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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR 5530
DATE COMPLAINT FILED: 9/8/04
DATE OF NOTIFICATION: 9/15/04
DATE ACTIVATED: 2/15/05

EXPIRATION OF THE STATUTE OF
LIMITATIONS: 9/1/08

COMPLAINANT: Gregg Tyler Sims

RESPONDENTS: Commission on Presidential Debates

RELEVANT STATUTES AND REGULATIONS: 2 U.S.C. § 431(9)(B)(ii)
2 U.S.C. § 441b(a)
11 C.F.R. § 110.13
11 C.F.R. § 114.4(f)

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

In this matter, complainant, Gregg Tyler Sims ("Sims"),¹ asserted that respondent, the Commission on Presidential Debates ("CPD"), violated the Federal Election Campaign Act of 1971, as amended ("the Act") by requiring that each candidate show significant public support to participate in the 2004 presidential debates.

¹ Sims identified himself as a supporter of Michael Petrouka, the Constitution Party's 2004 presidential candidate. Mr. Peroutka was on the ballot in 36 states and received a total of 130,285 votes in the November 2, 2004 presidential election. See Constitution Party National Website, <http://www.constitution-party.net> (last accessed March 17, 2005.)

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1 Sims did not object to the first two criteria of the CPD's Nonpartisan Candidate Selection
2 Criteria: constitutional eligibility and ballot access. However, he asserted that the third criterion,
3 that each candidate have the support of at least 15% of the electorate as determined by five
4 national public opinion polling organizations, violated the "election law and my constitutional
5 rights."² Specifically, Sims claimed that the use of polling results to determine which candidates
6 to invite to the debates is "partisan" and a deliberate attempt to avoid including those candidates
7 who theoretically could win the election based on their ballot access. While presenting virtually
8 no evidence, complainant contended that the CPD's selection criteria has served to benefit only
9 the two major parties and their supporters and that it used polling results to avoid letting
10 "anybody else really run in the race." Complaint at 3. Further, complainant requested that the
11 CPD be removed as the staging organization and replaced by "a debate committee who will
12 follow only the first two guidelines of the CPD's selection criteria for debate candidates." *Id.*

13 CPD responded that the sufficiency of its debate criteria, including the third "indicators
14 of electoral support" criterion, has been previously considered by the Commission in several
15 MURs and consistently resolved in the CPD's favor. CPD stated that in these prior cases, the
16 Commission has determined "the CPD satisfies the requirement of a staging organization that it
17 not endorse, support or oppose political candidates or political parties," and the "CPD's criteria
18 for participation in the candidate debates appear to be pre-established, objective criteria as
19 required by 11 C.F.R. § 110.13(c) and not designed to result in the selection of certain
20 prechosen participants." Response at 2. Respondent also submitted several Declarations to
21

² Sims also claimed that the CPD's inclusion of "indicators of electoral support" in its selection criteria violated his rights under Articles IV and VI of the U.S. Constitution, the First and Fourteenth Amendments, as well as 42 U.S.C. §§ 1971 and 1973. This report does not address these allegations as they are not within the Commission's jurisdiction. See also *Perot v. FEC*, 97 F.3d 553, 557 (D.C. Cir. 1996) (First Amendment claim presented by plaintiff could not lie because CPD is not a state actor)

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1 counter complainant's assertions of bias in its inclusion of electoral support criterion. The
2 Declarations signed by Executive Director Janet H. Brown and board member Dorothy S.
3 Ridings asserted that the CPD's rationale for including the "indicators of electoral support"
4 criterion was entirely objective and consistent with the regulations. CPD's Response, Exhibits 1
5 and 7. The affiants both avowed that the selection criteria at issue, including the "electoral
6 support" criterion, were not adopted with partisan or bipartisan purpose or with the intent to keep
7 any particular party from participating in the debates or "to bring about a predetermined result."
8 *Id.*

9 When evaluated against the CPD's response, the relevant MUR and case precedent and
10 the public record, complainant's allegations are insufficient to generate an investigation of the
11 CPD's debate candidate selection policies or its eligibility to stage presidential debates.
12 Therefore, this Office recommends that the Commission find no reason to believe that the CPD
13 violated the Act.

14 **II. APPLICABLE LAW AND ANALYSIS**

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16 **A. Background**

17 The CPD was organized as a not-for-profit corporation in the District of Columbia in
18 February of 1987. Its mission is to sponsor general election presidential and vice presidential
19 debates and related voter education activities. CPD's Response, Exhibit 1, ¶3. The CPD derives
20 its funding from sources that include corporations, foundations, universities and private
21 donations. *Id.*, ¶5.

22 Since 1988, the CPD has staged these debates pursuant to 2 U.S.C. § 431(9)(B)(ii)'s safe
23 harbor provision which exempts from the definition of "expenditure" "nonpartisan activity
24 designed to encourage individuals to vote or register to vote." This exemption permits

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1 “[n]onprofit organizations described in 26 U.S.C. 501(c)(3) or (c)(4) and which do not endorse,
2 support, or oppose political candidates or political parties” to “stage candidate debates in
3 accordance with this section and 11 C.F.R. § 114.4(f).” 11 C.F.R. § 110.13(a)(1). The
4 regulations leave the structure of the debate to the discretion of the staging organization provided
5 that the organization does not arrange the debates in a manner that promotes or advances one
6 candidate over another, and that the criteria for candidate selection are objective and pre-
7 established, pursuant to 11 C.F.R. §§ 110.13(b) and (c).³ Thus, if the debate staging organization
8 meets the requirements of section 110.13(a)(1), and stages debates in accordance with sections
9 110.13(b) and (c) and section 114.4(f), the organization’s activities are exempt from the
10 definitions of “contribution” and “expenditure.”

11 On September 24, 2003, the CPD announced that its candidate selection criteria for the
12 2004 general election debates were the same criteria applied during the 2000 general election:

13 (1) evidence of the candidate’s constitutional eligibility to serve as President of the United States
14 pursuant to Article II, Section 1 of the United States Constitution; (2) evidence of ballot access,
15 meaning that the candidate qualified to have his/her name appear on enough state ballots to have
16 at least a mathematical chance of securing an Electoral Majority in the 2004 general election;
17 and (3) indicators of electoral support of at least 15% fifteen percent of the national electorate as
18 determined by five selected national public opinion polling organizations, using the average of
19 those organizations’ most recently publicly reported results at the time of the determination.

20 Candidates had to satisfy all three criteria in order to be invited to debate. CPD’s Response,

³ Corporations staging debates in accordance with 11 C.F.R. § 110.13 may use their own funds to do so, and may also accept donations from other corporations and labor organizations for the purpose of staging the debates. 11 C.F.R. §§ 114.4(f)(1) and (3), *see also* 11 C.F.R. §§ 100.92 and 100.154 (exempting funds used to defray costs incurred in staging candidate debates in accordance with the provisions of 11 C.F.R. §§ 110.13 and 114.4(f) from the definitions of “contribution” and “expenditure,” respectively).

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1 Exhibit E and The Commission on Presidential Debates Homepage, <http://www.debates.org> (last
2 accessed March 17, 2005).⁴ *Id.*

3 B. Analysis

4 The Commission has previously rejected claims that were virtually identical to those
5 brought by complainant and the courts have upheld these decisions. In MURs 4987, 5004 and
6 5021 (Buchanan) the Commission specifically considered the selection criteria the CPD adopted
7 for the 2000 presidential and vice presidential debates and approved its use of "indicators of
8 electoral support" as one of those criteria. The Commission found that the CPD's selection
9 criteria were objective as required by 11 C.F.R. § 110.13(c) and "not designed to result in the
10 selection of certain pre-chosen participants."⁵ See First General Counsel's Report in MURs
11 4987, 5004 and 5021, at 15 (July 19, 2000). The Commission found that the inclusion of the
12 electoral support criterion appeared to "be even more objective than the 1996 candidate criteria"
13 and in accordance with the requirements of 11 C.F.R. § 110.13. *Id.* at 17.

14 The complainants contested the dismissal of MUR 4987 (Buchanan) under section
15 437g(a)(8), but the court upheld the Commission's determination that the CPD was an eligible
16 debate staging organization, as well as concluding that the "15% support level set by the CPD"
17 in its third criterion was not inconsistent with the Commission's regulations. *Buchanan v. FEC*,
18 112 F. Supp. 2d 58, 74 (D.D.C. 2000), *aff'd in part*, No. 00-5337 (D.C. Cir. September 29, 2000)

⁴ On September 24, 2004, the CPD announced that after application of its Non-Partisan Candidate Selection Criteria for 2004 it was extending invitations to the first debate on September 30, 2004 to President George W. Bush and Senator John F. Kerry. In all, the CPD sponsored three presidential debates between Senator Kerry and President Bush. The Commission on Presidential Debates Homepage, <http://www.debates.org> (last accessed March 17, 2005).

⁵ As noted previously, the Commission gives great latitude in establishing the criteria for participant selection. In promulgating 11 C.F.R. § 110.13(c), the Commission stated, in pertinent part, that "[t]he objective criteria may be set to control the number of candidates participating in a debate if the staging organization believes that there are too many candidates to conduct a meaningful debate." 60 Fed. Reg. 64,262 (December 14, 1995).

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1 (“*Buchanan*”). The court specifically addressed the CPD’s use of pre-debate polling criticized in
2 the current matter. The *Buchanan* court held that it was not unreasonable or subjective to
3 consider the extent of a candidate’s electoral support prior to the debate to determine whether the
4 candidate is viable enough to be included. *Id.* at 75, *see also Natural Law Party v. FEC*, Civ.
5 Action No. 00-02138 (D.D.C. September 21, 2000), *aff’d in part*, No. 00-5338 (D.C. Cir.
6 September 29, 2000)(brought by complainants in MUR 5004, the court found for the
7 Commission based on the reasoning set forth in *Buchanan*.)⁶

8 Complainant here presents no new evidence of partisan or subjective behavior by the
9 CPD beyond that considered and found insufficient to support a reason to believe finding in
10 these prior Commission decisions. Therefore, this Office recommends that the Commission find
11 no reason to believe that the Commission on Presidential Debates violated 2 U.S.C. § 441b(a),
12 and close the file.

13 **III. RECOMMENDATIONS**

- 14 1. Find no reason to believe that the Commission on Presidential Debates violated
15 2 U.S.C. § 441b(a).
16
17 2. Approve the appropriate letters.

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⁶ In another section 437g(a)(8) dismissal suit involving a challenge to the Commission’s finding of no reason to believe that CPD violated the Act in MUR 5378 (*Hagelin*), a district court granted plaintiffs summary judgment in part and reversed and remanded the case to the Commission for further proceedings consistent with the court’s decision. *Hagelin v FEC*, Civil Action 04-00731 (HHK). MUR 5378 involved the CPD’s decision to exclude third party candidates from the audience of the October 3, 2000 debate, which decision is not raised in the instant MUR. The Commission has filed a notice of appeal. *Id.* On October 6, 2004, the court granted the Commission’s motion for a stay pending appeal, retroactive to August 31, 2004. *Id.*

Most recently, in MUR 5414 (*Farah*), the Commission rejected complainant’s allegation that the CPD violated the Commission’s debate staging regulations in a variety of ways, including an allegation that the 15% criterion violated 11 C.F.R. § 110.13(c)

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1 3. Close the file.

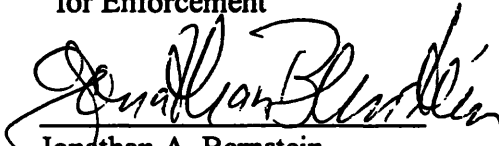
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