



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Brett G. Kappel
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1828 L Street, NW
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JUN 26 2009

RE: MUR 6111
Columbus Metropolitan Club

Dear Mr. Kappel:

On November 27, 2009, the Federal Election Commission notified your client, the Columbus Metropolitan Club, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended (the "Act"). On June 22, 2009, the Commission found, on the basis of the information in the complaint and information provided in your client's response, that there is no reason to believe the Columbus Metropolitan Club violated the Act. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Wanda D. Brown, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter G. Blumberg".

Peter G. Blumberg
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Columbus Metropolitan Club **MUR:** 6111

I. BACKGROUND

The complainant in this matter alleges that the Columbus Metropolitan Club ("CMC") acted as a "political action group" when it cosponsored a debate with WOSU Public Media on October 16, 2008 featuring three candidates for Ohio's 15th District U.S. Representative seat, but excluded Libertarian candidate Mark Noble. The Complainant suggests that the debate was tantamount to a financial contribution to, or an expenditure on behalf of, the participating candidates because the debate gave them "preferential exposure," and asserts that CMC "should be required to [register with the Commission] and file the required forms." Further, the Complainant maintains that the participating candidates should report the alleged in-kind contribution in disclosure reports filed with the Commission. The Commission received a supplement to the original complaint on January 6, 2009 raising "new facts" supporting the original allegations, including that WOSU broadcast a radio "call-in show" on October 30, 2008 with the same three candidates that participated in the debate. The supplement also noted that Mr. Noble polled over 10,000 votes in the general election demonstrating that he was a serious candidate.

In its response to the original complaint, CMC maintains that it did not violate the Federal Election Campaign Act of 1971, as amended, ("the Act") by excluding Noble from the debate. Specifically, CMC contends that as a tax exempt organization under Section 501(c)(3) of the Internal Revenue Code, it is legally permitted to stage candidate debates in accordance with the requirements of 11 C.F.R. § 110.13. CMC claims it

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adhered to these requirements because the participating candidates were chosen by its cosponsor, WOSU, who utilized "pre-established objective eligibility criteria" to determine which candidates "demonstrated a measurable chance of election to the office they [sought]" and would thereby be invited to participate in the debate. CMC Response at 2-3. In addition, CMC maintains that because the debate was a "nonpartisan activity designed to encourage individuals to vote or to register to vote" it is exempt from the Act's definition of a "contribution" or "expenditure." 2 U.S.C. § 431(9)(B)(ii); CMC Response at 3. CMC also notes that each year it hosts numerous forums and debates, and that in planning and hosting all events it strives to remain completely neutral and does not advertise, promote, endorse, oppose, or advocate any person, candidate, position or ideology. CMC did not submit a response to the complaint supplement alleging that the October 30, 2008 radio program also resulted in a contribution or expenditure. However, it appears that CMC had no role in the radio program.

Based on all available information, the Commission found no reason to believe that CMC violated the Act by making prohibited contributions to, or expenditures on behalf of the candidates participating in the debate in question, or by failing to register with the Commission and file disclosure reports, and closed the file as to both Respondents.

II. FACTUAL AND LEGAL ANALYSIS

A. Background

In anticipation of the November 4, 2008, general election, WOSU and CMC entered into an agreement to cosponsor a debate featuring candidates vying for Ohio's 15th District U.S. Representative seat. Under the agreement, CMC was to promote

attendance, gather reservations, help with set design and collect and screen questions to be asked at the debate. WOSU was to choose the participating candidates and to host and broadcast the debate.

WOSU invited three candidates to participate in the debate on October 16, 2008. In addition, the same candidates participated in a WOSU Radio open line call-in show on October 30, 2008. It appears that the participating candidates for each of these events were chosen pursuant to WOSU's policy regarding political debates, implemented in March 2008. According to WOSU's debate policy, candidates demonstrating a measurable chance of election, defined as those receiving at least five percent support in a poll or public opinion survey conducted by an independent organization, would be included. Candidates not receiving the requisite support would be excluded because, according to the policy, "such participation will hinder the audience's understanding of the positions held by candidates who have a legitimate chance of winning election."

On October 8, 2008, Mr. Buckel, the complainant in this matter, phoned WOSU regarding Noble's exclusion from the scheduled debate. WOSU explained that Noble had been excluded because he had failed to receive the requisite five percent support. It also provided a copy of its policy regarding political debates in a letter sent to Mr. Buckel the same day. Subsequently, Mr. Buckel filed his complaint with the Commission.

B. The Columbus Metropolitan Club Did Not Violate the Act

The CMC is incorporated in the state of Ohio and is a 501(c)(3) organization. The Act prohibits "any corporation whatever" from making contributions or expenditures in connection with federal elections. 2 U.S.C. § 441b(a). However, 2 U.S.C.

§ 431(9)(B)(ii) exempts from the definition of “expenditure” “nonpartisan activity designed to encourage individuals to vote or register to vote.” The regulation implementing the statutory exemption includes “funds provided to defray costs incurred in staging candidate debates in accordance with the provisions of 11 C.F.R. §§ 110.13 and 114.4(f)” within the exemption. See 11 C.F.R. §§ 100.92 and 100.154. Section 110.13(a)(1), in turn, permits “[n]onprofit organizations described in 26 U.S.C. §§ 501(c)(3) or (c)(4) and which do not endorse, support, or oppose political candidates or political parties” to “stage candidate debates in accordance with this section and 11 C.F.R. § 114.4(f).”

The regulations leave the structure of the debate to the discretion of the staging organization, provided that the debate includes at least two candidates, the organization does not arrange the debates in a manner that promotes or advances one candidate over another, and the criteria for candidate selection are objective and pre-established, under 11 C.F.R. § 110.13(b) and (c). For general election debates, staging organizations shall not use nomination by a particular party as the sole objective criterion to determine debate eligibility. 11 C.F.R. § 110.13(c). In its *Explanation and Justification for Corporate and Labor Activity*, the Commission stated that section 110.13 does not require that candidate selection criteria be reduced to writing or be made available to all candidates. 60 Fed. Reg. 64260-64262 (December 14, 1995). In past “debate” MURs, the Commission has considered a number of different criteria to have been acceptably “objective,” including percentage of votes received by a candidate in a previous election; the level of campaign activity by the candidate; his or her fundraising ability and/or standing in the polls; and eligibility for ballot access. See MURs 4956, 4962, and 4963

(Gore 2000, *et al.*); MUR 5395 (Dow Jones, *et al.*); and MUR 5650 (University of Arizona).

In this matter, CMC, a 501(c)(3) non-profit organization, complied with the requirements of 11 C.F.R. § 110.13 when it cosponsored the debate in question. The debate featured three candidates, all of which purportedly met predetermined criteria for candidate selection. The criteria for candidate selection appear objective, requiring that participating candidates be legally qualified to hold the office for which they are campaigning, have achieved ballot access or actively campaigning as a write-in candidate, and receive five percent or more of support in a professionally conducted independent poll or survey.¹ CMC provided information indicating that just prior to the debate Noble had the support of approximately two percent of voters, according to a poll conducted by SurveyUSA on behalf of a local television network. The complainant does not dispute the results of the poll, or claim that Noble was otherwise eligible to participate in the debate pursuant to the criteria set forth by WOSU. Finally, the Complainant did not allege, nor is there information to suggest that the structure of the debate promoted or advanced one candidate over another. In fact, the organization's published mission is to "promote the open exchange of information and ideas among the

¹ The selection criteria submitted by WOSU in its response is slightly different from that submitted by CMC, even though CMC purports to be submitting WOSU's policy. For instance, CMC lists submission of campaign finance reports filed with a government agency as an objective criterion to measure candidate viability, while WOSU does not. Nevertheless, it appears that the minor differences between the criteria submitted by each are not material to our analysis here. In addition, the criteria submitted by both WOSU and CMC appear to apply only to third party candidates. It is not clear whether there are separate criteria for major party candidates that were not submitted to the Commission or whether there are no selection criteria for major party candidates and they are automatically invited to the debate. For general election debates, staging organizations cannot use nomination by a particular party as the sole objective criterion to determine debate eligibility. See 11 C.F.R. § 110.13(c). Nevertheless, information in the complaint responses indicates that the major party candidates met the selection criteria used for third party candidates (e.g. 5% polling threshold, ballot access). For instance, at the time of the debate, the two major party candidates had polled 47% and 42%, respectively, in public support. See CMC Response, Exhibit B.

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residents of Central Ohio” in a non-partisan manner and to “provide a platform for the discussion of social, political, economic and cultural issues of concern to the community.” <http://www.columbusmetroclub.org/Default.aspx?pageId=49310>, last viewed May 8, 2009. To this end, the organization organizes 60-70 events per year, billed as “forums and debates,” to promote “diversity, discussion and debate.” *Id.* There is no available information to suggest that the organization endorses, supports, or opposes any political candidates or political parties. In fact, most CMC forums and debates involve social topics unrelated to political candidates or political parties.

Accordingly, because the Columbus Metropolitan Club is a 501(c)(3) non-profit organization and complied with the requirements of provisions 11 C.F.R. § 110.13 when it hosted the debate, the Commission found no reason to believe that CMC violated the Act by failing to register with the Commission and file disclosure reports or by making prohibited and unreported contributions to, or expenditures on behalf of, the candidates participating in the debate.