



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )  
 )  
 Fox News Network, LLC ) MUR 6952

**STATEMENT OF REASONS OF  
CHAIRMAN MATTHEW S. PETERSEN AND  
COMMISSIONERS CAROLINE C. HUNTER AND LEE E. GOODMAN**

In May of 2015, Fox News Network, LLC (“Fox News”), announced that it would host a debate on August 6, 2015, featuring Republican candidates seeking their party’s presidential nomination. As the summer of 2015 unfolded, a large field of more than a dozen diverse Republican candidates garnered significant public interest. To give the American people an opportunity to hear from as many candidates as was practical, Fox News decided to sponsor two debates rather than one. One debate would feature the top ten polling candidates and for the second, the so-called “undercard debate,” Fox News ultimately chose to invite *any* candidate who was merely identified as a candidate in national polls, without requiring minimum poll numbers. Invitations based on these criteria resulted in two debates featuring a total of seventeen candidates.

Astonishingly, the Office of General Counsel concluded that Fox News made a prohibited corporate contribution to the candidates in violation of the Federal Election Campaign Act, as amended (the “Act”), by opening participation in its debates to a broader set of candidates than it initially contemplated.<sup>1</sup> Two of our fellow commissioners agreed. They also agreed with the Office of General Counsel’s recommendation that the Commission should penalize Fox News, while the remaining commissioner agreed that Fox News was subject to regulation but voted to dismiss the matter in an exercise of “discretion.”<sup>2</sup> Both of these alternatives, however, presume that the Commission may punish a press entity based on who it chooses to question in a debate and how it questions them.

This matter thus forces the Commission to confront a legal issue it has carefully avoided for 35 years. That is, we must now reconcile the core freedom of the press under the First Amendment to the Constitution, as well as the Act’s corresponding jurisdictional limitation upon the Commission, with the Commission’s assertion of the power to dictate whom press entities

<sup>1</sup> See First General Counsel’s Report at 8 (recommending that the Commission find reason to believe Fox News violated 52 U.S.C. § 30118(a)); Amended Certification ¶ 1 (May 24, 2016) (Commissioners Ravel and Walther voted to find reason to believe Fox News violated 52 U.S.C. § 30118(a) and approve the factual and legal analysis proposed by the Office of General Counsel); Amended Certification ¶ 2 (May 24, 2016) (Commissioner Weintraub voted to dismiss this matter as an exercise of prosecutorial discretion).

<sup>2</sup> Amended Certification ¶ 1 (May 24, 2016) (Commissioners Ravel and Walther voted to authorize conciliation on the terms proposed by the Office of General Counsel); Amended Certification ¶ 2 (May 24, 2016) (Commissioner Weintraub voted to dismiss this matter as an exercise of prosecutorial discretion).

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invite to candidate debates they host, moderate, and televise, and how they conduct those debates.

Only once in its history has the Commission threatened a press entity for hosting a candidate debate. In 1980, the Commission informed the *Nashua Telegraph* that it found reason to believe the newspaper was about to make a corporate contribution by hosting a debate three days later and that the Commission had authorized its counsel to seek an injunction to stop that debate.<sup>3</sup> As a result, then-candidate Ronald Reagan's campaign committee paid for the debate. When the moderator tried to cut off Reagan's microphone, Reagan famously refused by saying to great effect and applause, "I am paying for this microphone."<sup>4</sup>

But soon after that incident, two seminal court decisions in the early 1980's explicated press rights<sup>5</sup> and the Federal Communications Commission determined that hosting candidate debates is news coverage.<sup>6</sup> Since then, the Commission has not asserted that press entities violated the Act by hosting candidate debates, much less threatened to punish a press entity for doing so. Indeed, the issue was seemingly resolved in 2002, when a bipartisan majority of commissioners announced that a press entity's sponsorship of a candidate debate was categorically a press function that could not be regulated by the Commission.<sup>7</sup>

Nevertheless, in a drastic turn, several of our colleagues and the Office of General Counsel would have this agency regulate and punish newsroom decisions *as a matter of campaign finance regulation* in defiance of the Constitution and the plain letter of the Act. Our colleagues' position, and that of the Office of General Counsel, is all the more baffling because Fox News chose to let *every* candidate who was the subject of national polls into its debates instead of limiting the field to a favored subset—for a total of seventeen participants!—precluding any determination that it favored a select few and thereby made a prohibited corporate contribution.

The last time this issue was presented, over two years ago, our colleagues voted against recognizing the press exemption, but argued they were merely disposing of the matter on a

<sup>3</sup> See Ltr. to Telegraph Publishing Company (Feb. 20, 1980), MURs 1167, 1168, 1170 (Nashua Telegraph) (informing newspaper's publisher that the Commission found reason to believe it violated the Act's prohibition against making corporate expenditures, instructing it to answer several questions by the following day, and warning that the Commission had already authorized its counsel to seek an injunction to stop the newspaper's debate between candidates Ronald Reagan and George Bush scheduled to take place in three days because respondent did not invite other qualified candidates).

<sup>4</sup> See <http://www.cbsnews.com/videos/ronald-reagan-at-1980-gop-debate-i-am-paying-for-this-microphone/>

<sup>5</sup> See *Readers Digest Ass'n. Inc v. FEC*, 509 F.Supp. 1210,1214 (S.D.N.Y. 1981); *FEC v. Phillips Publishing, Inc.*, 517 F.Supp. 1308, 1313 (D.D.C. 1981).

<sup>6</sup> See Regarding Petitions of Henry Geller and the National Association of Broadcasters and the Radio-Television News Directors Association to Change Commission Interpretation of Certain Subsections of the Communications Act ("Geller Order"), 48 Fed. Reg. 53166, 53166-71 (Nov. 25, 1983).<sup>7</sup> MUR 5224 (WZB-TV and Boston Globe), Statement of Reasons of Chairman David Mason, Vice Chairman Karl Sandstrom, Commissioner Bradley Smith and Commissioner Michael Toner at 2.

<sup>7</sup> MUR 5224 (WZB-TV and Boston Globe), Statement of Reasons of Chairman David Mason, Vice Chairman Karl Sandstrom, Commissioner Bradley Smith and Commissioner Michael Toner at 2.

narrow legal basis—compliance with the debate regulation. Although we expressed misgivings then about the doctrinal importance of the press exemption,<sup>8</sup> we acquiesced to a dismissal on the narrower grounds of the debate regulation.<sup>9</sup> Given the Office of General Counsel's recommendation and our colleagues' votes in this matter, this compromise is no longer tenable. The Commission's debate regulation cannot be used to impose government restrictions on newsroom decisions and to punish, and even censor, American press organizations. We can no longer agree to avoid addressing freedom of the press. As we have been warning in matter after matter, our colleagues' desire to use this agency's authority to regulate and punish the press and media warrants more robust scrutiny and a civil public debate.<sup>10</sup>

As explained below, we declined to support our colleague's motion to approve the recommendations of the Office of General Counsel to punish Fox News for hosting these debates because Fox News's sponsorship of these debates was squarely within its press function and thus protected from the Commission's regulation under the press exemption and the free press clause of the First Amendment. Further, Fox News in fact complied with the Commission's debate regulation, which the Commission has previously concluded satisfies the press exemption when the debate sponsor is a press entity.

## I. BACKGROUND

Fox News, a limited liability company ("LLC") registered with the State of New York, is a broadcaster that owns and operates two national cable television networks — the Fox News Channel and the Fox Business Network — and is a subsidiary of Twenty-First Century Fox, Inc.<sup>11</sup> In January 2015, the Republican National Committee announced plans for twelve Republican presidential debates to be hosted by various news organizations throughout 2015 and 2016.<sup>12</sup> Fox News was selected to organize, moderate, and televise the first debate, which was to

<sup>8</sup> MUR 6703 (WCVB-TV), Statement of Reasons of Vice Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen; Lee E. Goodman, *The Feds Flirt With Reining in TV Talk: A TV Station Invites Two Candidates to Debate. Has It Made an Illegal Contribution to Their Campaigns?*, WALL STREET JOURNAL (Feb. 4, 2014).

<sup>9</sup> MUR 6703 (WCVB-TV), Certification ¶ 1 (Nov. 19, 2013); MUR 6703 (WCVB-TV), Statement of Reasons of Vice Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen.

<sup>10</sup> See MUR 6779 (Joel Gilbert; Highway 61 Entertainment, LLC); MUR 6703 (WCVB-TV & Hearst Stations); MUR 6320 (Sean Hannity); AO 2010-25 (RG Entertainment); see also Statement of Commissioner Steven T. Walther, AO 2010-08 (Citizens United) ("In light of the *Citizen United* decision, it would be my hope that the Commission will revisit the breadth of the Act's press exemption, and its policy underpinnings, as part of our rulemaking proceeding."); Audio Recording of Commission Open Meeting Held on July 23, 2014, at 24:00-25:50, AO 2014-06 (Paul Ryan for Congress) (statement by Commissioner Weintraub that a 1987 advisory opinion of the Commission concluded that "books don't appear to be covered by the media exemption. What we call the media exemption, oddly enough, doesn't use the word 'media' and doesn't use the word 'press' . . . . I don't know why Congress wrote the word 'periodical publication' in there but they did and we are constrained in interpreting that particular provision to interpret that particular provision and the words that it uses.").

<sup>11</sup> Resp. at 3; Company Overview of FOX News Network, LLC, <http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=4245059> (last visited Mar. 29, 2016).

<sup>12</sup> Resp. at 2.

be held on August 6, 2015, at the Quicken Loans Arena in Cleveland, Ohio.<sup>13</sup> Fox News' Executive Vice President of News (Editorial) Michael Clemente announced that Fox News would select candidates to participate in its debate according to certain criteria that would require, among other things, that a candidate place in the top ten of an average of the five most recent national polls, as recognized by Fox News, leading up to August 4, 2015 at 5:00 p.m.<sup>14</sup>

On June 11, 2015, Fox News announced that it would expand the opportunity for candidate participation by staging and broadcasting an additional debate on August 6, 2015.<sup>15</sup> This additional debate would be open to Republican presidential candidates who did not poll among the top ten, and therefore did not qualify for the main debate, but who received the support of at least 1% of poll respondents in an average of the five most recent national polls, as recognized by Fox News, leading up to August 4, 2015 at 5:00 p.m.<sup>16</sup>

On July 27, 2015, 10 days before the debate was to be held and eight days before the previously announced criteria for the undercard debate would operate to choose the participants, Fox News announced it would further expand the eligibility criteria for the second-tier debate. Specifically, Fox News announced it would include in the second-tier debate all candidates whose names were "consistently . . . offered to respondents in major national polls (as recognized by Fox News) leading up to August 4."<sup>17</sup> Mr. Clemente stated Fox News changed its criterion "[d]ue to the overwhelming interest" in the debate and "a concerted effort to include and accommodate the now 16 Republican candidate field."<sup>18</sup>

In addition to the ten candidates who satisfied the criteria for the top-tier debate, seven additional candidates' names were included in the five most recent national polls recognized by Fox, as of August 4, 2015. Fox News therefore included these seven candidates in the second-tier debate.<sup>19</sup>

<sup>13</sup> *Id.*; see Press Release, *Fox News And Facebook Partner To Host First Republican Presidential Primary Debate of 2016 Election* (May 2015), <http://press.foxnews.com/2015/05/fox-news-and-facebook-partner-to-host-first-republican-presidential-primary-debate-of-2016-election/> (Resp. Attach. A).

<sup>14</sup> Compl. at 2; Resp. at 2.

<sup>15</sup> Resp. at 2.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 3.

<sup>18</sup> In full, the relevant portion of Clemente's reported statement was: "Due to the overwhelming interest in the FOX News Facebook Debate Event Night on August 6th and in a concerted effort to include and accommodate the now 16 Republican candidate field — the largest in modern political history — FOX News is expanding participation in the 5 PM/ET debate to all declared candidates whose names are consistently being offered to Fox News in major national polls, as recognized by Fox News." Mike Allen, *Fox Lowers Threshold For Early Debate*, POLITICO (July 28, 2015), <http://www.politico.com/story/2015/07/fox-republican-debate-lowers-threshold-120748#ixzz3rselFYIo> [hereinafter "POLITICO Article"] (attached to Response as Attachment B).

<sup>19</sup> Resp. at 2-4.

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Complainant was a candidate for the Republican presidential nomination in 2016.<sup>20</sup> The Complaint alleges Fox News violated the Commission's regulations governing candidate debates by excluding him from the debate it organized, moderated, and televised on August 6, 2015.<sup>21</sup> Specifically, the Complaint alleges that Fox News failed to apply pre-established and objective candidate selection criteria in violation of 11 C.F.R. § 110.13(c), focusing on what the Complaint terms as Fox News's "last minute" switch in the selection criteria.<sup>22</sup> The Complaint challenges Fox News's right to make a "last minute" change to debate participation criteria ten days before the scheduled debate, which would include candidates whose names were "consistently" offered to respondents in national polls, and argues that "consistently" is not an objective standard, as required under the Commission's debate regulation.<sup>23</sup> The Complaint asserts that Fox News "does not provide any enlightenment or even any guidance to the candidates and their organizations on how it, as the sole arbiter, will define 'consistently'; nor does it give even a hint about which 'major national polls' it . . . will use to test eligibility."<sup>24</sup>

In addition, the Complaint asserts that Fox News was prohibited from selecting the candidates that it deemed newsworthy to participate in a debate that it televised as news programming. The Complaint points to the statement by Clemente — that "[w]e made a concerted effort to include and accommodate the now 16 Republican candidate field" — to argue that Fox News illegally selected 16 candidates, excluding him.<sup>25</sup> Finally, the Complaint argues that Fox News was legally required to use a Republican National Committee online straw poll — which it argues is "a solid reflection of 'real' GOP candidates [that] objectively draws the line between serious and inconsequential candidates" — a choice that would have included the Complainant in the debate as the 18<sup>th</sup> candidate, but no additional candidates.<sup>26</sup>

Fox News denies it selected candidates illegally and asserts that it modified its original selection criteria to expand, not selectively restrict, the opportunity for more candidates to participate in the debate.<sup>27</sup> Fox News maintains that its amended criteria were established in

<sup>20</sup> See Mark Everson, Statement of Candidacy (Mar. 10, 2015); Compl. at 1. On November 5, 2015, Everson ended his campaign. See <https://web.archive.org/web/20160313000657/http://markforamerica.com/> (last visited Mar. 29, 2016).

<sup>21</sup> Compl. at 1, 3.

<sup>22</sup> *Id.* at 3-7. The Complaint also states that Fox News structured the debate in violation of 11 C.F.R. § 110.13(b)(2), *see* Compl. at 5-6, which forbids conducting the debate in a manner which promotes or advances one candidate over another. *See* 11 C.F.R. § 110.13(b)(2); *Corporate and Labor Organization Activity; Express Advocacy and Coordination With Candidates*, 60 Fed. Reg. 64260, 64262 (Dec. 14, 1995). The content of the Complaint's allegations, however, is confined to Fox News' participant selection criteria rather than the debate structure. Accordingly, there is no reason to believe that Fox News violated 11 C.F.R. § 110.13(b)(2).

<sup>23</sup> Compl. at 4.

<sup>24</sup> *Id.* at 5.

<sup>25</sup> *Id.* at 5-6.

<sup>26</sup> *Id.* at 6.

<sup>27</sup> Resp. at 1-3.

advance of the debate (ten days) and complied with Commission debate regulations.<sup>28</sup> Citing Commission precedent and federal court decisions, Fox News posits that the criteria it applied “are consistent with the FEC regulations governing such events,” which does not require that criteria be numerical.<sup>29</sup> Fox News also invokes the press exemption and argues its sponsorship and broadcast of a debate is outside the Commission’s regulatory jurisdiction.<sup>30</sup>

## II. LEGAL ANALYSIS

The Act prohibits corporations from making contributions to federal candidates.<sup>31</sup> Expenditures coordinated with candidates or their campaigns are considered in-kind contributions. 52 U.S.C. § 30116(a)(7)(B). Accordingly, unless exempted, payments by a corporate debate sponsor to conduct a candidate debate may result in an in-kind contribution from the sponsor. There are two exemptions applicable to Fox News’ hosting of the August 6, 2015 debate: the Act’s press exemption and the exemption provided by the Commission’s debate regulation. As explained below, Fox News satisfied both of these provisions.

### A. The Fox News Debates Are Protected from Regulation by the Constitutional Freedom of the Press and the Act’s Press Exemption

The First Amendment to the Constitution provides that “Congress shall make no law . . . abridging the freedom of the press.”<sup>32</sup> The Supreme Court has emphasized “the special and constitutionally recognized role of [the press] in informing and educating the public, offering criticism, and providing a forum for discussion and debate.”<sup>33</sup> It has also explained that “the press serves . . . as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve,” and how the suppression of press rights “muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.”<sup>34</sup>

Congress incorporated the freedom of the press in the Act and codified its intent to not abridge that freedom. Specifically, Congress excluded from the Act’s definition of expenditure “any news story, commentary, or editorial distributed through the facilities of any broadcasting station . . . unless such facilities are owned or controlled by any political party, political

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<sup>28</sup> *Id.* at 2-5.

<sup>29</sup> *Id.* at 2.

<sup>30</sup> *Id.* at 5.

<sup>31</sup> 52 U.S.C. § 30118(a). An LLC that elects to be treated as a corporation by the IRS is considered a corporation under Commission regulations. See 11 C.F.R. § 110.1(g)(3). Publicly available information suggests that Fox News has elected to be treated as a corporation. See Dun & Bradstreet Business Information Report for Fox News Network, LLC at 6 (“On Aug. 21, 2014, this business was reclassified as a corporation.”) (accessed Nov. 17, 2015).

<sup>32</sup> U.S. Const., Amend. I.

<sup>33</sup> *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978).

<sup>34</sup> *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

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committee, or candidate.”<sup>35</sup> Congress explained that it enacted the press exemption to protect the press’s core First Amendment right to comment upon political matters without interference by the federal government:

[I]t is not the intent of the Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press and of association. Thus the exclusion assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.<sup>36</sup>

Thus, at bottom, the press exemption is a statutory recognition of the First Amendment’s Free Press Clause and the profoundly important role the press plays in the political affairs of our country.<sup>37</sup> Congress’s stated intent to prohibit the Commission from “limit[ing] or burden[ing] in any way” the press’s exercise of editorial decisions makes the press exemption a limit upon the Commission’s jurisdiction. The Commission can proceed to examine a press entity’s activities only if the Commission first determines the exemption does not apply.<sup>38</sup> Thus, if the press exemption applies, “the FEC lacks subject matter jurisdiction and is barred from investigating the subject matter of the complaint.”<sup>39</sup>

Courts interpreting the freedom of the press have established a two-step analysis for conducting this threshold inquiry: (1) whether the press entity is owned or operated by a political party, candidate or political committee; and (2) whether the organization is operating as a press entity in taking the action complained of.<sup>40</sup> The Supreme Court has supplied touchstones for determining whether an organization is acting as a press entity, including whether its publication, in this case a televised news program or debate, is published and disseminated in the ordinary course of the publisher’s regular press activities.<sup>41</sup>

The Commission has implemented the press exemption in a wide variety of contexts. For example, the Commission has concluded that television stations and newspapers are exempt from the Act’s regulation when they provide free and unfettered airtime or print space to

<sup>35</sup> 2 U.S.C. § 431(9)(B)(i). The Commission has incorporated this exemption into its regulations at 11 C.F.R. § 100.73 (excluding from the definition of contribution news stories and commentary) and 11 C.F.R. § 100.132 (same as to expenditure).

<sup>36</sup> H.R. Rep. No. 93-1239, 93d Congress, 2d Sess. at 4 (1974).

<sup>37</sup> U.S. Const., Amend. I (“Congress shall make no law . . . abridging the freedom of the press.”);

<sup>38</sup> See *Readers Digest Ass’n. Inc v. FEC*, 509 F.Supp. 1210,1214 (S.D.N.Y. 1981); MUR 5110 (KBHK Channel 45); MUR 5162 (ABC News); MUR 4689 (Doran), Statement of Reasons of Vice Chairman Darryl R. Wold and Commissioners Lee Ann Elliott, David M. Mason and Karl J. Sandstrom.

<sup>39</sup> *FEC v. Phillips Publishing, Inc.*, 517 F.Supp. 1308, 1313 (D.D.C. 1981).

<sup>40</sup> *Phillips Publishing*, 517 F.Supp. at 1313; *Readers Digest*, 509 F.Supp. at 1214.

<sup>41</sup> *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 250-51 (1986).

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candidates and political parties to expressly advocate their candidacies and solicit financial contributions, recognizing that this is an exercise of journalistic and editorial discretion.<sup>42</sup>

The Commission has also concluded that press entities engage in a legitimate press function when they sponsor and broadcast debates. Therefore, any payments to sponsor a debate are exempted from the Act's definitions of contributions and expenditures under the press exemption, and press entities' debate sponsorship is outside of the Commission's jurisdiction. In MUR 5224 (Boston Globe), the Commission dismissed a complaint similar to the one at issue here, involving a debate sponsored by Boston television station WBZ-TV and *The Boston Globe*. In that matter, four Commissioners issued a Statement of Reasons concluding that "a news organization's presentation of a debate is a 'news story' within the meaning of this provision of the FECA [the press exemption]."<sup>43</sup> The *Boston Globe* Statement of Reasons similarly observed the jurisdictional limit the press exemption imposes upon the Commission when contemplating regulation of a press entity's sponsorship of a debate, noting that the "statutory language of 2 U.S.C. § 431(9)(B) is categorical, and therefore precludes the Commission from creating requirements which a debate must meet in order to qualify for the press exemption."<sup>44</sup>

This conclusion is consistent with that of the Federal Communications Commission, which examined the question more than 30 years ago and concluded that debates are protected press activities.<sup>45</sup> More recently, the FCC stressed how it "is prohibited from engaging in activities that might be regarded as censorship of programming content," including any government-imposed requirement that "a particular candidate . . . be included in a debate."<sup>46</sup>

Fox News's sponsorship of the debates here was protected by the press exemption and the First Amendment to the Constitution. The undisputed factual record before us establishes that Fox News is a *bona fide* press organization that acted well within its legitimate press function in organizing, moderating, and televising its second-tier presidential debate on August 6, 2014—because sponsoring a debate is inherently within a press entity's legitimate press

<sup>42</sup> See Advisory Opinion 1998-17 (Daniels Cablevision); Advisory Opinion 1982-44 (Turner Broadcasting and WTBS); MUR 486 (Charles Percy).

<sup>43</sup> MUR 5224 (WZB-TV and Boston Globe), Statement of Reasons of Chairman David Mason, Vice Chairman Karl Sandstrom, Commissioner Bradley Smith and Commissioner Michael Toner at 2; see also, MUR 6703 (WCVB-TV), Statement of Reasons of Vice Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen.

<sup>44</sup> MUR 5224 (WZB-TV and Boston Globe), Statement of Reasons of Chairman David Mason, Vice Chairman Karl Sandstrom, Commissioner Bradley Smith and Commissioner Michael Toner at 2.

<sup>45</sup> The Federal Communications Commission has determined that debates sponsored by broadcasters is news coverage. See Regarding Petitions of Henry Geller and the National Association of Broadcasters and the Radio-Television News Directors Association to Change Commission Interpretation of Certain Subsections of the Communications Act ("Geller Order"), 48 Fed. Reg. 53166, 53166-71 (Nov. 25, 1983).

<sup>46</sup> *In the Matter of Emergency Complaint of Dennis Kucinich v. CNN and Time Warner, Inc.*, 23 F.C.C.R. 482, 484 (Jan. 18, 2008).



function.<sup>47</sup> Accordingly, its sponsorship of the debate is protected from Commission regulation by the press exemption.

Nevertheless, to the extent a legitimate press function must be proven, the facts in this regard are overwhelming. Fox News's judgments regarding the debate were made by its news department and announced by its Executive Vice President of News Editorial.<sup>48</sup> Fox News incorporated the debate into its regular course of news coverage and programming, presenting the debate across all of its news platforms, television on Fox News, radio on Fox News Radio, mobile on Fox News Mobile and online at FoxNews.com.<sup>49</sup> Experienced Fox News anchors Bret Baier, Megyn Kelly, and Chris Wallace moderated the main debate while political journalists Bill Hemmer and Martha MacCallum moderated the second-tier debate.<sup>50</sup> Ultimately, Fox News's decision to interview and broadcast 10, or 16, or 17 candidates on one or two debate stages was a wholly legitimate exercise of its editorial and journalistic discretion entitled to the full protection of the press exemption.

Fox News also made the obvious judgment that it could not accommodate the "approximately 130 declared Republican presidential candidates,"<sup>51</sup> but nonetheless "endeavored to be inclusive to the extent practicable."<sup>52</sup> Fox News thus made two newsroom judgments to provide the public expanded coverage and information about as broad a field of candidates as practicable. First, it decided to moderate and cover two debates instead of one. This afforded the public an opportunity to hear from more than the 10 candidates selected to participate in the main debate. Second, Fox News decided to expand its selection criteria. Fox News's decision to expand the participation criteria in response to "growing public interest in hearing from a broad array of candidates" and "in a concerted effort to include and accommodate the now 16 Republican candidate field"<sup>53</sup> — that is, to include additional candidates — is wholly consistent with an editorial judgment that 16 candidates were *newsworthy* and viewers would benefit from hearing from additional candidates.<sup>54</sup> Accordingly, the press exemption plainly exempts Fox News's sponsorship of the August 6, 2015 debate.

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<sup>47</sup> The Federal Communications Commission has determined that debates sponsored by broadcasters is news coverage. See Regarding Petitions of Henry Geller and the National Association of Broadcasters and the Radio-Television News Directors Association to Change Commission Interpretation of Certain Subsections of the Commun

<sup>48</sup> Resp. at Attachment A.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at Attachment B.

<sup>51</sup> *Id.* at 1.

<sup>52</sup> *Id.* at 2.

<sup>53</sup> *Id.* at 5 (quoting POLITICO Article, *supra*) (emphasis added). Although Clemente mentioned a 16-candidate field, a total of 17 candidates participated in either the top-tier or second-tier debate.

<sup>54</sup> *Id.* There is a lurking absurdity in our colleague's interpretation of the interplay between the Commission's debate regulation and the Act's press exemption. If, as they would interpret the debate regulation, a news organization makes a prohibited corporate contribution by paying for a program in which it questions 17 candidates

**B. Fox News Complied With the Commission's Debate Regulation and Thus Its Sponsorship of the Debates Is Exempt from Commission Regulation under the Press Exemption**

As explained below, the Commission adopted a regulation in 1979 governing the sponsorship of debates by corporations and press organizations. In 1996, the Commission harmonized its debate regulations with the Constitutional freedom of the press and the Act's press exemption by clarifying that the debate regulation serves as a safe harbor, which ensures satisfaction of the test developed by the courts to determine the application of the press exemption. Thus, if a press entity complies with the Commission's debate regulation, it *per se* operates within its press function and therefore is exempt from the Commission's regulation. Here, Fox News complied with the Commission's debate regulation when it sponsored the August 6, 2015, debates and therefore it was operating within its legitimate press function and is exempt from the Commission's regulation.

*1. The Commission's Debate Regulation*

Commission regulations supplement the statutory press exemption with an additional exemption from the definitions of contributions and expenditures for the sponsorship of candidate debates. The purpose of the debate rules was to provide an exception to FECA's corporate contribution ban at 52 U.S.C. § 30118(a) so that non-profit organizations and news media organizations can stage debates without being deemed to have made prohibited contributions to the candidates participating in the debates.<sup>55</sup>

Under the debate regulation, funds used or provided "to defray costs incurred in staging candidate debates" *per se* are not contributions when the debates are conducted "in accordance with the provisions of 11 C.F.R. [§§] 110.13 and 114.4(f)."<sup>56</sup> Sections 110.13 and 114.4(f), respectively, provide in relevant part that a broadcaster (including a cable television operator, programmer or producer) staging a candidate debate has "discretion" regarding how to structure its debate and "must use pre-established objective criteria to determine which candidates may participate in the debate" in order to qualify for the safe harbor protection of the regulation.

To qualify as "objective," criteria need not "be stripped of all subjectivity or be judged only in terms of tangible, arithmetical cut-offs. Rather, they must be free of 'content bias,' and not geared to the 'selection of certain pre-chosen participants.'"<sup>57</sup> In prior matters considering

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based on its participation criteria, then how can that same news organization be permitted under the press exemption, as it must, to pay for the staging, filming, and broadcasting costs to interview a single candidate (or 17 candidates individually) of its editorial choosing?

<sup>55</sup> See Notice of Disposition of Petition for Rulemaking, 80 Fed. Reg. 72616 (Nov. 20, 2015).

<sup>56</sup> See 11 C.F.R. § 100.92.

<sup>57</sup> MUR 6703 (WCVB-TV), Factual and Legal Analysis at 5.

the “objectivity” of debate selection criteria, the Commission and federal courts have not required rigid definitions or mathematical percentages.<sup>58</sup>

As Fox News correctly observes here, one federal court has approved the Commission’s acceptance of editorial judgments such as “professional opinions of Washington bureau chiefs of major newspapers, news magazine and broadcast networks; the opinions of professional campaign managers and pollsters not employed by the candidates; the opinions of representative political scientists specializing in electoral politics; a comparison of the level of coverage on front pages of newspapers and exposure on network telecasts; and published views of prominent political commentators.”<sup>59</sup>

In MURs 4451 and 4473 (Commission on Presidential Debates), the Commission explained in a Statement of Reasons that the debate regulations sought to give debate sponsors wide leeway in deciding what specific criteria to use:

During the [FEC]’s promulgation of § 110.13, the [FEC] considered the staff’s recommendation to specify certain ostensibly objective selection criteria in the regulations and to expressly preclude the use of “[p]olls or other assessments of a candidate’s chances in winning the nomination or election.” . . . The [FEC] unanimously rejected this approach. . . . Instead, the Commission decided that the use of outside professional judgment in considering candidate potential is permissible.<sup>60</sup>

The Commission then noted that questions “can be raised regarding any candidate assessment criterion,” but asking “such questions each and every time a candidate assessment criterion is used . . . would render the use of that criterion unworkable.”<sup>61</sup> The Commission noted it would look for “specific evidence that a candidate assessment was ‘fixed’ or arranged in some manner to guarantee a preordained result,” but otherwise would not “look behind and investigate every application of a candidate assessment criterion.”<sup>62</sup> The Commission also recently explained that,

<sup>58</sup> See MURs 4956, 4962, 4963 (Union Leader Corp., *et al.*). Courts reviewing the Commission’s assessment of the objectivity of debate participation criteria have acknowledged the Commission’s authority to define which criteria are reasonable.

As the D.C. Circuit has noted, 11 C.F.R. § 110.13(a) “does not spell out precisely what the phrase ‘objective criteria’ means . . .” \* \* \* The regulation therefore does not “mandat[e] a single set of ‘objective criteria’ all staging organizations must follow,” but rather “[gives] the individual organizations leeway to decide what specific criteria to use.” \* \* \* As a result, “[t]he authority to determine what the term ‘objective criteria’ means rests with the agency . . . and to a lesser extent with the courts that review agency action.”

*Buchanan v. FEC*, 112 F. Supp. 2d 58, 73 (D.D.C. 2000), *aff’d in part*, No. 00-5337 (D.C. Cir. Sept. 29, 2000) (internal citation omitted).

<sup>59</sup> Resp. at 4; *Buchanan*, 112 F. Supp. 2d at 78 n.11.

<sup>60</sup> MURs 4451 and 4473 (Commission on Presidential Debates), Statement of Reasons at 8.

<sup>61</sup> *Id.* at 9.

<sup>62</sup> *Id.*

“[w]ithin the realm of reasonable criteria,” it would give “great latitude” to debate sponsors’ criteria for participant selection.<sup>63</sup>

Likewise, as the Commission noted in promulgating section 110.13(c), to establish that the criteria were set in advance of selecting the debate participants, staging organizations “must be able to show that their objective criteria were used to pick the participants, and that the criteria were not designed to result in the selection of certain pre-chosen participants.”<sup>64</sup>

Accordingly, the debate regulation historically has been applied with great flexibility. Since the court decisions in *Phillips Publishing* and *Reader’s Digest* in 1981, the Commission has never found a bona fide press organization failed to comply with the debate regulation.

2. *For Press Entities, the Debate Regulation Buttresses the Press Exemption.*

From the Commission’s beginning, it has struggled doctrinally to analyze press-sponsored debates under the Free Press Clause of the Constitution, the statutory press exemption, and the debate regulation.<sup>65</sup> But eventually, the Commission reasoned these provisions actually complement one another.

The Commission’s first attempt to craft a debate regulation in July 1979 omitted any mention of the press. Members of Congress, the press, and the Federal Communications Commission (“FCC”) reacted to this omission — and the necessary implication that the Commission was prohibiting press entities from sponsoring debates, as they had for decades.<sup>66</sup> Congress then disapproved the regulation.<sup>67</sup> Instead of clarifying that the press was not regulated by the debate exemption in its December 1979 version of the regulation, the Commission instead included the press in the scope of the regulation and further asserted that press sponsorship of debates was not covered by the press exemption.<sup>68</sup> The Courts subsequently decided *Phillips* and *Readers Digest*, which concluded that the First Amendment shields press entities from the Commission’s regulation. Additionally, in 1982 (and again in 1998), the Commission issued advisory opinions confirming the right of the press to provide air

<sup>63</sup> See *Notice of Disposition of Petition for Rulemaking*, 80 Fed. Reg. at 72616.

<sup>64</sup> *Corporate and Labor Organization Activity; Express Advocacy and Coordination With Candidates*, 60 Fed. Reg. at 64262 (emphasis added).

<sup>65</sup> See, e.g., MUR 6703 (WCVB-TV). The Commission divided 3-3 on a vote to find no reason to believe on the basis that the Commission’s jurisdiction was limited under the press exemption. As a compromise, the Commission then voted 6-0 to find no reason to believe on the basis that WCVB-TV complied with the debate regulation. MUR 6703 (WCVB-TV) Certification ¶ 1 (Nov. 21, 2013).

<sup>66</sup> Concurring Statement of Commissioner Lee E. Goodman to the Notice of Disposition of Petition for Rulemaking on Candidate Debates at 6 (Nov. 9, 2015).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 8-9.

time to one candidate, alone.<sup>69</sup> And in 1983, the FCC determined that debate sponsorship was bona fide news coverage.<sup>70</sup> These developments forced the Commission to reconcile its debate regulation with the press exemption.

In 1996, the Commission amended the debate regulation. In its Explanation and Justification, the Commission acknowledged its prior advisory opinions that recognized broad press freedom to donate free, unfettered time to candidates and parties, as well as court decisions interpreting the press exemption.<sup>71</sup> The Commission focused on court decisions conditioning the press exemption upon a press organization's dissemination of news and commentary "to fall broadly within the press entity's legitimate press function," and squared the debate regulation with the press exemption by observing that press organizations "can satisfy this standard" by complying with the Commission's debate regulation.<sup>72</sup> Thus, a press entity's compliance with the relatively straightforward requirements of the debate regulation establishes that it is engaging in legitimate press activity within the Act's press exemption. That is, the debate regulation is effectively a *safe harbor* for press entities that allows them to efficiently show they engaged in legitimate press activity without entangling the Commission in complicated judgments regarding legitimate press activity.<sup>73</sup> So long as a press organization conforms its debate sponsorship with the regulation, the Commission will recognize the organization's conduct as a *per se* "legitimate press function" and thus protected from regulation by the Act's press exemption.

If, however, a press entity ventures beyond the safe harbor of the regulation, its disbursements and activities may nonetheless be exempt from the definition of contribution under the press exemption, albeit without the *per se* protection of the debate regulation. In that instance, the Commission must decide if a press entity sponsoring a debate nevertheless acted within the bounds of its press function.

3. *Fox News' Sponsorship of the August 6, 2015 Debate Complied with the Commission's Debate Regulation and, In Any Event, Is Protected by the Press Exemption.*

Fox News conducted the second-tier debate in accordance with the Commission's debate regulation. As the Commission explained in 1995, staging organizations must be able to show

<sup>69</sup> For a more complete summary of the tension between the press exemption and the debate regulation, see Concurring Statement of Commissioner Lee E. Goodman to the Notice of Disposition of Petition for Rulemaking on Candidate Debates (Nov. 9, 2015); see also MUR 5224 (WZB-TV and The Boston Globe).

<sup>70</sup> Concurring Statement of Commissioner Lee E. Goodman to the Notice of Disposition of Petition for Rulemaking on Candidate Debates at 11 (Nov. 9, 2015).

<sup>71</sup> *Candidate Debates and News Stories*, 61 Fed. Reg. 18049, 18052 (Apr. 24, 1996).

<sup>72</sup> *Id.* (citing *Readers Digest*, 509 F.Supp. at 1214).

<sup>73</sup> The Commission's Office of General Counsel agrees that the debate regulation is a useful proxy for assessing "legitimate press function," advising the Commission that "use of objective, pre-established selection criteria not designed to result in the selection of pre-chosen candidates ensures that the media entity is acting within its 'legitimate press function' in staging the debate." First Gen. Counsel Rep. at n. 21. But it cannot be the exclusive test for what press activity qualifies as "legitimate press activity" under the press exemption statute and Free Press Clause of the Constitution.

that their selection criteria determine the participants, and that the criteria were not designed to result in the selection of certain pre-chosen participants. Section 110.13 thus requires that debate sponsors “use pre-established objective criteria to determine which candidates may participate in [the] debate.”<sup>74</sup> As explained below, the record indicates that Fox News’s selection criteria were both pre-established and objective.

Fox News used “pre-established” criteria by announcing its final selection criteria on July 27, 2015, which was eight days before those criteria could be satisfied and would operate to select the field of invitees, and ten days prior to the debate. The criteria resulted in the identification of a total of 17 candidates for the two debates on August 6, including seven for the second-tier debate. That Fox News announced an initial set of criteria for the second-tier debate on June 11, 2015, and a final set of criteria on July 27, 2015, does not mean that it failed to set “pre-established” criteria. The Commission’s debate regulation does not require selection criteria to be established a certain number of days before a debate nor does it prohibit changing selection criteria before the selection and invitation of debate participants.<sup>75</sup> The key requirements, satisfied here, are that a debate sponsor chooses selection criteria before invitees are selected and that the criteria select the invitees.<sup>76</sup> By finalizing and announcing its selection criteria in advance of determining invitees, and using those criteria to select the invitees, Fox News used “pre-established” criteria.

Fox News also used “objective” criteria by basing its final selection criteria for the second-tier debate on national polls. “[T]o qualify as ‘objective,’ the criteria need not ‘be stripped of all subjectivity or be judged only in terms of tangible, arithmetical cut-offs. Rather, it appears that they must be free of ‘content bias,’ and not geared to the ‘selection of certain pre-chosen participants.’”<sup>77</sup> The objective criteria may be set to “control the number of candidates participating in” a debate if the staging organization believes there are too many candidates to stage a “meaningful debate.”<sup>78</sup>

Fox News announced that the second-tier debate would be open to “those declared Republican presidential candidates whose names were consistently being offered to respondents in major national polls (as recognized by Fox News) leading up to August 4” and who did not qualify for the top-tier debate.<sup>79</sup> Such criteria are sufficiently objective under both federal court

<sup>74</sup> 11 C.F.R. § 110.13(c).

<sup>75</sup> The criteria Fox News announced before July 27, 2015, were to be applied to poll results as of August 4, 2015. Resp. at 2. Accordingly, Fox News’s July 27, 2015, criteria were instituted before the earlier criteria operated to select candidates to be invited to the debate.

<sup>76</sup> See MUR 6703 (WCVB-TV), Factual and Legal Analysis at 5 (“To establish that the criteria were pre-established, the Commission has stated that, ‘[s]taging organizations must be able to show that their . . . criteria were used to pick the participants.’”) (quoting *Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates*, 60 Fed. Reg. at 64262).

<sup>77</sup> *Id.* (quoting MURs 4956/4962/4963 (Union Leader, *et al.*), First General Counsel’s Report, at 23).

<sup>78</sup> *Notice of Disposition of Petition for Rulemaking*, 80 Fed. Reg. at 72617; *Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates*, 60 Fed. Reg. at 64262.

<sup>79</sup> Resp. at 3.

and Commission precedent.<sup>80</sup> Moreover, Fox News's debate criteria appear to be "free of any content-bias designed to exclude any particular candidate."<sup>81</sup> There is no evidence that the criteria were not used to choose the participants or that the criteria were designed to favor particular candidates over others. At the time the final criteria were announced, Fox News expected them to result in the inclusion of *all* candidates generally acknowledged to be the significant candidates in the Republican primary—which Fox anticipated would number 16 candidates. In fact, the criteria produced 17 invitees.

Fox News's decision to invite all candidates whose names were consistently included in national polls responded to "growing public interest in hearing from a broad array of candidates," and not any effort to "promote or advance' one candidate over another."<sup>82</sup> All criteria necessarily include some candidates while excluding others. The function of an objective standard ensures that the debate sponsor does not select certain candidates for the sole purpose of advantaging their electoral prospects over other candidates. To the extent the Commission has historically expressed concern about designing criteria to result in the selection of pre-chosen candidates, that concern is less compelling where, as here, the debate sponsor sought not to advantage certain candidates over others by excluding certain candidates, but rather to expand debate participation to every candidate being polled in a demonstrable effort to include as many as candidates as practical. The Commission has already approved of using debate criteria to *limit* the field of candidates in a debate to ensure that the debate is "meaningful," a practice that would presumably raise a greater concern about sponsors pre-selecting candidates to favor than Fox News's "concerted effort to include and accommodate" the entire field of candidates included in national polls at the time of the August 6, 2015 debate.<sup>83</sup>

Thus, by announcing its selection criteria before candidates were invited, using those criteria to select the invitees, and basing its selection criteria on whether a candidate's name consistently appeared in major national polls, Fox News used pre-established objective criteria. Consequently, by operation of the Commission's debate regulation, its payments to sponsor the debate were neither contributions nor expenditures.

<sup>80</sup> See *Buchanan*, 112 F. Supp. 2d at 78 n.11 (approving as objective criteria "professional opinions of Washington bureau chiefs of major newspapers, news magazines and broadcast networks," "opinions of professional campaign managers and pollsters not employed by the candidates," "opinions of representative political scientists specializing in electoral politics," "the level of coverage on front pages of newspapers and exposure on network telecasts," and "published views of prominent political commentators"); MUR 6703 (WCVB-TV) (approving size of campaign organization, campaign schedule, press coverage, campaign fundraising, and polling as objective criteria); MUR 5650 (University of Arizona) (approving level of campaign activity and significant voter interest as objective criteria); MUR 5395 (Dow Jones, et al.) (approving active campaigning, ability to fundraise, and standing in public polls as objective criteria); MURs 4956/4962/4963 (Union Leader Corporation, *et al.*) (approving significant candidate and campaign organization presence as objective criteria).

<sup>81</sup> MUR 6703 (WCVB-TV), Factual and Legal Analysis, at 5.

<sup>82</sup> Resp. at 2.

<sup>83</sup> *Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates*, 60 Fed. Reg. at 62262.

