



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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BEFORE THE FEDERAL ELECTION COMMISSION

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

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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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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_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

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 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.

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 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

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 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.

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 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

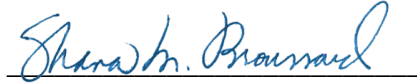
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1 stamped on each form, the Respondents do not address the potential coordination by other BT and TPM
2 employees to stamp these forms.

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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.

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9
10 11/29/2024

11 Date



Shana M. Broussard

Commissioner