



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

JUL 13 2012

Erik Bierbauer, Litigation Counsel
NBCUniversal
30 Rockefeller Plaza
1093-E
New York, NY 10112

RE: MUR 6544
MSNBC

Dear Mr. Bierbauer:

On March 30, 2012, the Federal Election Commission notified your client, MSNBC, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended.

On June 28, 2012, the Commission found, on the basis of the information in the complaint, and information provided by you that there is no reason to believe MSNBC violated 2 U.S.C. §§ 441b(a) and 441b(b)(2). 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). A Factual and Legal Analysis further explaining the basis for the Commission's decision is enclosed.

If you have any questions, please contact Frankie D. Hampton, the paralegal assigned to this matter at (202) 694-1650.

Sincerely,

Anthony Herman
General Counsel

BY: *Jeff S. Jordan*
Jeff S. Jordan
Supervisory Attorney
Complaints Examination and
Legal Administration

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: MSNBC, Inc.

MUR 6544

I. INTRODUCTION

This matter was generated by a complaint filed by David H. Zisser alleging violations of the Federal Election Campaign Act of 1971, as amended ("the Act") by MSNBC, Inc.

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

Complainant David H. Zisser asserts that MSNBC, Inc., by broadcasting a program hosted by Ed Schultz and entitled The Ed Show, made illegal in-kind corporate contributions to the re-election campaign of President Obama. Specifically, Mr. Zisser states that *The Ed Show*, which he characterizes as a "news commentary program, devoted 14 minutes and 48 seconds of uninterrupted cable time to President Obama's fundraising speech in Atlanta, Georgia which was identified as 'Breaking News.'" Complaint at 1-2. In addition, according to the complaint, "no further than 80 laudatory emails/tweets appeared below the President as he spoke," whereas no such communications "of a negative nature" appeared. Complaint at 2.

Although Mr. Zisser concedes that the President's speech was of "modest news note" [sic],¹ he asserts that it was not the equivalent of a "White House Rose Garden Press Conference or an Oval Office speech to the nation on a subject of national importance" and, therefore, "was not worthy of an uninterrupted fifteen minutes of free cable time." *Id.* As such, Mr. Zisser maintains that the MSNBC program at issue was merely a "thinly-disguised and illegal [in-kind]

¹ Mr. Zisser does not describe the topics on which the President spoke.

1 campaign contribution,” the cost of which, he observes, can only be imagined, but that clearly
2 ran afoul of 2 U.S.C. §§ 441b(a) and 441b(b)(2).²

3 MSNBC and NBCUniversal Media, LLC, which owns MSNBC, filed a joint response to
4 the complaint, stating that “the broadcast in question did not violate the Act because it falls
5 squarely within the “press exemption to Section 441b.” Response at 1. The response goes on
6 to state that the “Act specifically exempts from the definition of ‘expenditure’” any news story,
7 commentary, or editorial distributed through the facilities of any broadcasting station...unless it
8 is owned or controlled by any political party, committee or candidate,” which MSNBC is not, as
9 it is owned by NBCUniversal, a global media company that is also not owned by any candidate,
10 party or committee. Response at 2. Further, the response quotes *Citizens United v. the Federal*
11 *Election Commission*, 130 S.Ct. 876, 905 (2010), for the proposition that “media corporations
12 are now exempt from § 441b’s ban on corporate expenditures.” Response at 1. Accordingly,
13 the respondents state that Mr. Zisser’s complaint lacks merit, and urge that the Commission
14 summarily dismiss it.

² In his complaint, Mr. Zisser states that “MSNBC has very strict in-house ethical rules governing political campaign contributions by members of its own journalism team,” and mentions Keith Olbermann and Joe Scarborough as two journalists who, Mr. Zisser alleges, ran afoul of MSNBC’s ethical guidelines. However, MSNBC suspended Mr. Scarborough and Mr. Olbermann for two days each, after the two journalists were found to have made contributions of \$4,000 (Scarborough) and \$7,000 (Olbermann) to political candidates. See <http://mediadecoder.blogs.nytimes.com/2010/11/19/joe-scarborough-suspended-for-two-days-for-political-donations/>. It does not appear that the Scarborough/Olbermann incidents, which involved direct political contributions, are relevant here.

B. Legal Analysis

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

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1 Here, MSNBC fits squarely within the "press exemption." First, MSNBC is a cable
2 television network that delivers news and commentary 24 hours a day. Response at 1. Second,
3 neither it nor NBCUniversal, which owns MSNBC, are owned by any political candidate,
4 committee or party. The fact that MSNBC's program, *The Ed Show*, may have been favorable to
5 Mr. Obama's candidacy does not remove it from the confines of the press exemption.
6 See Advisory Opinion 2010-08 (Statement of Commissioner Steven T. Walther) (the press
7 exemption "assures the unfettered right of the newspaper, TV networks, and other media to cover
8 and comment on political campaigns...the Commission has applied the press exemption broadly
9 to news stories, commentaries, and editorial 'no matter in what medium they are published...'").

10 Accordingly, the Commission found no reason to believe that MSNBC, Inc. violated
11 2 U.S.C. §§ 441b(a) and 441b(b)(2) and closed the file.

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