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BEFORE THE FEDERAL ELECTION COMMISSION

2010 AUG 31 PM 12: 06

In the Matter of

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CELA

MUR 6304

)

CASE CLOSURE UNDER THE

MARK LEVIN

)

ENFORCEMENT PRIORITY

KQTH-FM

)

SYSTEM

CITADEL BROADCASTING CORPORATION

)

SENSITIVE

GENERAL COUNSEL'S REPORT

Under the Enforcement Priority System, matters that are low-rated

are forwarded to the Commission with a recommendation for dismissal, or in certain cases where the responses sufficiently rebut the allegations set forth in the complaint, a no reason to believe finding.

The complaint in this matter centers on a radio talk show hosted by Mark Levin on January 14, 2010, and on the show's companion website, www.marklevinshow.com. Mr. Levin is an employee of Citadel Broadcasting Corporation's ("Citadel") subsidiary Radio Networks, LLC ("Radio Networks"), and his show, which runs for three consecutive hours on Mondays through Fridays, is broadcast on numerous radio stations. One of these stations is KQTH-FM in Tucson, Arizona, which is owned by Journal Broadcast Corporation ("Journal Broadcast"), an affiliate of Journal Communications, Inc. ("Journal Communications"). The complainant, Steven M. Jandreau, alleged that during a broadcast of the Mark Levin Show ("Levin show"), on KQTH-FM, Mr. Levin may have solicited contributions for the campaign of then-senatorial candidate Scott Brown when Mr. Levin "asked his producer if a link to Brown's campaign site was still on the front page of Levin's web site and told him to put the link on Levin's Facebook and Twitter sites," and stated that he "encourage[d] people to

1 . . . consider giving a contribution to that [Brown's] campaign."¹

2 Although the complainant does not cite to any violations of the Federal Election
3 Campaign Act of 1971, as amended ("the Act"), or underlying regulations, it appears that he
4 may be alleging that these purported statements and website links disqualify Mr. Levin's
5 radio show and website from being covered by the so-called "press exemption" or "media
6 exemption," which excludes from the definition of "contribution" "any cost[s] incurred in
7 covering or carrying a news story, commentary, or editorial by any broadcasting station
8 (including a cable television operator, programmer or producer), Web site, newspaper,
9 magazine, or other periodical publication, including any Internet or electronic publication . . .
10 unless the facility is owned or controlled by any political party, political committee, or
11 candidate," 11 C.F.R. § 100.73.² If the media exemption does not apply to the Levin show
12 and website, they could potentially be viewed as illegal in-kind corporate contributions to the
13 Brown campaign by Citadel, Radio Networks, Journal Broadcast, and/or Journal
14 Communications, in potential violation of 2 U.S.C. § 441b(a).

15 In their joint response, Mark Levin, radio station KQTH-FM, and Citadel
16 (collectively, "respondents") maintain that "no action" by the Commission "is warranted
17 . . . because the programming at issue falls squarely within the 'media exemption'" of the
18 Act. According to the respondents, KQTH-FM which, like Radio Networks, Journal

¹ The January 14, 2010 Levin show may be heard in its entirety at
<http://zmlc.fmnc.net/article.asp?id=1657036&spid=32630>

² The Act prohibits corporations from making contributions from their general treasury funds in connection with any election of any candidate for Federal office, 2 U.S.C. § 441b(a), with the term "contribution" defined to include "anything of value," including in-kind contributions, made for the purpose of influencing any election for Federal office. 2 U.S.C. § 431(8), 11 C.F.R. § 100.52(d)(1). See, however, 2 U.S.C. § 431(9)(B) (excluding from the definition of "expenditure" 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").

1 Broadcast and Journal Communications, is not owned by any political candidate, committee
2 or party, serves a legitimate press function, as it has offered "news, talk and opinion
3 programming," since April 2007, including a regularly-scheduled talk show by commentator
4 and constitutional lawyer Mark Levin, which focuses on "matters that are topical and
5 controversial." In addition, the respondents state that the radio show has a companion website
6 at www.marklevinshow.com, which includes complete audio files from previous programs,
7 continuing topical features, and "occasional links to the websites of candidates whom
8 Mr. Levin has endorsed" although "these links typically appear [only] for a brief period of
9 time before being replaced by new ones relating to more recent" programs.

10 The respondents also point out that the contents of the show and the website are
11 widely available to listeners within the KQTH-FM coverage area and to any individual with
12 access to a computer and the Internet, respectively, and that the January 14, 2010 show and
13 website were comparable in nature to other Mark Levin radio broadcasts and companion
14 websites. Finally, the respondents include an affidavit by Mr. Levin, which avers, *inter alia*,
15 that the show's website does not "directly attempt to collect money for any purpose," and
16 what is described as a transcript of the January 14, 2010 radio show, which quotes Mr. Levin
17 as encouraging listeners to make donations to Mr. Brown's campaign.

18 As neither the Act nor the Commission's regulations use or define the term "media
19 exemption," the Commission has historically conducted a two-step analysis to determine
20 whether the media exemption applies. First, the Commission asks whether the entity
21 engaging in the activity is a media entity, and focuses on whether the entity in question
22 produces, on a regular basis, a program that disseminates news stories, editorials, and/or
23 commentary. *See* Advisory Opinions 2010-8 (Citizens United); 2005-16 (Fired Up!); and

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1996-16 (Bloomberg). Second, in determining the scope of the exemption, the Commission considers two factors: (1) whether the press entity is owned or controlled by a political party, political committee, or candidate; and, if not, (2) whether the media entity is acting as a media entity in conducting the activity at issue (i.e., whether the entity is acting in its "legitimate press function"). See *Reader's Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981). With respect to the second factor, when determining whether an entity is engaging in a legitimate media function, the Commission examines 1) whether the entity's materials are available to the general public; and 2) whether they are comparable in form to those ordinarily issued by the entity. *Id.*; see also Advisory Opinion 2010-8 (Citizens United).

In previous matters, the Commission has recognized that an entity otherwise eligible for the media exemption "would not lose its eligibility merely because of a lack of objectivity in a news story, commentary, or editorial, even if the news story, commentary, or editorial expressly advocates the election or defeat of a clearly identified candidate for Federal office." Advisory Opinion 2005-16 (Fired Up!); see also MUR 5928 (Kos Media, LLC) and MUR 6242 (J.D. Hayworth). Additionally, the Commission has concluded that media entities do not forfeit the media exemption if they solicit contributions for candidates.³ In fact, a solicitation for contributions may appear in a commentary that is a regular feature of a website, provided that the solicitation does not become a regular feature of its content.⁴

Here, the Levin show and its companion website, appear to fit within the contours of the media exemption. First, radio station KQTH-FM, a broadcast media outlet licensed to

³ See *Explanation and Justification for Final Rules on Internet Communications*, 71 Fed. Reg. 18589 at 18609 (Apr. 12, 2006); see also Advisory Opinions 1980-109 (Ruff Times) and 1982-44 (DNC/RNC).

⁴ See Advisory Opinion 2008-14 (Melothé) ("[T]he intermittent provision of a hyperlink directing a media Web site's visitors to a campaign's contribution page... would not be prohibited.")

1 serve the Tucson, Arizona area, is a media entity, which produces regularly-scheduled
2 programs offering news, editorials and commentary, including the Mark Levin show. Second,
3 KQTH-FM, like Radio Networks, Journal Broadcast and Journal Communications, is
4 apparently not owned or controlled by any political candidate, committee or party. Third, the
5 station appears to be carrying out a legitimate press function by carrying the Mark Levin show
6 and website, which are available to the general public, as described *supra*. Fourth, it appears
7 that the January 14, 2010 show and website, which are the subjects of the instant complaint,
8 are similar to other programs broadcast by Mr. Levin, as well as their accompanying websites.
9 The fact that Mr. Levin appeared to support Mr. Brown's candidacy and allegedly solicited
10 contributions for the Brown campaign does not appear to remove Mr. Levin's program from
11 the confines of the media exemption.

12 Accordingly, based upon the complaint and response in this matter, we recommend
13 the Commission find that there is no reason to believe that Mark Levin, KQTH-FM and
14 Citadel Broadcasting Corporation violated 2 U.S.C. § 441b(a).

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RECOMMENDATIONS

1. Find no reason to believe that Mark Levin violated 2 U.S.C. § 441b(a).
2. Find no reason to believe that KQTH-FM violated 2 U.S.C. § 441b(a).
3. Find no reason to believe that Citadel Broadcasting Corporation violated 2 U.S.C. § 441b(a).
4. Close the file and send the appropriate letters.

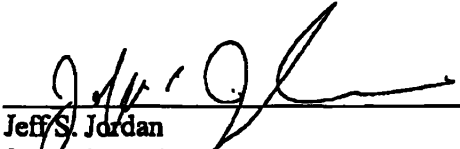
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