



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

December 2, 2024

VIA EMAIL

neil@sandlerreiff.com

Neil Reiff, Esq.
1620 Eye Street NW, Suite 900
Washington, DC 20006

RE: MURs 7865 and 7866
Targeted Platform Media, LLC
Buying Time, LLC

Dear Mr. Reiff:

On December 20 and 22, 2020, the Federal Election Commission notified your clients, Targeted Platform Media, LLC, and Buying Time, LLC, of a Complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). On October 29, 2024, the Commission, on the basis of the information in the Complaint and the Response you filed on February 19, 2021, dismissed the allegation that your clients violated the Act. Accordingly, the Commission voted to close its file in this matter effective December 2, 2024.

Documents related to the case will be placed on the public record today. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). Any applicable Factual and Legal Analysis or Statements of Reasons available at the time of this letter's transmittal are enclosed.

If you have any questions, please contact Peter Blumberg, the staff assigned to this matter, at (202) 694-1617 or pblumberg@fec.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "A.B.R.", is written over a horizontal line.

Anne B. Robinson
Assistant General Counsel

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Ditch Fund and Jennifer May in her official capacity as treasurer
Honor Bound PAC and Chris Patton in his official capacity as treasurer f/k/a Amy McGrath for Senate, Inc.
March On PAC and Evvie Harmon in her official capacity as treasurer
Mike Espy for Senate Campaign Committee and Kaiser Brown in his official capacity as treasurer
Targeted Platform Media, LLC
Buying Time, LLC

MURs 7865 and 7866

I. INTRODUCTION

The Complaints in these matters allege that two candidate committees and two non-connected committees, respectively, coordinated television advertisements through common vendors, Buying Time (“BT”) and Targeted Platform Media (“TPM”). The Complaints, filed by the same Complainant on the same day using a similar template, base the allegations primarily on the fact that Catherine Herrick, the president and founder of both BT and TPM, signed National Association of Broadcasters political advertising disclosure forms (“NAB Forms”) filed with the Federal Communications Commission (“FCC”) for all of the subject communications sponsored by the candidate committees and the non-connected committees, suggesting she acted as a coordinating agent.

Specifically, in MUR 7865, the Complaint alleges that Herrick’s involvement in certain advertising resulted in Amy McGrath for Senate and Chris Patton in his official capacity as treasurer (the “McGrath Committee”) coordinating with Ditch Fund and Jennifer May in her official capacity as treasurer (“Ditch Fund”). Similarly, in MUR 7866, Mike Espy for Senate Campaign Committee and Kaiser Brown in his official capacity as treasurer (the “Espy Committee”) allegedly coordinated with March On PAC and Evvie Harmon in her official

1 capacity as treasurer (“March On”) also through Herrick and her companies, BT and TPM. Both
2 Complaints allege that the coordinated communications resulted in excessive, prohibited, and
3 unreported in-kind contributions to the candidate committees.

4 In this matter, the Responses, including sworn declarations, and other underlying facts
5 sufficiently rebut the coordination allegations. Therefore, the Commission dismisses the
6 allegations that Ditch Fund, the McGrath Committee, March On, the Espy Committee, BT, or
7 TPM violated the Federal Election Campaign Act of 1971, as amended (the “Act”).¹

8 **II. FACTUAL BACKGROUND**

9 Ditch Fund is a hybrid political committee with a non-contribution account, also known
10 as a “Carey Committee.”² In 2020, Amy McGrath was the Democratic U.S. Senate candidate in
11 Kentucky, and the McGrath Committee was her principal campaign committee.³ Ditch Fund
12 contracted with TPM, a media placement vendor, and paid for and disseminated independent
13 expenditures supporting McGrath and opposing the incumbent Republican senator, Mitch
14 McConnell.⁴ Ditch Fund reported almost \$11.5 million on independent expenditures in that race
15 during the 2020 cycle.⁵ TPM founder Herrick signed NAB forms filed with the FCC in

¹ The Espy Committee did not respond to the Complaint, nor to CELA’s efforts to inquire about a response.

² See Ditch Fund, Amended Statement of Organization (May 2, 2021), <https://docquery.fec.gov/pdf/129/202105029446141129/202105029446141129.pdf>; Ditch Fund Resp. at 1 (July 22, 2021); see *Carey v. Federal Election Commission*, 791 F. Supp. 2d 121 (D.D.C. 2011).

³ See Amy McGrath, Statement of Candidacy (July 18, 2019), [https://docquery.fec.gov/pdf/239/201907189151452239.pdf](https://docquery.fec.gov/pdf/239/201907189151452239/201907189151452239.pdf); Amy McGrath for Senate, Inc., Statement of Organization (July 9, 2019), <https://docquery.fec.gov/pdf/315/201907099150524315/201907099150524315.pdf>.

⁴ Ditch Fund Resp. at 1-2.

⁵ See *Ditch Fund: Spending 2019-2020*, FEC.GOV, <https://www.fec.gov/data/committee/C00688739/?tab=spending&cycle=2020> (last visited Aug. 20, 2024).

MURs 7865 and 7866 (Ditch Fund, *et al.*)

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connection with those advertisements.⁶ The MUR 7865 Complaint attached copies of those forms.⁷

The McGrath Committee also paid for and disseminated advertising and contracted with BT, a media placement firm, in connection with its television advertisements, which totaled more than \$35 million.⁸ FCC records indicate that BT placed ads for the Committee on broadcast television stations across Kentucky.⁹ The Complaint includes attachments showing that Herrick signed NAB disclosure forms regarding these ads as well.¹⁰

In addition to Herrick's role, the MUR 7865 Complaint asserts that the ads' timing and placement suggests a coordinated effort. It points to six instances on four broadcast television stations where the McGrath Committee and Ditch Fund ads ran on the same station at around the same time.¹¹ The Complaint alleges that BT and TPM, through Herrick, bought these "ad flights" for the McGrath Committee and Ditch Fund, respectively, evidencing a strategy to disseminate the ads in a complementary fashion.¹² The Complaint alleges that because BT and

⁶ MUR 7865 Compl. at 4-5 (Dec. 17, 2020).

⁷ See MUR 7865 Compl., Exs. B, I, J, M, N, P.

⁸ Revised McGrath Committee Resp. at 1-2 (Feb. 26, 2021); see *FEC Disbursements: Filtered Results*, FEC.GOV https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00711549&recipient_name=buying+time&two_year_transaction_period=2020 (last visited Aug. 20, 2024) (reflecting all disbursements by the McGrath Committee to Buying Time during the 2020 election cycle).

⁹ MUR 7865 Compl. at 4; *id.*, Exs. A, C, D, K, L, O. The FCC requires that a broadcast, cable, or satellite licensee place information about political advertising "immediately" in its "political file," which is available in the FCC's online public database. 47 C.F.R. § 73.1943. The political file must contain requests to purchase broadcast time made by candidates or communicates a message relating "to any political matter of national importance." 47 U.S.C. § 315(e)(1). The file must include: (1) whether the request is accepted or rejected; (2) the rate charged; (3) the date and time the communication is to air; (4) the name of the candidate and the office and election referenced, or the issue referenced, if applicable; and (5) in the case of a request made by the candidate, the name of the candidate, candidate's authorized committee, and treasurer; or in the case of any other request, the name of the person purchasing the time, the name, address, and phone number of a contact person for such person. *Id.* § 315(e)(2). NAB Form PB-18, "Political Broadcast Agreement Form," can satisfy the disclosure requirements.

¹⁰ See MUR 7865 Compl., Exs. A, E, F, K, L, O.

¹¹ See MUR 7865 Compl. at 5-7.

¹² *Id.* at 14.

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TPM are “effectively indistinguishable,” Ditch Fund’s ads constitute excessive or prohibited in-kind contributions to the McGrath Committee in the form of coordinated communications through the use of a common vendor.¹³

The MUR 7866 Complaint makes similar allegations in connection with the 2020 Senate race in Mississippi. Like Ditch Fund, Respondent March On is registered with the Commission as a hybrid political committee with a non-contribution account, also known as a “Carey Committee.”¹⁴ In 2020, Espy was a federal candidate for the U.S. Senate in Mississippi, and the Espy Committee was his authorized committee.¹⁵ March On reported \$74,166.68 in independent expenditures supporting his candidacy.¹⁶

Like Ditch Fund, March On hired TPM to place its independent expenditure television advertisements, while the Espy Committee, like the McGrath Committee, hired BT to place its television ads.¹⁷ Herrick signed the NAB disclosure forms for all of the ads funded by March On and the Espy Committee.¹⁸ Thus, the MUR 7866 Complaint alleges Herrick’s role in signing all of the disclosure forms demonstrates coordination.¹⁹ Further, the Complaint states that in three instances in October and November 2020, ads disseminated by March On and the Espy

¹³ *Id.* at 12-15.

¹⁴ March On PAC, Amended Statement of Organization (Apr. 20, 2023), <https://docquery.fec.gov/pdf/520/202304209581180520/202304209581180520.pdf>; *see supra* note 2.

¹⁵ *See* Michael Espy, Statement of Candidacy (Nov. 30, 2018), <https://docquery.fec.gov/pdf/690/201811309133886690/201811309133886690.pdf>; Espy Committee, Statement of Organization (Mar. 14, 2019), <https://docquery.fec.gov/pdf/285/201903149145708285/201903149145708285.pdf>.

¹⁶ *See* FEC Independent Expenditures: Filtered Results, FEC.GOV, https://www.fec.gov/data/independent-expenditures/?committee_id=C00748228&iWs_notice=true&data_type=processed&q_spender=C00748228&q_spender=C90020421&is_notice=true&candidate_id=S8MS00287&support_oppose_indicator=S&min_date=01%2F01%2F2019&max_date=12%2F31%2F2020 (last visited Aug. 20, 2024) (reflecting all independent expenditures by March On supporting Espy during the 2020 election cycle).

¹⁷ MUR 7866 Compl. at 2, 4-5 (Dec. 17, 2020).

¹⁸ *Id.* at 4-5.

¹⁹ *Id.* at 11-15.

Committee complemented each other, and ran on the same television stations during the same time periods, and that in two of those instances, March On paid more while the Committee paid less, or vice versa.²⁰ Based on these circumstances, the Complaint alleges that March On violated the Act by making unreported excessive and prohibited in-kind contributions to the Espy Committee in the form of coordinated communications.²¹

The candidate committees and the hybrid committees responded to the Complaints by describing the organization and activities of Respondents BT and TPM and submitted declarations from Herrick and employee Kathryn Welsh.²² In addition, Ditch Fund and March On provided declarations from the creators of the advertising at issue.²³

In her declaration, Herrick states that she established BT in 1999 to provide “media planning and buying services to political campaigns, political committees, and non-profit organizations.”²⁴ In 2014, she created TPM as a subsidiary of BT “to delineate between work done for candidates and work done for other independent clients.”²⁵ Herrick states that she is the sole owner, president, and chief executive officer of both BT and TPM.²⁶ Herrick describes how

²⁰ *Id.* at 13-14.

²¹ *Id.* at 15.

²² The McGrath Committee and Ditch Fund submitted original and Revised/Supplemental Responses, noting that the Revised/Supplemental Responses included a more recent declaration from Herrick, who filed her own Response and an identical declaration on behalf of BT and TPM.

²³ Ditch Fund Resp. at 14-15; March On Resp. at 13 (Feb. 9, 2021).

²⁴ MURs 7865, 7866 Buying Time/Targeted Platform Media Resp. (Feb. 23, 2021) (“BT/TPM Resp.”), Ex. A, Declaration of Catherine Herrick ¶ 2 (“Herrick Decl.”).

²⁵ *Id.* at 2, Herrick Decl. ¶ 3.

²⁶ *Id.*, Herrick Decl. ¶¶ 1, 6.

1 “BT and TPM have separate office space for their strategic staff and do not have overlapping
2 employees that work on strategic services.”²⁷

3 Herrick states that BT and TPM operate under a firewall policy, attached to the BT/TMP
4 Response, and that it specifically provides for the separation of document access, storage, and
5 internal lists.²⁸ She states that during the 2020 election cycle, in both the Kentucky and
6 Mississippi Senate races, she was restricted to working with candidate committees, and that
7 neither she nor to her knowledge any other BT employee “provided any non-public strategic
8 information, or otherwise provided any strategic advice regarding the plans, projects, or needs of
9 any candidate committee to Ditch Fund or March On during the 2020 cycle.”²⁹

10 Herrick also states that the media forms relied on by the Complainant are standard forms
11 required for political advertising purchases; that as president of BT and TPM, her signature is
12 generally stamped onto the forms; that she does not review every form; and that her stamped
13 signature does not prove that she had specific knowledge of any specific purchase of time.³⁰

14 TPM employee Kathryn Welsh states in her declaration that during the 2020 election
15 cycle, she provided strategic and media placement advice to “Ditch Mitch” and March On and
16 that she was the only person at BT or TPM to provide such services to them.³¹ Welsh states that
17 under the internal firewall policy in effect during 2020, she “was not privy to, nor did [she] use,
18 any non-public information about the plans, projects, activities or needs of any candidate or

²⁷ *Id.*, Herrick Decl. ¶ 4.

²⁸ *Id.*, Herrick Decl. ¶ 5, Ex. B.

²⁹ *Id.*, Herrick Decl. ¶ 8.

³⁰ *Id.*, Herrick Decl. ¶ 7.

³¹ BT/TPM Resp., Ex. C, Declaration of Kathryn Welsh ¶ 2 (“Welsh Decl.”). Ditch Fund is also known as the Ditch Mitch Fund.

1 candidate's committee in Mississippi or Kentucky.”³² She further states that she had no access
 2 to any BT files or documents with such information, and she “did not engage in any substantive
 3 discussions with any BT employee that provided strategic services to any candidate for United
 4 States Senate in Kentucky or Mississippi regarding those candidate's plans, projects, activities,
 5 or needs.”³³

6 Phillip de Vellis, a partner at Beacon Media, the media and advertising firm hired by
 7 Ditch Fund, declares that he only communicated with Welsh at TPM regarding ad buys and the
 8 Kentucky Senate race.³⁴ De Vellis states that Herrick informed him about the firewall policy
 9 between TPM and BT and that in accordance with it, neither he nor his colleagues at Beacon
 10 Media discussed the Kentucky Senate race or Ditch Fund's ad purchases with Herrick.³⁵ He
 11 further states that the only discussion he had with Herrick about Welsh's work for Ditch Fund
 12 concerned the commission percentage TPM would charge Ditch Fund for its work.³⁶

13 March On's ad creation vendor, Sivan Jacobovitz of Van Ness Creative Strategies (“Van
 14 Ness”), states that when he contacted Herrick at BT on behalf of March On, she told him that BT
 15 could not provide services to it in Mississippi because BT “had implemented a firewall in the
 16 Mississippi Senate race.”³⁷ He further states that TPM then contacted Van Ness, which “served
 17 as March On's point of contact with [TPM].”³⁸ Jacobovitz states that all services provided to

³² *Id.*, Welsh Decl. ¶ 5.

³³ *Id.*

³⁴ Ditch Fund Resp. at 14, Declaration of Phillip de Vellis ¶¶ 1, 4 (“de Vellis Decl.”).

³⁵ *Id.*, de Vellis Decl. ¶¶ 5-6.

³⁶ *Id.*, de Vellis Decl. ¶ 6.

³⁷ March On Resp. at 13, Declaration of Sivan Jacobovitz ¶ 5 (“Jacobovitz Decl.”). The Herrick, Welsh, de Vellis, and Jacobovitz Declarations are all sworn under penalty of perjury.

³⁸ *Id.*

Van Ness and Ditch Fund were provided by Welsh at TPM, and that neither Herrick nor Welsh “divulge[d] any non-public strategic information regarding the plans, projects or needs of *any* candidate to [Van Ness].”³⁹

BT and TPM’s firewall policy states that employees representing a candidate may not communicate with those representing an outside spending organization with respect to the same candidate or election.⁴⁰ It further provides that client-specific information should be segregated from shared libraries or files,⁴¹ and that printed materials and email lists must be securely maintained.⁴²

III. LEGAL ANALYSIS

The Act defines the terms “contribution” and “expenditure” to include “anything of value” made by any person for the purpose of influencing an election.⁴³ The term “anything of value” includes in-kind contributions.⁴⁴ In-kind contributions result when goods or services are provided without charge or at less than the usual and normal charge,⁴⁵ and when a person makes an expenditure in cooperation, consultation or in concert with, or at the request or suggestion of a candidate or the candidate’s authorized committee or their agents.⁴⁶ The Act requires committee

³⁹ *Id.* ¶¶ 6, 8 (emphasis in original).

⁴⁰ BT/TPM Resp., Ex. B at 2 (Firewall Policy).

⁴¹ *Id.* at 3.

⁴² *Id.*

⁴³ 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i).

⁴⁴ 11 C.F.R. § 100.52(d).

⁴⁵ *Id.*

⁴⁶ 52 U.S.C. § 30116(a)(7)(B); 11 C.F.R. § 109.20.

1 treasurers to file reports of receipts and disbursements in accordance with the provisions of
2 52 U.S.C. § 30104.⁴⁷

3 Under Commission regulations, expenditures for “coordinated communications” are
4 addressed under a three-prong test at 11 C.F.R. § 109.21. Under this three-prong test for
5 coordinated communications, a communication is coordinated and treated as an in-kind
6 contribution when it is paid for by someone other than a candidate, a candidate’s authorized
7 committee, a political party committee, or the authorized agents of either (the “payment prong”);
8 satisfies one of five content standards (the “content prong”); and satisfies one of five conduct
9 standards (the “conduct prong”).⁴⁸ A communication must satisfy all three prongs to be a
10 “coordinated communication” under Commission regulations.

11 The “conduct prong” is satisfied by: (1) communications made at the “request or
12 suggestion” of the relevant candidate or committee; (2) communications made with the “material
13 involvement” of the relevant candidate or committee; (3) communications made after a
14 “substantial discussion” with the relevant candidate or committee; (4) specific actions of a
15 “common vendor;” (5) specific actions of a “former employee or independent contractor;” and
16 (6) specific actions relating to the dissemination of campaign material.⁴⁹

⁴⁷ 52 U.S.C. § 30104(a), (b).

⁴⁸ 11 C.F.R. § 109.21(a); *see also id.* § 109.21(b) (describing in-kind treatment and reporting of coordinated communications); *id.* § 109.21(c), (d) (describing content and conduct standards, respectively). A sixth conduct standard describes how the other conduct standards apply when a communication republishes campaign materials. *See id.* § 109.21(d)(6).

⁴⁹ *Id.* § 109.21(d).

The “common vendor” standard of the conduct prong has three elements: (i) the person paying for the communication, or an agent of such person, uses a “commercial vendor”⁵⁰ to create, produce, or distribute the communication; (ii) the vendor previously provided certain enumerated services to the candidate identified in the communication during the previous 120 days; and (iii) the commercial vendor uses or conveys to the person paying for the communication:

- (A) Information about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate’s opponent, or a political party committee, and that information is material to the creation, production, or distribution of the communication; or
- (B) Information used previously by the commercial vendor in providing services to the candidate who is clearly identified in the communication, or the candidate’s authorized committee, the candidate’s opponent, the opponent’s authorized committee, or a political party committee, and that information is material to the creation, production, or distribution of the communication.⁵¹

Commission regulations state that a candidate or authorized committee “does not receive or accept an in-kind contribution” resulting from coordination through a common vendor unless the communication was made at the request or suggestion of, with the material involvement of, or after substantial discussions with, the candidate or authorized committee.⁵² Further, the

⁵⁰ A commercial vendor includes “any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services.” *Id.* § 116.1(c). A “commercial vendor” also includes “any owner, officer, or employee of the commercial vendor.” *Id.* § 109.21(d).

⁵¹ *Id.* § 109.21(d)(4)(iii); *see id.* § 116.1(c).

⁵² *Id.* § 109.21(b)(2); *see id.* § 109.21(d)(1)-(3).

Commission has crafted a safe-harbor provision for commercial vendors that have established and implemented a written firewall policy that meets certain requirements.⁵³

A firewall policy satisfies the “safe harbor” if it: (1) is “designed and implemented to prohibit the flow of information between employees or consultants providing services for the person paying for the communication and those employees or consultants currently or previously providing services to the candidate who is clearly identified in the communication, or the candidate’s authorized committee, the candidate’s opponent, the opponent’s authorized committee, or a political party committee”; and (2) is “described in a written policy that is distributed to all relevant employees, consultants, and clients affected by the policy.”⁵⁴ The safe harbor, however, “does not apply if specific information indicates that, despite the firewall, information about the candidate’s . . . campaign plans, projects, activities, or needs that is material to the creation, production, or distribution of the communication was used or conveyed to the person paying for the communication.”⁵⁵

In their Responses to the Complaints in the present matters, Respondents acknowledge that parts 1 and 2 of the common vendor definition in the Commission’s coordination regulations are met here: BT and TPM are owned by the same person,⁵⁶ BT and TPM performed work in connection with the same candidate race at the same time, and third parties (Ditch Fund and March On) paid for advertisements in connection with that race.⁵⁷ Respondents argue, however,

⁵³ *Id.* § 109.21(h).

⁵⁴ *Id.* § 109.21(h)(1)-(2).

⁵⁵ *Id.* § 109.21(h).

⁵⁶ *See* 11 C.F.R. § 109.21(d)(4)(ii).

⁵⁷ *See* March On Resp. at 4; Ditch Fund Resp. at 5.

1 that BT and TPM's firewall policy satisfies the Commission's requirements and in fact prevented
2 material information from passing between BT and TPM, as set forth in the declarations.⁵⁸

3 BT and TPM's firewall policy appears to be written to provide for effective separation
4 between the entities, and based on Herrick's statements, appears to have been implemented. It
5 requires segregation of electronic documents with password protection and the use of separate
6 email lists.⁵⁹ Clients are notified of the firewall policy and the need for confidentiality.⁶⁰ The
7 firewall policy does not allow communication between the candidate-side workers and the
8 independent committee-side workers concerning their clients, and it does not exempt anyone
9 from the policy.⁶¹ Thus, it appears to satisfy the Commission's requirement to be written to
10 prevent the flow of information between the two sides of the firm.⁶²

11 Moreover, Herrick and Welsh state in their declarations that they abided by the policy in
12 connection with the 2020 Kentucky and Mississippi Senate races.⁶³ As described in detail
13 above, the declarations and firewall policy specifically detail the measures taken to ensure that
14 information would not be even inadvertently shared between Herrick and Welsh, including that
15 BT and TPM have separate office space for their strategic staff and do not have overlapping
16 employees who work on strategic services.⁶⁴ Welsh, for instance, as media director, states that
17 she was the only person to provide any strategic or media placement advice in the 2020 cycle to

⁵⁸ See BT/TPM Resp. at 3-5; Ditch Fund Resp. at 5-7; March On Resp. at 4-6.

⁵⁹ BT/TPM Resp., Ex. B.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See, e.g., Factual & Legal Analysis at 10-11, MUR 6120 (Republican Campaign Comm. of N.M.) (finding firewall policy that prevented contact between common vendor employees at issue, along with affidavits stating that there was no coordination, satisfied Commission's requirements).

⁶³ BT/TPM Resp., Herrick Decl. ¶¶ 5, 8, Welsh Decl. ¶¶ 4-5.

⁶⁴ BT/TPM Resp., Ex. B, Herrick Decl. ¶¶ 3-5, Welsh Decl. ¶¶ 4-5.

1 Ditch Fund or March On and was strictly limited to working only with non-candidate committees
 2 in the Mississippi and Kentucky Senate races in 2020.⁶⁵

3 In addition, the declaration from Jacobovitz of Van Ness, which created ads for March
 4 On in the Mississippi Senate race, offers an illustration of the firewall's application. He states
 5 that he initially contacted Herrick at BT regarding an ad for Espy, and she told him that she
 6 could not provide services because of a firewall and that he should contact TPM.⁶⁶ He then
 7 worked with Welsh at TPM, and states that neither Herrick nor Welsh divulged any non-public
 8 strategic information regarding the plans, project or needs of any candidate in the 2020 cycle.⁶⁷
 9 Similarly, de Vellis, a partner at Beacon Media, states that he was Ditch Fund's media
 10 consultant, and as the primary contact with TPM, he only discussed the substance of Ditch
 11 Fund's ad buys or the 2020 U.S. Senate race in Kentucky with Welsh.⁶⁸

12 The relevant employees here state in declarations that they complied with the policy and
 13 did not share information, satisfying the Commission's requirement that the policy be distributed
 14 to all relevant employees.⁶⁹ In sum, the firewall as written complies with Commission
 15 regulations, the relevant Respondents affirm that it was followed, and no contrary information
 16 has been alleged or has been found showing that information was shared or that that firewall was
 17 otherwise not observed.

⁶⁵ *Id.*, Welsh Decl. ¶¶ 4-5.

⁶⁶ March On Resp., Jacobovitz Decl. ¶¶ 1, 5.

⁶⁷ *Id.*, Jacobovitz Decl. ¶¶ 6-8.

⁶⁸ Ditch Fund Resp., de Vellis Decl. ¶ 1, 3-4.

⁶⁹ The Commission has stated that a "person paying for a communication seeking to use the firewall safe harbor should be prepared to provide reliable information (*e.g.*, affidavits) about an organization's firewall, and how and when the firewall was distributed and implemented." Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006).

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1 Therefore, the Commission dismisses the allegations that Ditch Fund and March On
2 made, and the McGrath Committee and the Espy Committee accepted, excessive or prohibited
3 contributions in the form of coordinated communications. In addition, the Commission
4 dismisses the allegations that Buying Time, LLC, and Targeted Platform Media, LLC, violated
5 the Act.



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

1

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Ditch Fund, *et al.*) MURs 7865, 7866
)

2

**STATEMENT OF REASONS OF COMMISSIONER
SHANA M. BROUSSARD**

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5 These matters arose from complaints alleging that two candidate committees and two non-
6 connected committees, respectively, coordinated television advertisements through common vendors,
7 Buying Time (“BT”) and Targeted Platform Media (“TPM”). In its analysis, the Office of General
8 Counsel (“OGC”) identified BT and TPM’s firewall policy as complying with Commission regulations,
9 found that the relevant Respondents complied with the policy, and did not find any information to show
10 that the firewall was violated.¹ I write to explain my vote against dismissing the allegations against all
11 Respondents.²

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I. Factual Background

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In MUR 7865, Ditch Fund, a hybrid political committee with a non-contribution account,
contracted with TPM to disseminate independent expenditures, specifically television advertisements,
supporting Amy McGrath, the 2020 Democratic U.S. Senate candidate in Kentucky.³ Simultaneously,
the McGrath Committee contracted with BT to disseminate advertising in an identical manner.⁴

In MUR 7866, March On, a hybrid political committee with a non-contribution account,
contracted with TPM to disseminate television advertisements supporting Michael Espy, the 2020
Democratic U.S. Senate candidate in Mississippi.⁵ The Espy Committee, like the McGrath Committee,
hired BT to place its television ads.⁶

¹ First Gen. Counsel’s Rpt. (“First GCR”) at 20 (Aug. 22, 2024).

² Certification ¶ 2 (Oct. 31, 2024).

³ Ditch Fund Resp. at 1-2 (July 22, 2021); *see* Ditch Fund, Amended Statement of Organization (May 2, 2021),
<https://docquery.fec.gov/pdf/129/202105029446141129/202105029446141129.pdf>.

⁴ Revised McGrath Committee Resp. at 1-2 (Feb. 26, 2021); *see* *FEC Disbursements: Filtered Results*, FEC.GOV,
[https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00711549&recipient_](https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00711549&recipient_name=buying+time&two_year_transaction_period=2020)
[name=buying+time&two_year_transaction_period=2020](https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00711549&recipient_name=buying+time&two_year_transaction_period=2020) (last visited Aug. 20, 2024) (reflecting all disbursements by the
McGrath Committee to Buying Time during the 2020 election cycle).

⁵ MUR 7866 Compl. at 2, 4-5 (Dec. 17, 2020).

⁶ *Id.*

BT was established by Catherine Herrick in 1999 to provide “media planning and buying services to political campaigns, political committees, and non-profit organizations.”⁷ In 2014, Herrick created TPM as a subsidiary of BT “to delineate between work done for candidates and work done for other independent clients.”⁸ The entities “have separate office space for their strategic staff and do not have overlapping employees that work on strategic services.”⁹ During the 2020 election cycle, BT and TPM operated pursuant to a firewall policy that was originally developed for the entities in 2016.¹⁰

For each advertisement placed on behalf of the McGrath Committee, the Espy Committee, Ditch Fund, and March On, BT and TPM, respectively, filed a NAB Form PB-18 with the FCC, to satisfy the agency’s disclosure requirements for political advertising.¹¹ Each form contained the signature of Herrick, the sole owner, president, and chief executive officer of both BT and TPM.¹²

II. Legal Analysis

An expenditure is a thing of value done for the purpose of influencing an election.¹³ Expenditures for “coordinated communications” are addressed under a three-prong test.¹⁴ A communication is coordinated and treated as an in-kind contribution when it is paid for by someone other than a candidate, a candidate’s authorized committee, a political party committee, or the authorized agents of either (the “payment prong”); satisfies one of five content standards (the “content prong”); and satisfies one of five conduct standards (the “conduct prong”).¹⁵ A communication must satisfy all three prongs to be a “coordinated communication.”¹⁶

However, when looking to the actions of commercial vendors, the conduct standard is not met, and thus the communication is not coordinated, “if the commercial vendor, former employee, or political committee has established and implemented a firewall” that is “described in a written policy that is distributed to all relevant employees, consultants, and clients affected by the policy,” and “designed and implemented to prohibit the flow of information between employees or consultants providing services for the person paying for the communication and those employees or consultants . . . providing services to the candidate who is clearly identified in the communication, or the candidate’s authorized committee, . . . or a political party committee.”¹⁷ This safe harbor “does not apply if specific information indicates that, despite the firewall, information about the candidate’s . . . campaign plans, projects, activities, or needs that is material to the creation, production, or distribution of the communication was used or conveyed to the person paying for the communication.”¹⁸

⁷ MURs 7865, 7866 Buying Time/Targeted Platform Media Resp. (Feb. 23, 2021) (“BT/TPM Resp.”), Ex. A, Declaration of Catherine Herrick ¶ 2 (“Herrick Decl.”).

⁸ BT/TPM Resp. at 2 (*citing* Herrick Decl. ¶ 3).

⁹ *Id.*, Herrick Decl. ¶ 4.

¹⁰ BT/TPM Resp., Ex. B, BT/TPM Firewall Policy.

¹¹ See First GCR at 4-5.

¹² See MUR 7865 Compl., Exs. A, B; MUR 7866 Compl., Exs. B, D. BT/TPM Resp., Herrick Decl. ¶ 1, 6.

¹³ 52 U.S.C. § 30101(9).

¹⁴ See 11 C.F.R. § 109.21.

¹⁵ 11 C.F.R. § 109.21(a); *see also id.* § 109.21(b) (describing in-kind treatment and reporting of coordinated communications); *id.* § 109.21(c), (d) (describing content and conduct standards, respectively). Herein, this is a matter that OGC reviewed under the conduct prong by a common vendor. See First GCR at 10-14; § 109.21(d)(4).

¹⁶ *Id.* § 109.21(d).

¹⁷ 11 CFR § 109.21(h)(1)-(2); *see* 11 CFR § 109.21(d).

¹⁸ *Id.* § 109.21(h)(1)-(2).

1 In the 2006 Explanation and Justification describing the firewall safe harbor in 11 CFR
 2 109.21(h), the Commission provided “that common leadership or overlapping administrative personnel
 3 does not defeat the use of a firewall[, and] . . . mere contact or communications between persons on
 4 either side of a firewall does not compromise the firewall, as long as the firewall prevents information
 5 about the candidate’s or political party committee’s campaign plans, projects, activities or needs from
 6 passing between persons on either side of the firewall.”¹⁹ Furthermore, the Commission will not draw a
 7 negative inference from the lack of a firewall.²⁰

8
 9 Applying this standard, BT and TPM are, as OGC acknowledged, covered by the safe harbor
 10 provision. However, the firewall is defective, and absent the firewall safe harbor, the facts of the matter,
 11 which arguably fail to rise to the level sufficient to find “Reason to Believe,” reveal defects that remain
 12 unaddressed.

13
 14 First, the firewall is outdated. The policy, originally written in 2016, stated that TPM was the
 15 entity that would handle federal candidate committee activity.²¹ In the 2020 election cycle, TPM did not
 16 handle federal candidate committee activity, but BT did. The policy makes no mention of BT’s
 17 responsibilities, and it notes that Waterfront Strategies, an entity not involved in the 2020 election cycle,
 18 was to handle all work involving Super PACs, other 527 organizations, and 501(c) organizations.²² In
 19 the 2020 election cycle, BT covered some client work that, in 2016, was originally designated for
 20 Waterfront Strategies. Therefore, BT’s firewall did not sufficiently apprise employees of the division of
 21 client work for the 2020 election cycle. The record also fails to establish whether the vendors distributed
 22 the firewall policy to “all relevant employees, consultants, and clients,”²³ though some employees and
 23 sub vendors did provide declarations about how the firewall policy operated,²⁴ or that the vendors
 24 informed them of the firewall.²⁵

25
 26 Second, there is a question as to whether information related to the airing of television
 27 advertisements may have been communicated between BT and TMP. There were several instances
 28 where the campaign committees aired advertisements in the same market, on the same station, and in
 29 the same timeframe as their respective independent spenders.²⁶ These overlapping advertisements were
 30 not placed on air in timeframes that would have a reasonable relation to electoral events or otherwise,
 31 which would include national television events like the Super Bowl, where television viewership in the
 32 targeted markets would be high. The lack of information from either respondent addressing these
 33 overlapping advertisements, from a common vendor, begs the question that there may have been
 34 impermissible communications.

35
 36 Lastly, Herrick’s signature appears to have been rubber stamped or duplicated on the FCC
 37 forms.²⁷ While Herrick declared that she did not violate the firewall by allowing her signature to be

¹⁹ Coordinated Communications, 71 Fed. Reg. 33190, 33207 (June 8, 2006).

²⁰ *Id.*

²¹ BT/TPM Resp., Ex. B, BT/TPM Firewall Policy.

²² *Id.*

²³ 11 C.F.R. § 109.21(h)(2).

²⁴ See MURs 7865, 7866 Buying Time/Targeted Platform Media Resp. (Feb. 23, 2021) (“BT/TPM Resp.”), Ex. A, Declaration of Catherine Herrick ¶ 2 (“Herrick Decl.”).

²⁵ See Ditch Fund Resp. at 14, Declaration of Phillip de Vellis ¶¶ 1, 4 (“de Vellis Decl.”). See also March On Resp. at 13, Declaration of Sivan Jacobovitz ¶ 5 (“Jacobovitz Decl.”).

²⁶ See MUR 7865 Compl., at 5-7; MUR 7866 Compl., at 5-7.

²⁷ First GCR at 14-16.

DRAFT MURs 7865, 7866 (Ditch Fund, *et al.*)

Statement of Reasons

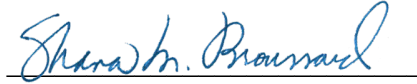
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1 stamped on each form, the Respondents do not address the potential coordination by other BT and TPM
2 employees to stamp these forms.

3
4 In closing, while BT and TPM's firewall served as sufficient evidence to rebut allegations of
5 coordination, the deficiency in the firewall and the facts that remain unaddressed, prevent me from
6 voting in accordance with OGC's recommendation of dismissal.

7
8
9
10 11/29/2024

11 Date



Shana M. Broussard

Commissioner