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**BY E-MAIL ATTACHED FILE TO _____ AND PRIORITY MAIL -
DELIVERY CONFIRMATION
April 1, 2010**

Mr. Jeff S. Jordan
c/o F. Hampton
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

2010 APR -6 AM 11:09

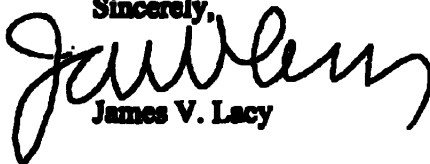
Regarding: MUR 6242

Dear Mr. Jordan:

Attached and timely filed is the response of J.D. Hayworth 2010 Committee and its' Treasurer, Kelly Lawler, to the above referenced MUR.

Thank you.

Sincerely,


James V. Lacy

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OFFICE OF GENERAL
COUNSEL

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BEFORE THE FEDERAL ELECTION COMMISSION

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COUNSEL

In the Matter of:

J.D. Hayworth 2010 Committee,
Kelly Lawler, Treasurer, and
Clear Channel Communications

MUR 6242

Respondents.

**JOINT RESPONSE OF J.D. HAYWORTH 2010 COMMITTEE
AND KELLY LAWLER AS TREASURER TO THE COMPLAINT**

I. INTRODUCTION

On behalf of J.D. Hayworth 2010 Committee, and Kelly Lawler, as Treasurer, (collectively, the "respondents"), we respectfully submit the following joint response to the complaint filed in the above captioned matter under review ("MUR").

On December 15, 2009, the complainant filed unverified allegations of violations of certain sections of the Federal Election Campaign Act (2 U.S.C. § 431 *et seq*) (the "Act"). In response, respondents and J.D. Hayworth, an unnamed party, respectfully submit that because J.D. Hayworth was engaged in legitimate press activity at the time, respondents are entitled to the "press or media exemption" as referred to herein further, described at 2 U.S.C. § 431(9)(B)(i). Accordingly, respondents did not violate the Act with respect to allegations made by the complainant.

Furthermore, even if the FEC were to determine that Mr. Hayworth is not entitled to the press exemption, the respondents still did not violate the Act, because during the period in question, the FEC did not have jurisdiction since Mr. Hayworth did not qualify as a "candidate" for U.S. Senate within the meaning of the Act.

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Inasmuch as the facts show that the media exemption applies to this matter, and in addition, that Mr. Hayworth was never a candidate for U.S. Senate during the period in question, we respectfully state that the Commission must find no reason to believe that the respondents violated the Act and must dismiss this matter under review.

II. FACTS

After leaving Congress in January, 2007, J.D. Hayworth returned to his chosen profession of broadcasting, working as the "afternoon drive-time" host at NewsTalk 550, KFYI-AM in Phoenix, Arizona. He served in this capacity from April 26, 2007 through January 22, 2010. Each weekday, from 4:00 p.m. to 7:00 p.m., Mr. Hayworth started his radio show by commenting on the prevalent news of the day or ongoing matters of a policy nature, and then invited phone calls, e-mails and letters from listeners. This activity continued until the owner of the radio station, Clear Channel Communications, exercised an option in his contract, resulting in Mr. Hayworth leaving this position in January, 2010.

Due to his extensive background in broadcasting and his time in public office, Mr. Hayworth had become a sought-after guest on many cable outlets. For example, during the time he was hosting his radio show in Phoenix, Mr. Hayworth also was featured several times on national cable outlets as a guest commentator on Fox News Channel, Fox Business Network, and CNBC. During the spring and summer of 2009, Mr. Hayworth appeared weekly as a commentator on CNBC's "Power Lunch," where he still appears. He also entered into a compensated agreement with KNXV-TV, the ABC affiliate in Phoenix, to provide commentary during the 2008 Presidential Debate "season" through Election Night. Mr. Hayworth is a frequent guest on many cable outlets and a

valued commentator during the political election season because he is recognized not solely as an elected official, but also as a broadcaster with broad experience in policy issues.

Mr. Hayworth considers broadcasting as his primary profession. Before attending college, he worked weekend shifts at a radio station in High Point, North Carolina, his home town. Following an interest in broadcasting, Mr. Hayworth then received a bachelor's degree in speech communications and political science from North Carolina State University. His first television job came during his undergraduate days at North Carolina State at WPTF-TV, then the NBC affiliate in Raleigh, North Carolina, which became a full-time job upon his graduation. After eighteen months in that position, Mr. Hayworth was hired as a sports anchor for WFBC-TV in Greenville, South Carolina, where he worked for five years from 1981 to 1986. Mr. Hayworth went on to work as a sports anchor for WLWT-TV in Cincinnati for one year, then as the sports anchor on KTSP-TV, the CBS affiliate in Phoenix, from March 1987 to December 1993, resigning to run for U.S. Congress. Mr. Hayworth also worked as a fill-in host for nationally-syndicated radio show hosts such as Michael Reagan and Laura Ingraham while in Congress. Mr. Hayworth has worked continuously in broadcasting, and has depended upon it for his livelihood, other than his time serving as a member of the U.S. Congress.

Complainant's Unverified Radio Transcripts

Even according to the complainant's unverified transcripts of Mr. Hayworth's radio show, which from an evidentiary standpoint are not admissible in a Federal court as impermissible "hearsay," and to which respondents' express their continuing objection in this and any further proceeding, it is clear that rather than stoking support for a possible

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U.S. Senate campaign, Mr. Hayworth consistently tells listeners he is not a candidate for public office. Complainant claims he has accessed the radio show transcripts from the radio station's website at <http://kfyi.com/pages/podcast-archives.php?pname=jdhaywoth.xml>. Initially, when an independent Rasmussen poll was announced in the news in November 2009 showing Senator McCain and J.D. Hayworth in a dead heat for the Republican nomination for U.S. Senate in 2010, Mr. Hayworth stated on his show on Friday November 20, 2009 that "I'm not running." Regarding endorsements for a potential run for office, he said "I am not out actively seeking endorsements for a race that I am not entered in." On Monday, November 23, 2009, Mr. Hayworth stated on the air that "I am not running."

On Thursday, December 10, 2009, Mr. Hayworth said "I am not announced for anything." On Friday, December 11, 2009, while responding to an email from a listener, Mr. Hayworth said "But there is the thing that is funny. I have made no declaration of candidacy." The same day, the transcript shows that Mr. Hayworth spoke with Dennis Welch of the *East Valley Tribune*. In the course of answering a question about his motivations for discussing an *Arizona Guardian* poll showing himself and Senator McCain tied, Mr. Hayworth stated that "it is news, so I do talk about it." On several occasions throughout the provided transcripts, Mr. Hayworth referred to the same *Arizona Guardian* poll that showed him tied with Senator McCain as "a lot of fun."

On Tuesday, December 15, 2009, Mr. Hayworth remarked to his listeners, throughout the show, "I am not an announced candidate for public office", "I am not a candidate for anything", "heck, I am not a candidate anyway." Mr. Hayworth described his status on Wednesday, December 16, 2009 as "a broadcaster, a former office holder

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who has been asked to consider running again." (Emphasis added). The complainant's own unverified transcripts of Mr. Hayworth's radio show that Mr. Hayworth never considered himself a candidate for any public office during the period in question.

III. LEGAL ANALYSIS

A. KFYL-AM and Clear Channel Communications, and All Respondents, Are Entitled To The Media Exemption.

The Act provides for a press or media exemption requiring that when a complaint is made, the Commission must first determine whether the exemption is applicable before any violations of the Act can be found. If the FEC determines that the press or media exemption is applicable, the FEC's inquiry into the content of the programming must cease as a statutory and constitutional matter. In other words, if the press or media exemption applies, no further inquiry into the content of J.D. Hayworth's show's broadcasts is necessary.

Any party claiming the media exemption is subject to a two-part test. The Commission will first ask whether the entity engaging in the activity is a media entity within the meaning of the Act and the Commission's regulations. Next, the Commission determines the exemption's scope by inquiring: (a) whether the media entity is owned or controlled by a political party, committee, or candidate; and if not, (b) whether the entity was functioning within the scope of a legitimate media entity at the time of the alleged violation. If the media entity is independent of any of the above political affiliations, and if it was acting as a legitimate media entity at the time of the alleged violation, then the entity is subject to the exemption provided by the Act. In *FEC v. Phillips Publishing, Inc.* 517 F. Supp. 1308 (D.D.C. 1981), the court explained that "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. 1308 at 1313.

Applying the media exemption test to the present matter, the first question is whether KFYI-AM is acting as a media entity with respect to the broadcast of Mr. Hayworth's radio show which is the subject of this matter. KFYI-AM, a broadcast radio station owned by Clear Channel Communications, one of the largest broadcasting companies in the United States, is a journalistic entity covered by the media exemption. The remaining question is whether, during the period in question, the radio station acted within its legitimate media function. Mr. Hayworth's show began in April, 2007. As stated earlier, through the run of this show, Mr. Hayworth discussed the news of the day and then interacted with listeners through their phone calls, e-mails and letters to the show. Neither the format, distribution, nor any other aspect of the production of the show was altered during the period in question. For these reasons, KFYI-AM and Clear Channel were acting as media entities with respect to their broadcast of Mr. Hayworth's radio show for the period in question and, thus, have satisfied the first test of the media exemption of the Act.

As for the second part of the media exemption test, KFYI-AM is owned by Clear Channel Communications ("Clear Channel"), the largest radio station group owner in the United States. Clear Channel owns and operates over 900 stations nationwide, hosting other news talk programs such as *The Rush Limbaugh Show* and *The Mark Levin Show*. Clear Channel clearly is not owned or controlled by any political party or candidate, a fact for which we assume the Commission does not require supporting information, beyond Respondent Clear Channel's own response in this matter. Thus, the media entity

in question is not owned or controlled by any political party, committee, or candidate, and consequently, the second test to meet the media exemption of the Act is satisfied.

Mr. Hayworth has been hosting his show under contract to respondent radio stations since April of 2007 as his principal occupation; his show is, therefore, no short-lived publicity vehicle to aid any effort at winning elective office. Furthermore, the FEC has previously addressed the media exemption in the context of a radio host. See MUR 4689 (Dornan). When Congressman Robert Dornan, who had decided to run again for another federal office, appeared as a guest host for several radio talk shows in 1997, the Commission determined that the expenditure and contribution prohibitions did not apply because the station was acting in its capacity as a member of the media in presenting the programs that Mr. Dornan was guest-hosting. According to the complaint against him, during this guest-hosting period, Mr. Dornan allegedly used air time to attack his political opponent and expressly advocate on behalf of his own election. The Commission found that the broadcasting stations involved were not owned or controlled by a party or candidate and the media entities were acting in their capacities as members of the media in airing the program. See Statement of Reasons by Commissioners Wold, Elliot, Mason, and Sandstrom in MUR 4689. Since it "appeared that the activities complained of [were] protected by the press exemption," the Commission majority stated that the Commission lacked subject matter jurisdiction in the matter and could proceed no further.

The Commission should proceed no further in this case. There is even less indication in this complaint than in the Dornan matter that anything about Mr. Hayworth's show changed at any point during the period in question. Mr. Hayworth has been on the air and under contract since April 2007, featuring news stories, commentary

and editorials, as required by 11 C.F.R. § 100.73. The format, distribution and any other aspects of the show remained the same during the period in question. Furthermore, the case for Mr. Hayworth's treatment under the media exemption is strengthened by the fact that his broadcasting career predated his time in public office, and at no time during the period in question was he a declared candidate for public office.

Any speech or activity by listeners of the show advocating for Mr. Hayworth's potential candidacy fall within the range of what qualifies as a "legitimate press activity" for such a show. Any such participation by listeners are regular features of many radio shows that feature discussion about news, politics and current events, and again, are well within a show's legitimate press function. The fact that listeners would engage Mr. Hayworth in political repartee is entirely relevant to the established format of the show, which was the discussion of politics and ongoing policy issues of interest to Arizona listeners—and was not a format of another subject, such as sports radio. Furthermore, this format was established well before any election. To any extent that such activity constitutes express advocacy, because the entities carrying the radio show are not owned or controlled by any political party, committee or candidate, such broadcasts qualify for the media exemption.

B. Even if KFYI-AM And Clear Channel Communications Are Not Entitled To The Media Exemption, The Respondents Still Did Not Violate The Act.

An electioneering communication occurs where a broadcast, cable or satellite communication targeted to the relevant electorate clearly identifies a Federal candidate within 30 days of a primary election or 60 days of a general election. See 11 C.F.R. § 100.29(a). At no time during his broadcasts did Mr. Hayworth state that he was a candidate for Federal office. When a November 2009 Rasmussen poll that showed Mr.

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Hayworth and Senator McCain were in a statistical "dead heat," listeners contacted the radio show and encouraged Mr. Hayworth to run for office. However, such contact and communication should be considered programming material, as it served as news that was of interest to the audience, and was entirely relevant to the show's format. In that vein, these communications "appearing in a news story, commentary, or editorial" through the facilities of any broadcast station not owned or controlled by any political party, committee, or candidate is excluded from the definition of electioneering communication under 2 U.S.C. § 434(f)(3)(B) and 11 C.F.R. § 100.29(c)(2).

In MUR 5555 (Ross), the respondent clearly identified himself as a candidate on his radio program within 30 days of his primary, yet such communications were exempt from the Act because they fell within the media exemption. See MUR 5555. Mr. Hayworth, then, is in a much stronger position to qualify for the media exemption. At no point during his time of employment at KFYI-AM did Mr. Hayworth state he was a candidate. Furthermore, any comments or conversations with listeners speculating about his potential candidacy were carried by KFYI-AM and Clear Channel, neither of which are owned or controlled by any political party, committee or candidate. The broadcasts during the period in question were speech that did not violate the Act.

Mr. Hayworth also never solicited any funds on his program during the period in question. During the period in question, he had a contractual agreement with the nonprofit organization, Citizens United, to serve as their "Ronald Reagan Fellow," a position that required him to travel to Washington, D.C. in December 2009. His position with Citizens United was his purpose for the trip. While he was in Washington, he also

attended functions and met with other political figures in his capacity as Ronald Reagan Fellow.

"Campaigning" activity that transforms a "testing the waters" phase into a Federally-regulated "candidate" phase depends on more facts than simply discussing the feasibility of becoming a candidate with friends and political allies, or on a radio show. "Campaigning" means the making or authorization of actual statements ("vote for J.D. Hayworth for Senate!"), use of public political advertising, raising more money than is reasonably needed, or conducting activities over a protracted period of time, or taking action to qualify for the ballot. See 11 CFR 100.72(b) and 100.131(b). No such facts are present in the materials that the complainant has submitted to the commission.

Furthermore, Mr. Hayworth had never formally announced a "testing the waters" period. However, should it be found that Mr. Hayworth was indeed "testing the waters," he still did not fit the statutory definition of a "candidate" because he had not yet raised or spent over \$5,000 during this period. Mr. Hayworth did not open a bank account for election purposes until January 7, 2010. He did not raise or spend in excess of \$5,000 until January 25, 2010, when he started his Federal committee for the U.S. Senate run.

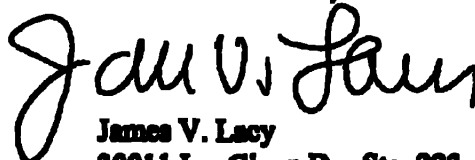
The bank account Mr. Hayworth opened on January 7, 2010 is not considered a political committee because Mr. Hayworth did not engage in campaigning until he announced for the U.S. Senate on January 25, 2010. Mr. Hayworth had already left his on-air position by this time.

IV. CONCLUSION

Mr. Hayworth was under contract with KFYI-AM and Clear Channel from April, 2007 to January, 2010. During this time, he hosted a radio program that covered the news of the day, as well as recurring topics of political interest to his audience. At no time did the format or production of his radio program change. While engaging with listeners who encouraged him to run for public office, Mr. Hayworth never declared his candidacy for Federal office while he was still broadcasting his show. Discussion regarding the U.S. Senate race in Arizona serves a legitimate news function, one that was carried by KFYI-AM and Clear Channel, two entities which are not owned or controlled by any political party, candidate or committee. Mr. Hayworth did not expressly advocate for himself as a candidate, nor did he solicit funds while hosting his radio program, nor was he actually "testing the waters" under Commission regulations during the period in question. His travel to Washington, D.C. was carried out within the scope of his position as a consultant and a "Ronald Reagan Fellow" for the nonprofit organization Citizens United.

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 1st day of April 2010.

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