with candidates, no matter how biased, are clearly protected by the media exemption. Interviewing candidates serially would likewise be wholly protected, but bringing opposing candidates into the same interview room or studio simultaneously would trigger government scrutiny.

Consequently, 11 CFR 100.13(b) and (c) as applied to media entities are beyond the authority of the FECA, and the instant matters should have been dismissed for this reason.

February 13, 2001



David M. Mason, Commissioner