



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )  
 ) MUR 7073  
Meluskey for U.S. Senate, Inc., *et al.* )

**STATEMENT OF REASONS OF COMMISSIONER LEE E. GOODMAN**

In this matter I voted to find reason to believe that Alex Meluskey and his principal campaign committee, Meluskey for U.S. Senate, Inc. and Julianne Ryan in her official capacity as treasurer (the "Committee"), violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by accepting and failing to disclose in-kind contributions and by failing to include the appropriate disclaimers in several episodes of "The Alex Meluskey Show."<sup>1</sup>

In addition to Meluskey and the Committee, the Commission's Office of General Counsel ("OGC") added as respondents the radio stations that broadcasted "The Alex Meluskey Show"—Salem Media Group, Inc. ("Salem"), Prescott Valley Broadcasting Co., Inc. ("Prescott"), and Premier Radio Stations, LLC ("Premier") (collectively, the "Radio Stations")—and recommended the Commission "take no action at this time" with respect to them, despite acknowledging that "there is no information to support a conclusion that the media entities made contributions to the Committee in violation of 52 U.S.C. § 30118(a)."<sup>2</sup>

I disagree with OGC's recommendation and voted to find no reason to believe the Radio Stations violated the Act.<sup>3</sup>

**I. FACTUAL & LEGAL ANALYSIS**

**A. The Complaint**

On its face, the Complaint cannot clearly be understood to have made any allegation *against the Radio Stations*. But even assuming *arguendo* that an allegation against the Radio Stations was clear, such an allegation would be based solely on the fact that the stations aired

<sup>1</sup> See MUR 7073 (Meluskey for U.S. Senate, Inc., *et al.*), Certification at ¶5 (Dec. 12, 2017) ("Certification"). I also voted to find reason to believe that Alexander Meluskey violated 52 U.S.C. § 30102(e)(1) by failing to file a timely Statement of Candidacy. *Id.*

<sup>2</sup> MUR 7073 (Meluskey for U.S. Senate, Inc., *et al.*), First Gen. Counsel's Rpt. at 21.

<sup>3</sup> See Certification at ¶4.

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“The Alex Meluskey Show” during Meluskey’s candidacy.<sup>4</sup> Allegations on this basis do not allege a violation of the Act.

A radio station does not violate the Act by sponsoring a show and employing a host who happens to be a candidate.<sup>5</sup> Alternatively, a radio station does not violate the Act by broadcasting and advertising a radio show paid for by a candidate.<sup>6</sup> Meanwhile, an individual radio show host may pay to broadcast a radio show he owns and controls after becoming a candidate without violating the Act.<sup>7</sup> And even where the candidate-host uses corporate resources to broadcast his own show, while that might implicate a violation by the candidate or the corporation, but it does not implicate a third-party radio station in a violation of the Act.<sup>8</sup>

Thus, in the absence of the required predicate legal violation for a reason to believe finding, the addition of the Radio Stations as respondents in this matter rested on questionable grounds.<sup>9</sup>

#### B. Definition of “Contribution”

The Act prohibits (1) corporations from making contributions to federal candidates and (2) federal candidates from knowingly accepting or receiving such corporate “contributions.”<sup>10</sup> A “contribution” under the Act includes “any gift, subscription, loan, advance, or deposit of . . .

<sup>4</sup> Compl. at 1.

<sup>5</sup> See *infra* Part I.C. and note 22.

<sup>6</sup> See Advisory Opinion 2005-18 (Reyes).

<sup>7</sup> See *id.*

<sup>8</sup> In *FEC v. Forbes*, Case No. 98-civ-6148 (S.D.N.Y. filed Aug. 31, 1998), three Commissioners voted to withdraw the agency’s suit because they determined a candidate-authored column in a candidate owned publication would be exempt from the definition of “expenditure” pursuant to the Act’s “press exemption,” which codified the First Amendment’s Free Press Clause. See Vice Chairman Darryl Wold and Commissioners Lee Ann Elliot, David A. Mason and Karl J. Sandstrom, Statement of Reasons for Voting to Withdraw the Commission’s Complaint in *FEC v. Forbes, et al.* at 1, 7-9 (May 26, 1999) (determining communications were exempt because “[n]one of the columns mentioned directly or indirectly that Mr. Forbes was a candidate for President, mentioned any other candidate for President, referred in any way to the presidential campaign . . . [nor increased] the exposure given to Mr. Forbes’ columns in the magazine, nor the distribution of the magazine.”). As noted in the Factual and Legal Analysis in this matter, however, “The Alex Meluskey Show” included express advocacy and solicited contributions to Meluskey’s campaign. See MUR 7073 (Meluskey for U.S. Senate, Inc., *et al.*), Factual & Legal Analysis at 11 (“F&LA”). That fact, however, does not implicate *the Radio Stations* on which the show aired in a violation of the Act.

<sup>9</sup> To the extent the Radio Stations were involved in broadcasting The Alex Meluskey Show, they were witnesses, not respondents. Adding the Radio Stations as respondents and gleaning information from their responses may have been an effective tactic to extract information about Meluskey prior to a finding of reason to believe in this case, but that result does not justify treating witnesses as respondents.

<sup>10</sup> 52 U.S.C. § 30118(a).

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anything of value made by any person for the purpose of influencing any election for Federal office.”<sup>11</sup> Commission regulations define “anything of value” to include in-kind contributions, such as the provision of goods or services without charge or at a charge that is “less than the usual and normal charge” for such goods or services unless exempted.<sup>12</sup> “Usual and normal charge” means “the price of those goods in the market for which they ordinarily would have been purchased at the time.”<sup>13</sup>

The complaint does not allege that the Radio Stations sold airtime to Meluskey at less than the usual and normal rate.<sup>14</sup> Instead, the complaint alleges a reporting violation by Meluskey and a potential prohibited contribution by the person who paid to broadcast the show.<sup>15</sup> Again, even assuming *arguendo* the Complaint alleged that the Radio Stations paid to broadcast the show, that would not, as a matter of law, warrant reason to believe the Radio Stations made an unlawful contribution, because the Radio Stations’ editorial decision to carry the show would be exempt from regulation under the Press Exemption.<sup>16</sup> And even assuming *arguendo* the Complaint alleged the Radio Stations sold airtime to Meluskey, that would not warrant reason to believe the Radio Stations violated the Act, because the Radio Stations would be exempt from regulation under the Commercial Vendor Exemption.<sup>17</sup>

Understandably, the Radio Stations’ responses demonstrated confusion as to the violation of the Act they were alleged to have committed.<sup>18</sup> Notwithstanding their confusion, the

<sup>11</sup> 52 U.S.C. § 30101(8)(A)(i).

<sup>12</sup> 11 C.F.R. § 100.52(d)(1).

<sup>13</sup> 11 C.F.R. § 100.52(d)(2).

<sup>14</sup> In fact, the statement that Meluskey was “[w]orking with three different radio stations one hour each per week” may easily be read to indicate an ordinary business transaction. The Commission should not draw an adverse inference in such circumstances. See Statement of Reasons of Commissioners Darryl R. Wold, David M. Mason, and Scott E. Thomas at 2, MUR 4850 (Deloitte & Touche, LLP, et al.) (“The burden of proof does not shift to a respondent merely because a complaint is filed.”).

<sup>15</sup> See F&LA at 12.

<sup>16</sup> The Press Exemption: 52 U.S.C. § 30101(9)(B)(i); 11 C.F.R. §§ 11 C.F.R. 100.73, 100.132 (exempting news stories, commentary, or editorials distributed through facilities of press organizations from the definition of expenditure and contribution).

<sup>17</sup> The Commercial Vendor Exemption: 52 U.S.C § 30101(8)(A), 11 CFR §§ 100.52(d)(1), 100.111(e)(1), MUR 5474 (Dog Eat Dog Films, Inc.). In sum, newspapers and other media are exempt from § 30120(a) under two overlapping and independent exemptions, the Press Exemption and the Business Vendor Exemption

<sup>18</sup> See Premier Response at 1 (“[T]he Complaint does not clearly identify Premier as a respondent, or allege a violation by Premier”); Salem Response at 1 (“The Complaint does not name Salem or make any factual allegations against it.”); *id.* at 2 (“[T]he Complaint does not allege that Fair Tax for All Radio and Mr. Meluskey did not pay for the program at issue, or that they did not pay enough for it.”); Email from Sanford Cohen, President of Prescott Valley, to Donna Rawls, FEC (Nov. 14, 2016) (“I’m trying to ascertain from the Complaint what our station’s role is”).

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responses do not indicate airtime and related services were sold at less than the usual and normal rate to broadcast and promote "The Alex Meluskey Show." On the contrary, the Radio Stations' responses directly rebut the accusation,<sup>19</sup> a fact acknowledged in OGC's report.<sup>20</sup> Accordingly, there is no reason to believe they violated the Act.<sup>21</sup>

### C. Press Exemption

Even if the complaint had alleged that the Radio Stations provided Alex Meluskey free airtime, that allegation if true, standing alone, would not necessarily constitute a violation of the Act. Radio stations are protected as press entities by the Act's "press exemption."<sup>22</sup> The complaint did not provide any facts which would remove that general protection. For example, the complaint did not allege that any station was owned or controlled by a political party, political committee, or candidate.<sup>23</sup> Nor did the complaint indicate that any station was not

<sup>19</sup> See Premier Response at 2, 4 (declaring under oath that Mr. Meluskey paid Premier "the same rate that other buyers . . . pay for Premier's airtime" for that time slot); Salem Response at 2 (describing how Salem provided airtime "in exchange for payment of a weekly programming fee representing Salem's normal and usual charge for the type of use at issue"); *id.* (citing attached "Time Brokerage Agreement" and confirming "Meluskey paid for the program at issue in full and on a regular basis"); *id.* ("Salem contracted with Fair Tax for All Radio and Mr. Meluskey, and required and received full, timely and fair market compensation in exchange for their use of KKNT"); Salem Response, Ex. 1, Time Brokerage Agreement between Common Ground Media, Inc. and FairTax For All and Meluskey (Dec. 28, 2016); Email from Sanford Cohen, President of Prescott Valley, to Donna Rawls, FEC (Nov. 14, 2016) (noting that Meluskey had "bought" airtime).

<sup>20</sup> See MUR 7073 (Meluskey for U.S. Senate, Inc., et al.), First Gen. Counsel's Rpt. at 20 ("The available evidence shows that Salem and Premier sold airtime and related services to Meluskey at the usual and normal charge.").

<sup>21</sup> See MUR 5467 (Michael Moore), First Gen. Counsel's Rpt. at 5 ("Purely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find a reason to believe that a violation of the FECA has occurred." (quoting MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee, Inc.)); MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1-2 ("The Commission may find 'reason to believe' only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA. Complaints not based upon personal knowledge must identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented. . . . Unwarranted legal conclusions from asserted facts, *see* SOR in MUR 4869 (American Postal Workers Union), or mere speculation, *see* SOR of Chairman Wold and Commissioners Mason and Thomas in MUR 4850 (Fossella), will not be accepted as true." (some citations omitted)).

<sup>22</sup> See Factual and Legal Analysis, MUR 6242 (J.D. Hayworth 2010) (finding no reason to believe committee violated the Act when radio station broadcast employed a radio host who was a candidate); MUR 5569 (The John and Ken Show); MUR 5555 (Friends of Dave Ross); MUR 4689 (Dornan) (finding no reason to believe committee violated the Act when candidate employed by a radio station served as a guest-host on several nationally syndicated radio shows); Advisory Opinion 2007-20 (XM Radio); Advisory Opinion 1994-15 (Byrne) (concluding no contribution results from the broadcast of a regularly scheduled radio show hosted by a candidate informing listeners on issues and lacking express advocacy or solicitations for contributions).

<sup>23</sup> 52 U.S.C. § 30101(9)(B)(i); 11 C.F.R. § 100.73; *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); *FEC v. Phillips Publishing*, 517 F. Supp. 1308, 1312-13 (D.D.C. 1981).

acting within its “legitimate press function” in airing what the complaint refers to as “radio shows in the name of Fair Tax Group.”<sup>24</sup> Without more concrete evidence based on personal knowledge that a station was not a press entity, or that it was owned or controlled by a political party, political committee, or candidate, the complaint failed to provide sufficient evidence to find reason to believe against the Radio Stations, *even if* it did not charge the usual and normal rate to air “The Meluskey Show.”

The responses, however, revealed Meluskey (or organizations he owned) owned and controlled “The Alex Meluskey Show” and that Meluskey (or organizations he owned) paid to air the show. Thus, recognizing that where a press entity, such as a broadcast station, sells airtime to another entity to broadcast its own content, the Commission’s press exemption analysis appropriately shifted to *that* entity.<sup>25</sup> The Commission then concluded (correctly) that the press exemption did not apply to “The Alex Meluskey Show.”<sup>26</sup>

#### D. The Commercial Vendor Exemption

The alternative theory—that the Radio Stations leased broadcast time to Meluskey—is also exempt. The Commission has countenanced the right of a campaign committee to pay a radio station for airtime to broadcast a candidate’s own talk show.<sup>27</sup> The Commission made clear that any regulatory conditions apply to the candidate and committee, not the radio station.

Similarly, in MURs 5539 (Fahrenheit 9/11) & 5474 (Dog Eat Dog Films, Inc. et al.), the Commission unanimously dismissed a complaint against Dog Eat Dog Films, Inc. and others for spending corporate funds to produce, advertise, and exhibit *Fahrenheit 9/11*, a political editorial film highly critical of President George W. Bush. While concluding the film did not expressly advocate the defeat of President Bush, OGC advanced an alternative basis for its no reason to believe recommendation: that even if the film constituted an independent expenditure the film and its related enterprises constituted “bona fide commercial activity.”<sup>28</sup> OGC concluded that “respondents are in the business of making, promoting, and/or distributing films, and no

<sup>24</sup> *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

<sup>25</sup> See F&LA at 6-7.

<sup>26</sup> See *id.* at 8.

<sup>27</sup> See Advisory Opinion 2005-18 (Reyes).

<sup>28</sup> MURs 5539 (Fahrenheit 9/11) & 5474 (Dog Eat Dog Films, et al.), First Gen. Counsel’s Rpt. at 13 (determining distributors and marketers of *Fahrenheit 9/11* did so “in connection with bona fide commercial activity and not for the purpose of influencing an election” and noting the commercial vendor exemption “serves as an independent basis for . . . find[ing] ‘no reason to believe’ without addressing the content” of the film, trailers, and website”); *id.* at 14-15 (“An analysis of whether the feature-length film, movie trailers and [website] are bona fide commercial activity does not turn on their content.”). OGC did not apply the Act’s press exemption because the Commission lacked four votes (at that time) recognizing the press exemption’s application to the film. See *id.* at 13 n.11. Subsequently, in Advisory Opinion 2010-08 (Citizens United), the Commission recognized that the Act’s press exemption could apply to films distributed by broadcast, cable, and satellite television, DVDs, video on demand, and movie theaters. AO 2010-08 at 7.

information has been presented to suggest that they failed to follow usual and normal business practices and industry standards in connection with [the film].” Because all of *Fahrenheit 9/11*’s production, marketing, and distribution efforts were determined to be exempt from regulation as bona fide commercial activity, OGC recommended the Commission find no reason to believe.

The evidence in the record here supports application of the commercial exemption to the Radio Stations. The Radio Stations are in the business of selling airtime for radio programs and marketing such programs. No information suggests that they failed to follow usual and normal business practices in their business transactions with Alex Meluskey. Indeed, contracts produced in several responses appear to show that usual and normal practices were followed.<sup>29</sup> Finally, the fact that certain episodes of “The Alex Meluskey Show” contained express advocacy does not remove the protection afforded by the commercial vendor exemption.<sup>30</sup>

Thus, because the evidence indicates the airing of “The Alex Meluskey Show” consisted of *bona fide* commercial activity—coupled with the lack of contrary evidence in the complaint—I believe the commercial vendor exemption applies to the Radio Stations.

## II. CONCLUSION

The information supplied by the Radio Stations (in one instance under oath) remains uncontroverted and, consistent with Commission precedent, supports a finding of no reason to believe. OGC acknowledges this, noting “the available evidence shows that Salem and Premier sold airtime and related services to Meluskey at the usual and normal charge” and that “there is no information to support a conclusion that the media entities made contributions [to the campaign].”<sup>31</sup> But rather than recommend a finding of no reason to believe, or even dismissal, OGC recommended that the Commission leave open the possibility of investigation and potential punishment “pending the results of our investigation [into Meluskey]”—presumably to unearth evidence against the Radio Stations.

I disagree with this approach, and am troubled (yet again) by certain colleagues’ unwillingness—even when confronted with “no evidence”—to remove the threat of investigation and punishment from media organizations. Indeed, it is difficult to imagine what more the Radio Stations could have done at the reason to believe stage to warrant a no reason to believe finding. The recommendation to take “no action at this time” against the Radio Stations “pending our

<sup>29</sup> See Premier Response at 5-6 (containing “Broadcast Agreement” between KFNX and Virtuous Communications LLC, an LLC whose sole member is Meluskey); Salem Response, Ex. 1, Time Brokerage Agreement between Common Ground Media, Inc. and FairTax For All and Meluskey (Dec. 28, 2016).

<sup>30</sup> MURs 5539 (*Fahrenheit 9/11*) & 5474 (*Dog Eat Dog Films, et al.*), First Gen. Counsel’s Rpt. at 14-15; see also 1994-30 at 6 (Conservative Concepts) (“Companies often determine to direct their business activities toward one type of political orientation. . . . Nevertheless, it does not, by itself, negate the merely commercial nature of an activity.”).

<sup>31</sup> MUR 7073 (Meluskey for U.S. Senate, et al.), First Gen. Counsel’s Rpt. at 20-21.

proposed investigation” also goes against court warnings that “mere ‘official curiosity’ will not suffice as the basis for [Commission] investigation.”<sup>32</sup> We should heed that warning.



Lee E. Goodman  
Commissioner

Feb. 12, 2018  
Date

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<sup>32</sup> *FEC v. Machinists Non-Partisan League*, 655 F.2d 380, 388 (D.C. Cir. 1981) (citation omitted).