FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
CBS Broadcasting, Inc.	)	
Kerry-Edwards 2004, Inc., and	)	MURs 5540 & 5545
Robert Farmer, in his official	)	
Capacity as Treasurer	)	
	)	

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STATEMENT OF REASONS OF VICE CHAIRMAN MICHAEL E. TONER AND COMMISSIONERS DAVID M. MASON AND BRADLEY A. SMITH

On June 7, 2005, by a vote of 6-0 the Commission accepted the Office of General Counsel's ("OGC") recommendation to find no reason to believe that CBS Broadcasting, Inc., Kerry-Edwards 2004, Inc. ("Campaign"), and Robert Farmer, in his official capacity as Treasurer, and the remaining respondents violated the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act") in connection with the September 8, 2004 broadcast of *60 Minutes Wednesday* ("Broadcast"). We voted to find no reason to believe in these matters because, even if the allegations in the complaint are true, the activities in question are protected by the Act's media exemption and require the complaints to be dismissed.

Analysis and Conclusions

These matters arose out of complaints filed by the Center for Individual Freedom ("Complainant") alleging that the broadcast of a *60 Minutes Wednesday* news story about President Bush's Texas Air National Guard Service was a prohibited electioneering communication under 2 U.S.C. § 434(f), that the electioneering communication was coordinated with the Kerry-Edwards campaign and was therefore a prohibited corporate contribution under 2 U.S.C. § 441b(a) and (c), that the electioneering communication should have been reported by CBS as a contribution and the Kerry-Edwards campaign as an expenditure under 2 U.S.C. § 434(f), and that the broadcast constituted an independent expenditure and a prohibited corporate contribution. Both complaints alleged that the broadcast was not entitled to the press exemption found at § 431(9)(B)(i) because CBS failed to thoroughly verify its news sources and improperly coordinated with the Kerry-Edwards campaign, and the broadcast did not fit the definition of a news story,

commentary, or editorial under 11 CFR §100.73 because it expressly advocated the defeat of President Bush.

FECA prohibits corporations from making contributions or expenditures from their general treasury funds in connection with any election of any candidate for federal office. 2 U.S.C. § 441b. Notwithstanding this prohibition, FECA's media exemption excludes from the definition of expenditure "any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station, newspaper, magazine or other periodical publication." 2 U.S.C. § 431(9)(B)(i). *See also* 11 C.F.R. §§ 100.73 and 100.132. Additionally, any communication "appearing in a news story, commentary, or editorial distributed though the facilities of any broadcast station" is excluded from the definition of an electioneering communication. 2 U.S.C. § 434(f)(3)(B).

Federal courts, when considering whether an entity is within the Act's media exemption, have held that several factors must be present: the entity engaged in the activity must be a press entity; the press entity must not be owned or controlled by a political party or candidate; and the press entity must be acting as a press entity in conducting the activity at issue (i.e., the entity must be acting within its legitimate press function). *See Reader's Digest Ass'n v. Fed. Election Comm'n*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981), *Fed. Election Comm'n v. Phillips Publ'g, Inc.*, 517 F. Supp. 1308, 1312-12 (D.D.C. 1981).

In the present case, the complaint alleged that CBS and the Kerry-Edwards campaign had been in contact a few days before the broadcast aired, and that representatives of CBS News arranged a meeting between the key source of the story and a representative of the Kerry-Edwards campaign. Complaint at 4. The complaint also alleged that because "the broadcast segment lacked all of the hallmarks of a legitimate 'news story' and responsible journalism," the press exemption should not apply. Complaint at 10.

It is not for this agency to determine what is a "legitimate news story" or who is a "responsible journalist." In reviewing the allegations in these complaints, the Commission's inquiry is limited to determining whether a "press entity charged with a violation is owned or controlled by a party or candidate and whether the distribution complained of was of the type exempted by the statute...No inquiry may be addressed to sources of information, research, motivation, connection with the campaign, etc. Indeed all such investigation is permanently barred by the statute unless it is shown that the press exemption is not applicable." *Reader's Digest*, 509 F. Supp. at 1214-15. *See also* MUR 3624 Walter H. Shapiro (concluding that pro-Bush/Quayle broadcast by Rush Limbaugh fell within the media exemption even though the broadcast was arguably biased).

The initial inquiries as to whether CBS is owned or controlled by a party or a candidate and whether the airing of the *60 Minutes Wednesday* broadcast was within the press exemption require no further investigation. CBS is not owned by a political party, committee or candidate and is in the business of disseminating news stories, commentary, and editorials to the public. First General Counsel's Report at 5. Additionally, *60*

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Minutes is one of CBS's regularly scheduled programs and the Broadcast appeared on a regularly scheduled *60 Minutes* program. *Id.* Also significant is the fact that the Broadcast appeared to be similar in form and was distributed in the same manner as other *60 Minutes* news stories. *Id.* at 6. *Contra Fed. Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 250 (1986) (noting that the publication at issue was not "comparable to any single issue of the newsletter [since] it was not published through the facilities of the regular newsletter... was not distributed to the newsletter's regular audience... [and did not have a] volume and issue number identifying it as one in a continuing series of issues").

Allegations of coordination are of no import when applying the press exemption. What a press entity says in broadcasts, news stories and editorials is absolutely protected under the press exemption, regardless of whether any activities occurred that might otherwise constitute coordination under Commission regulations.

For all the foregoing reasons, we voted in favor of the General Counsel's recommendation to find no reason to believe and close the files.

July 11, 2005

Michael E. Toner, Vice Chairman

David M. Mason, Commissioner

Bradley A. Smith, Commissioner

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