September 29, 2008

By Electronic Mail

Thomasenia Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on Advisory Opinion Request 2008-14 (Melothé)

Dear Ms. Duncan:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 in regard to AOR 2008-14, an advisory opinion request submitted on behalf of Melothé, Inc., requesting the Commission's opinion with respect to two questions:

1. Does Melothé's proposed Internet campaign-TV station qualify for the press exemption?

2. If the answer to the first question is "yes," may the station, as part of news or commentary containing express advocacy, include solicitations on behalf of the featured candidates?

See AOR 2008-14 at 8.

For the reasons set forth below, the Commission should advise Melothé that it does not qualify for the press exemption under 2 U.S.C. § 431(9)(B)(i) because it is not a "press entity." In the event the Commission erroneously concludes that Melothé is a "press entity," it should nonetheless advise Melothé that its planned solicitation of contributions for its "featured" federal candidates does not constitute a "legitimate press function."

Therefore, the Commission should further advise Melothé that any corporate funds it expends for the partisan purposes described in its AOR, including its communications that solicit

contributions, do not constitute the distribution of a "news story, commentary, or editorial" and, because they do not qualify for the press exemption, will constitute "expenditures" under 2 U.S.C. § 431(9) and 441b(b)(2), and in-kind "contributions," 2 U.S.C. § 431(8), if coordinated with a committee under 2 U.S.C. § 441a(a)(7)(B) and (C).

Discussion

Since its enactment, the Federal Election Campaign Act (FECA) has included an exemption from the definition of "expenditure" for any "news story, commentary, or editorial" distributed by "any broadcasting station, newspaper, magazine, or other periodical publication...." 2 U.S.C. § 431(9)(B)(i); *see also* 11 C.F.R. § 100.132.

The Commission through numerous advisory opinions has developed a body of law that construes and applies the news media exemption. The Commission has repeatedly said that "several factors must be present for the press exemption to apply." Ad. Op. 2004-07 (MTV) at 3 (citing advisory opinions). These are:

> First, the entity engaging in the activity must be a press entity described by the Act and Commission regulations. Second, an application of the press exemption depends upon the two-part framework presented in *Reader's Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981): (1) Whether the press entity is owned or controlled by a political party, political committee or candidate; and (2) Whether the press entity is acting as a press entity in conducting the activity at issue (i.e., whether the entity is acting in its "legitimate press function").

Id. (citations omitted); *see also* Ad. Op. 2007-20 (XM Radio) at 3-4.

Melothé describes itself as an "Internet TV station." AOR at 1.[1] While some Internet-based entities provide a function identical to or similar to classic media activities, and thus fall within the press exemption,[2] others surely do not. In its 2006 rulemaking on the Internet, the Commission extensively considered how FECA rules apply to online activities and, in particular as part of that, how the media exemption applies to Internet-based media. *See* "Internet Communications," 71 Fed. Reg. 18589 (April 12, 2006).

As a result of the rulemaking, the Commission modified 11 C.F.R. 100.132, the regulation implementing the media exemption, to clarify that the exemption includes not just a broadcasting station, newspaper or magazine, but also a "Web site" and "any Internet or

---

[1] Actually, Melothé agrees with the characterization by the General Counsel's office that it is a company "in the business of developing technology and providing technical capabilities to Internet sites, not a media entity itself." AOR Supplemental Answers (Email of Sept. 12, 2008) at 1 (response to Q.1(a)) (emphasis added). Although Melothé says it "hopes ... to become a media company," *id.*, it is now just a business corporation engaged in developing technology.

[2] *See, e.g.*, Ad. Op. 2005-16 (Fired Up); Ad. Op. 2004-7 (MTV); Ad. Op. 2000-13 (iNEXTV); Ad. Op. 1996-16 (Bloomberg).

electronic publication." But the fact that online publications are eligible for the media exemption does not automatically confer the exemption on them. Just as in the case of more traditional forms of media, such as a broadcast station or newspaper, the two-part umbrella test must still be applied: is the entity a "press entity" and is it acting "in its legitimate press function."[3]

I. Melothé is not a "press entity" by any recognizable definition of that term.

Thus, the first question is whether Melothé is a "press entity." The Commission has no clearly defined test for what constitutes a "press entity," but we note that in discussing the scope of FECA's press exemption, the Supreme Court stressed the distinctive nature of a "media corporation":

> [M]edia corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public. ... A valid distinction thus exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public.

Austin v. Michigan Chamber of *Commerce,* 494 U.S. 652, 667-68 (1990); *see also McConnell v. FEC,* 540 U.S. 93, 208 (2003).

The Commission has generally given broad scope to the definition of a "press entity." *See, e.g.,* AO 2005-16 (Fired Up). But even applying a generous and protective test, the facts presented in this AOR stretch the exemption past its breaking point.

Here, Melothé presents itself as what can only be termed to be a campaign arm of the Democratic Party or one or more of its candidates. In the AOR, Melothé makes clear that it:

- will be "focused" on "the campaign(s) of one or more federal candidates," AOR at 1, but those candidates will be only Democrats: it "will likely feature, and be supportive of, Democratic candidates," *id.* at 2;

---

[3] We further note that even if certain Internet activities do not qualify for the press exemption, they may nonetheless still be exempt from regulation pursuant to other Internet-related exemptions adopted by the Commission as a result of the 2006 rulemaking, which provide very broad protection to online activities by individuals. *See* 11 C.F.R. §§ 100.94, 100.155 (exempting "uncompensated Internet activity by individuals" from the definitions of "contribution" and "expenditure"). Further, these exemptions encompass "any corporation that is wholly owned by one or more individuals" and "that engages primarily in Internet activities and that does not derive a substantial portion of its revenues from sources other than income from its Internet activities." 11 C.F.R. §§ 100.94(d); 100.155(d). As the General Counsel noted in the "Factual and Legal Analysis" that accompanied the dismissal of MUR 5928 (Kos Media) (Sept. 4, 2007), the Internet blog site at issue in that matter would have been exempt from FECA regulation under the operation of sections 100.94 and 100.155, even if the press exemption had not been found applicable. MUR 5928, Factual and Legal Analysis at 2 n.8.

Melothé simply has not provided sufficient information for the Commission to determine if it qualifies for the corporate exemption in section 100.155(d) in the event the Commission finds, as we urge, that Melothé is not a "press entity."

- will "broadcast daily from the campaign's headquarters" of the Democratic candidate or candidates it "features," *id.*;

- will "solicit money for the featured campaign(s)" of the Democratic candidates it is covering, *id.*, including having its "program hosts, interviewers and news anchors ... solicit contributions," *see* AOR Supplemental Answers (Email of Sept. 12, 2008) at 2 (response to Q.6); and

- will have programming that consists of:

  -- "Pro-Democrat/Anti-Republican commentaries" (including, presumably, what otherwise might be termed campaign ads);

  -- discussions "featuring Democratic Party leaders ... to respond to Republican attacks and negative news stories;"

  -- segments "briefing" campaign volunteers about "what's happening in the campaign today" of the Democratic candidates it is featuring;

  -- interviews with campaign staff of the Democratic candidates it is featuring;

  -- "coverage of campaign events around the country," of the Democratic candidates it is featuring, and

  -- "Full start-to-finish live or pre-recorded broadcasts of campaign speeches, major rallies or other events" for those Democratic candidates it is featuring. AOR at 2.

Indeed, Melothé states that its TV station may even "devote itself exclusively to one candidate over a period of days, weeks, or months." AOR Supplemental Answers (Email of Sept. 12, 2008) at 2 (response to Q.2).

Melothé does not suggest any limitation on the extent to which all of these activities will be freely coordinated with the featured candidate or candidates nor, if Melothé is deemed to be a "press entity," will there be any restriction on coordination. Melothé does, of course, promise to retain ultimate "control" over the editorial content of its communications. AOR at 2.

In short, Melothé's apparent purpose is to engage in purported "press" activities for the exclusive support of one or more "featured" Democratic candidates, including the apparently unlimited solicitation of contributions for their campaigns. (We say this because Melothé suggests no limitation on the extent to which it might solicit such contributions.) It will do this as a corporation, spending its corporate treasury funds, potentially in full coordination with these candidates.

With this background, it is clear that Melothé is not a "press entity" by any recognizable definition of that term. Its proposed activities are more accurately described as the campaign press operation of one or more Democratic candidates. It does all the things that a campaign or party press operation does: inform and rally the candidate's volunteers and supporters, disseminate the candidate's message; rebut opposition attacks, and solicit support and money.

Nothing in the AOR limits the ruling sought here to activities that take place solely on the Internet. In principle, the opinion sought here by Melothe would apply to a corporation involved in other forms of communications, *e.g.*, broadcast or cable.

If the Commission deems Melothé to be a "press entity," then it is a simple matter to envision wealthy supporters of any candidate, or indeed, corporate or union supporters of a candidate, pooling unlimited resources to form a corporation that will provide the candidate with some or all of his or her campaign communications needs as a massive in-kind contribution of corporate goods and services, all in the name of operating as a "press entity" performing "legitimate press functions" in "covering" the "featured" candidate's campaign. This corporate entity, funded by the unlimited donations from a candidate's supporters, and operating in full coordination with the campaign, can air the candidate's campaign ads (in the form of "commentary"), solicit funds for the candidate, rally supporters and publicize the candidate's activities.[4]

Melothé indicates that its major purpose, indeed, its sole purpose, will be to provide campaign "coverage" of the favored Democratic candidates its selects to feature. Taken to its logical conclusion, Melothé's theory that it is a "press entity" would lead to the evisceration of the political committee requirements and restrictions of FECA. If the Commission advises Melothé that it may devote itself exclusively to distributing information about, and raising money for, one or more Democratic candidates – and even to do so in full coordination with those candidates –yet be exempt from all federal campaign finance laws under the protection of the press exemption, it is not clear what type of organization would still be subject to FECA.

The one restriction the law most clearly imposes on the press exemption is that it does not apply in the case of facilities "owned or controlled by any political party, political committee, or candidate," 2 U.S.C. § 431(9)(B)(i), unless the entity "give[s] reasonably equal coverage to all opposing candidates...." 11 C.F.R. § 100.132(b). But the practical import of Melothé's request is that it would operate as the functional equivalent of a media outlet controlled by a candidate or candidates, despite its claim to the contrary, without any pretense to the balanced coverage the law requires.

Under any reasonable and common sense understanding of the "press," Melothé's request to operate as a partisan arm of Democratic campaign operations should disqualify it from that

---

[4] For similar reasons, in an analogous circumstance, the Supreme Court in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 251 (1986), said the press exemption should be narrowly construed: "A contrary position would open the door for those corporations and unions with in-house publications to engage in unlimited spending directly from their treasuries to distribute campaign material to the general public, *thereby eviscerating § 441b's prohibition.*" (emphasis added); *see also McConnell*, 540 U.S. at 208 (describing the press exemption as a "narrow exception").

status. For all of these reasons, and in light of the purpose and meaning of the press exemption, the Commission should deny Melothé's request as contrary to law.

To be sure, the Commission's precedent acknowledges that a press entity's publications (including its online activities) can contain express advocacy for or against a candidate, and can have ideological or partisan bias. *See, e.g.,* AO 2005-16 (Fired Up); *see also* 71 Fed. Reg. 18608-10 (discussion of press exemption). There are many examples of both online and mainstream media outlets that have a clear partisan bias, and we do not contest their qualification for the press exemption. Indeed, most press entities endorse candidates and use express advocacy in so doing. In its lengthy 2006 discussion of the press exemption at the conclusion of the Internet rulemaking, the Commission even noted a few random examples of established press entities publishing solicitations for federal candidates. *See* 71 Fed. Reg. 18609 at n.56.

But even accepting all these precedents, Melothé is proposing something quite different and far more radical than anything the Commission has previously approved. This is truly a case where the facts "transform differences in degree to a difference in kind." *Randall v. Sorrell*, 126 S. Ct. 2479, 2499 (2006). Allowing a corporation to serve as the equivalent of a full-service communications shop for one or more federal candidates, in the name of "covering" those candidates as the "press," is far different than allowing a "press entity" to have an ideological slant or to use express advocacy to endorse candidates in editorial commentary.[5]

The determination of whether an entity qualifies for the press exemption turns on the totality of circumstances about what an entity is, how it operates and what it does. There is no simple formula or "magic words"-type test to define the "press." On these facts, the Commission should advise Melothé that its activities, taken as a whole, are so exclusively focused on promoting and supporting one or more federal candidates of the Democratic Party that it does not qualify as a "press entity."

---

[5] There is substantial support in the Commission's precedents for limits on the extent to which a "press entity" can engage in overt candidate support. Tellingly, Melothé cites Ad. Op. 1996-48 (C-SPAN) for the proposition that the Commission has approved programming that includes "campaign commercials and candidate biographies." AOR at 7. But the Commission did so only on the basis of assurances that C-SPAN's coverage of federal candidates would be "balanced," Ad. Op 1996-48 at 1, and that "[m]oreover, NCSC would take ... affirmative steps ... to ensure that viewers would not conclude that the airing of such materials constitutes an endorsement by the C-SPAN Networks of the candidates depicted." *Id.* at 3.

Melothé is no C-SPAN; it intends both to use express advocacy in support of the candidates it "covers" and to solicit contributions for them. That hardly is the stuff of Brian Lamb. *See also* Ad. Op. 2007-07 (MTV) (approving gift of air time to presidential candidates where "each qualifying presidential candidate will be afforded an 'equal opportunity' to make his or her views known."); Ad. Op. 1998-17A (Daniels Cablevision) (approving a request by a cablecaster to give free time to Federal candidates, but "caution[ing]" that "activities by Daniels which reflect an intent to advance one candidate over another, or to give any preference to any candidate, will be deemed to fall outside the Act's media exemption."); Ad. Op. 1982-44 (DNC/RNC) (approving offer of free time by cable company where offer is made to both political parties).

II. Solicitation of campaign contributions is not a legitimate press function.

For the reasons set forth above, we strongly disagree that Melothé is a "press entity." But if the Commission erroneously concludes to the contrary, and thus reaches the second question posed in the AOR, the Commission should conclude that Melothé should not be able to engage in unlimited solicitations of campaign contributions on behalf of its "featured" federal candidates.

Even if a corporation is a "press entity," it must still act in a "legitimate press function" for its spending to be exempt. Just because *The New York Times* is a "press entity" does not permit it to spend its corporate treasury funds for billboards or television ads that expressly advocate the election of a federal candidate. As the Supreme Court said in *McConnell*, "The [press exemption] excepts news items and commentary only; it does not afford *carte blanche* to media companies to generally ignore FECA's provisions." *McConnell*, 540 U.S. at 208.

Here, Melothé proposes to regularly solicit its listeners or viewers for contributions to Democratic Party candidates; indeed, for such solicitations to be made by its "program hosts, interviewers and news anchors."

Such solicitations are not within a "legitimate press function," as any reasonable person would understand that term. It is unheard of for news anchors, for instance, to solicit campaign contributions as part of their press activities. This is not journalism; it is candidate advocacy.

Melothé cites Ad. Op. 1980-109 (Hansen) as authority for the proposition that it may devote itself to soliciting contributions for candidates. AOR at 7. Yet in that opinion the Commission was asked whether "an endorsement of, including a contribution solicitation on behalf of" a federal candidate by a regular columnist to a publication would invalidate that publication's press exemption. Ad. Op. 1980-109 at 1 (emphasis added). The isolated endorsement and solicitation in a publication at issue there is a far cry from the type of pervasive and integrated fundraising that Melothé contemplates for multiple federal candidates of a single political party.

While it may not have been unreasonable for the Commission to determine in 1980 that a single, or even occasional, endorsement or solicitation by a journalist does not invalidate a publication's press exemption, it would be entirely unreasonable and contrary to law for the Commission to conclude that Melothé's program of apparently unlimited and systematic solicitations in the guise of news coverage be deemed to be a "legitimate press function."

Melothé also cites a Statement of Reasons by two (but only two) former commissioners (Commissioners Mason and Smith) for the proposition that the press is not required to "be fair or be balanced," AOR 2008-14 at 5, and a General Counsel Report that states, "Even seemingly biased stories or commentary by a press entity can fall within the media exemption." *Id.* These citations miss the point. The issue is not whether a press entity can have a point of view on matters of public policy. The issue here is whether a group that intends, for instance, to "devote itself exclusively to one candidate over a period of days, weeks, or months[,]" or to a small number of Democratic candidates, and to solicit contributions for those candidates, is operating

within its "legitimate press function" in doing so. Nothing in Commission precedent suggests that it is.

Conclusion

We submit that an organization whose apparent sole purpose is to be the functional equivalent of a partisan campaign operation – to elect Democratic candidates and to solicit contributions for such candidates – is not a "press entity" engaged in "legitimate press functions."

Accordingly, for the reasons set forth above, we urge the Commission to advise Melothé that its proposed Internet TV station does not qualify for the press exemption at 2 U.S.C. § 431(9)(B)(i).

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ Fred Wertheimer

Fred Wertheimer
Democracy 21

/s/ J. Gerald Hebert

J. Gerald Hebert
Paul S. Ryan
Campaign Legal Center

Donald J. Simon
Sonosky, Chambers, Sachse
Endreson & Perry LLP
1425 K Street NW – Suite 600
Washington, DC 20005

Counsel to Democracy 21

Paul S. Ryan
The Campaign Legal Center
1640 Rhode Island Avenue NW – Suite 650
Washington, DC 20036

Counsel to the Campaign Legal Center

Copy to: Commission Secretary