BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of:	)	
	)	
Friends of Dave Ross,	)	
Philip Lloyd, Treasurer, and	)	**MUR 5555**
Mr. Dave Ross	)	
	)	
Respondents.	)	
	)	

JOINT RESPONSE OF FRIENDS OF DAVE ROSS, PHILIP LLOYD, AS TREASURER, AND MR. DAVE ROSS TO THE COMPLAINT BY CHRIS VANCE

I. INTRODUCTION

On behalf of the Friends of Dave Ross, Philip Lloyd as Treasurer, and Mr. Dave Ross (collectively, the "respondents"), we respectfully submit the following joint response to the complaint filed in the above captioned matter under review ("MUR").

On October 5, 2004, Chris Vance, Chairman of the Washington State Republican Party, filed the complaint that initiated this MUR. In his complaint, Mr. Vance alleges, *inter alia,* that the respondents violated federal campaign finance law by using The Dave Ross Show to benefit Mr. Ross's congressional campaign. Mr. Vance also alleges that the respondents participated in "illegal corporate coordination" with 710 KIRO, Mr. Ross's employer.[1] *See* Complaint at 1.

[1] Mr. Vance also alleges that KIRO-AM denied Mr. Ross's opponent "equal time" under Federal Communications Commission rules. *See* Complaint at 4. Because potential violations of FCC regulations are not within the jurisdiction of the FEC, we do not address these allegations here. Accordingly, any such "equal time" argument should be dismissed for lack of FEC jurisdiction.

In response, the respondents respectfully submit that 710 KIRO and CBS Radio News were press entities engaging in legitimate press activity, and, thus, are entitled to the "press exemption" described at 2 U.S.C. § 431(9)(B)(i). Accordingly, neither 710 KIRO nor CBS Radio News made prohibited corporate contributions, and, thus, the respondents did not violate the Federal Election Campaign Act (the "Act") with respect to the allegations made by Mr. Vance.

In the alternative, should the FEC determine that 710 KIRO and CBS Radio News are not entitled to the press exemption, the respondents still did not violate the Act. Any communications by Mr. Ross made through his radio program were not "expenditures" or "electioneering communications" under the Act, and, thus, were not for the purpose of influencing, or in connection with, a federal election. Consequently, the respondents could not have received or accepted impermissible in-kind contributions from 710 KIRO or CBS Radio News.

For these reasons, we respectfully request that the Commission find no reason to believe the respondents violated the Act and dismiss this matter under review.

II. 710 KIRO AND CBS RADIO NEWS ARE ENTITLED TO THE PRESS EXEMPTION

It is well-settled federal law that where a press entity's activity is at issue, the FEC must first determine whether the press exemption is available. If the FEC determines that the press exemption is available, the FEC's inquiry into the content of the programming must cease as a statutory and constitutional matter.

The Act provides that the term "expenditure" does not include "any news story, commentary, or editorial distributed through the facilities of any broadcasting station . . .

unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. § 431(9)(B)(i). This provision is ordinarily referred to as the "press exemption" or the "media exception." *See, e.g.* Matter Under Review 4689 and Advisory Opinion 2004-30.

The court in *FEC v. Phillips Publishing, Inc.* 517 F. Supp. 1308 (D.D.C. 1981), outlined a two-part test to determine whether the press exemption is available with respect to a particular communication. The first test is whether the press entity was acting as a press entity with respect to the conduct in question. The second test is whether the news story, commentary, or editorial was distributed through facilities that are owned or controlled by a political party, political committee, or candidate. The court explained:

> [T]he initial inquiry is limited to whether the press entity is owned or controlled by any political party or candidate and whether the press entity was acting as a press entity with respect to the conduct in question. If the press entity is not owned or controlled by a political party or candidate and it is acting as a press entity, the FEC lacks subject matter jurisdiction and is barred from investigating the subject matter of the complaint.

Phillips, 517 F. Supp. at 1313.

Applying *Phillips*, the first test is whether 710 KIRO and CBS Radio News were acting as press entities with respect to the broadcast of The Dave Ross Show. They clearly were.

As an initial matter, 710 KIRO is a well-established and nationally respected radio station created and operating as an independent journalistic entity. According to 710 KIRO's website, 710 KIRO:

> . . . . [has] the largest radio news department in the Pacific Northwest, [and] 710 KIRO's professional and informative news reporters provide in-depth coverage. 710 KIRO is one of the most honored radio stations in the United States, winning nearly every major national award for excellence in broadcast journalism in the past decade alone. These awards include seven first-place Edward R. Murrow Awards in 2004 from the Radio-TV News Directors

Association, including Best Website, dozens of excellence in journalism awards from the Associated Press and Sigma Delta Chi, the Society of Professional Journalists, and the Crystal Award for Public Service from the National Association of Broadcasters.

http://www.kiro710.com/about.jsp (available November 18, 2004).

Mr. Ross joined 710 KIRO in 1978 and in September 1987 became host of The Dave Ross Show. The Dave Ross Show broadcasts on a daily basis, Monday through Friday, and has done so since its inception more than fifteen years ago. The show features Mr. Ross as the host, and he discusses news, current events, politics, entertainment, technology, and a range of other subjects on his show.[2]

Neither the format, distribution, nor other aspects of production of The Dave Ross Show were altered for the period in question of May 5, 2004, through July 23, 2004, and Mr. Vance has not alleged otherwise.[3] For these reasons, 710 KIRO and CBS Radio News were acting as press entities with respect to their broadcast of The Dave Ross Show and, thus, have satisfied the first *Phillips* test.

As to the second *Phillips* test, 710 KIRO is owned by Entercom Communications Corporation ("Entercom"). Entercom is one of the largest radio broadcasting companies in the United States, and it owns and operates a nationwide portfolio of radio stations including those in Boston, Seattle, Denver, Portland, Sacramento, Kansas City, Indianapolis, Milwaukee, New Orleans, Norfolk, Buffalo, Memphis, Providence, Greensboro, Greenville/Spartanburg,

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2 We note that in 1992, Mr. Ross was named as Charles Osgood's substitute on The Osgood File, and in 1993, Mr. Ross began his own daily CBS commentary which is carried by 240 stations.

3 In addition, as Mr. Vance concedes, Mr. Ross signed off The Dave Ross Show on July 23, 2004, the day he declared his candidacy. Since losing the general election, Mr. Ross has returned to host The Dave Ross Show.

Rochester, Madison, Wichita, Wilkes Barre/Scranton, Gainesville-Ocala, and Longview/Kelso, WA. *See* http://www.entercom.com/pages/about.html (available November 18, 2004).

CBS Radio News is also not owned or controlled by any political party or candidate, a fact for which we assume the Commission does not require supporting information.

Thus, none of the press entities in question is owned or controlled by any political party, political committee, or candidate, and, consequently, the second test under *Phillips* is satisfied.[4]

The press exemption's applicability in this matter is also supported by recent FEC action. More specifically, in Advisory Opinion 2004-30, the FEC determined that a "documentary" film produced by Citizens United was not entitled to the "media exception" because:

> Citizens United does not regularly produce documentaries or pay to broadcast them on television. Citizens United has produced only two documentaries since its founding in 1988, both of which it marketed primarily through direct mail and print advertising, and neither of which it paid to broadcast on television. Indeed, the very act of paying a broadcaster to air a documentary on television, rather than receiving compensation from a broadcaster, is one of the "considerations of form" that can help distinguish an electioneering communication from exempted media activity.

Advisory Opinion 2004-30.

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[4] While a "candidate" (Mr. Ross) arguably has a connection with The Dave Ross Show, the test in this case is not whether the show itself is "owned" by a candidate, but whether the broadcast "facility" is owned by a candidate, political committee, or political party. *See* 2 U.S.C. § 431(9)(B)(i)("...unless such facilities are owned or controlled by any political party, political committee, or candidate")(emphasis added).

By contrast, Mr. Ross has been hosting The Dave Ross Show since 1987 as his principal occupation; his show is, therefore, no short-lived publicity vehicle. Moreover, 710 KIRO pays Mr. Ross to host his show, not vice versa.

The FEC has also previously addressed the press exemption in the context of a radio host. In an enforcement matter designated as matter under review 4689, the Commission found "no reason to believe" that a broadcast station had made contributions or expenditures in violation of federal election law when former U.S. House Member Robert Dornan, who had decided to run again for federal office, was appearing as a guest host for several radio talk shows in 1997. Citing the "press exemption," the Commission determined that the expenditure and contribution prohibitions did not apply because the broadcast station was acting in its capacity as a member of the media in presenting the programs in question with Mr. Dornan as guest host. Moreover, the FEC concluded that no other provision of federal law would override this exemption which is based on the First Amendment to the U.S. Constitution. *See* MUR 4689.

Mr. Ross's case for treatment under the press exemption is, in fact, stronger than Mr. Dornan's. Mr. Ross has been a radio host and journalist, with his own show and under contract with 710 KIRO, for more than fifteen years. Unlike Mr. Dornan, Mr. Ross's career as a journalist predates his political activity.

If the FEC faithfully follows its own precedent, the Commission should not proceed to examine the content of The Dave Ross Show. As four FEC commissioners stated in the Statement of Reasons for MUR 4689: "[o]nly if we determine the [press] exemption is not applicable can the Commission examine the activity itself to determine if there was a violation

of the Act." Statement of Reasons of Vice-Chairman Darryl R. Wold, Commissioners Lee Ann Elliott, David M. Mason, and Karl J. Sandstrom, MUR 4689.

For these reasons, 710 KIRO and CBS Radio News have satisfied the first and second *Phillips* tests and, accordingly, the press exemption should apply to the broadcasts that Mr. Ross hosts.

The FEC, therefore, lacks subject matter jurisdiction over the activity at issue and the Commission should find no reason to believe the respondents violated the Act and dismiss this matter under review.

III. IF 710 KIRO AND CBS RADIO NEWS ARE NOT ENTITTLED TO THE PRESS EXEMPTION, THE RESPONDENTS NEVERTHELESS DID NOT VIOLATE THE ACT

Complainant has not adduced any impermissibly coordinated expenditure by KIRO 710 or CBS Radio News.

Under federal campaign finance law, an "expenditure" is defined as "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*; or the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." 2 U.S.C. §§ 431(8) & (9) (emphasis added).

However, a communication must contain "express advocacy" to be considered "for the purpose of influencing any election for federal office," or, in the alternative, meet the definition of an "electioneering communication." *See Buckley v. Valeo*, 424 U.S. 1, 80

(1976), and *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986). *See also* 2 U.S.C. § 434(f)(3) and 11 C.F.R. §§ 100.22 and 100.29.[5]

Regarding "express advocacy," to "expressly advocate" means any communication that uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Ross in '04," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Bush," or communications of campaign slogans or individual words, which in context "can have no other reasonable meaning" than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Bush's the One," "Ross '04," "Bush/Cheney," or "Ross!" *See* 11 C.F.R. § 100.22.

With respect to this matter, Mr. Vance does not allege in his complaint that Mr. Ross made any statements containing "express advocacy." In fact, Mr. Ross made no statements advocating his own election while on the air. Accordingly, the radio programs in question do not amount to "express advocacy."

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[5] The Supreme Court's recent decision in *McConnell v. FEC*, 124 S.Ct. 619 (2003), upholding the Bipartisan Campaign Reform Act of 2002 ("BCRA"), indicated that the so-called "magic words" requirement for "express advocacy" described in *Buckely v. Valeo* was not a constitutional imperative. 124 S.Ct. at 661. However, neither the U.S. Congress nor the Federal Election Commission has yet articulated or applied any broader formulation of "for the purpose of influencing any election for federal office" in a statutory or regulatory context. BCRA did create a separate, new class of regulated communications called "electioneering communications" that were upheld in *McConnell*, 124 S.Ct. at 686, and these are addressed herein.

Nor does the show amount to an "electioneering communication." This term means any broadcast, cable, or satellite communication that:

(1) Refers to a clearly identified candidate for Federal office;

(2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election; and

(3) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.

11 C.F.R. § 100.29.

"Publicly distributed," in the "electioneering communication" context, means "aired, broadcast, cablecast or otherwise disseminated for a fee through the facilities of a television station, radio station, cable television system, or satellite system." *Id.* (emphasis added).

Under these rules, The Dave Ross Show could not have made "electioneering communications" during the time period in question. The Washington congressional primary did not take place until September 9, 2004. Under the thirty-day electioneering communication rule, any communications broadcast by The Dave Ross Show between May 5, 2004 and July 23, 2004 could not be treated as electioneering communications because the broadcasts were made more than thirty days prior to the Washington primary. As noted above, Mr. Ross discontinued his radio program on July 23, 2004.

Moreover, neither Mr. Ross nor Friends of Dave Ross paid a fee for the broadcast of the show. On the contrary, Mr. Ross was paid by 710 KIRO to host his show. Therefore, for that reason alone, neither The Dave Ross Show nor any other potential programs which Mr. Ross was paid to host could constitute "electioneering communications." *See* 11 C.F.R. § 100.29(b)(3)(i).

Finally, we note that there is no legal basis to support Mr. Vance's allegation that 710 KIRO's continuing to broadcast The Dave Ross Show after Mr. Ross had signed off the air represented an impermissible coordinated expenditure. Again, the test is whether the programs constituted "expenditures" or "electioneering communications" under the Act, and for the reasons discussed herein, the communications were neither "expenditures" nor "electioneering communications." Further, 710 KIRO had a legitimate independent basis to continue to use The Dave Ross Show "brand name" during Mr. Ross's absence that was not related to supporting Mr. Ross's candidacy.

IV. CONCLUSION

For the foregoing reasons, we respectfully request that the Commission find no reason to believe the respondents violated the Act and dismiss them from this matter under review.

Respectfully submitted on this 19th day of November 2004.

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