

**FEDERAL ELECTION COMMISSION  
999 E Street, NW  
Washington, D.C. 20463**

**FIRST GENERAL COUNSEL'S REPORT**

**MUR 6131  
DATE COMPLAINT FILED November 17, 2008  
DATE OF NOTIFICATION November 20, 2008  
LAST RESPONSE RECEIVED December 10,  
2008  
DATE ACTIVATED March 17, 2009  
EXPIRATION OF STATUTE OF LIMITATIONS  
October 10, 2013**

**COMPLAINANT**

**David R Browning**

**RESPONDENT**

**Public Television 19, Inc**

**RELEVANT STATUTES  
AND REGULATIONS**

**2 U C S § 431(8)(B)  
2 U S C §§ 431(9)(A) and (B)  
11 C F R § 100 52  
11 C F R § 100 73  
11 C F R § 110 13  
11 C F R § 114 4(f)**

**INTERNAL REPORTS CHECKED**

**None**

**FEDERAL AGENCIES CHECKED**

**None**

**I. INTRODUCTION**

**The complaint in this matter alleges that Public Television 19, Inc ("Public Television")  
staged a debate in violation of 11 C F R § 110 13(b) and (c) because it promoted some  
candidates over others and had no pre-existing, pre-established criteria for selecting the**

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1 candidates to participate <sup>1</sup> According to the complaint, the debate consisted of one candidate  
2 competing in the election for the U S House of Representatives in Missouri's 6<sup>th</sup> Congressional  
3 District, Democratic nominee Kay Barnes, and an "empty chair" representing another competing  
4 candidate, Republican incumbent Representative Sam Graves, who had declined to participate in  
5 the debate The complainant, the Libertarian candidate for the same office, alleges that he was  
6 never invited to participate and that Respondent's president informed him that there would be no  
7 debate Further, the complaint alleges that Public Television's violation of 11 C F R § 110.13  
8 resulted in an in-kind contribution in excess of \$100,000 (alleged cost of advertising time during  
9 the debate) to Kay Barnes's campaign In response, Public Television maintains that it complied  
10 fully with the Act and the Commission's regulations when preparing for a candidate debate that  
11 ultimately never took place Moreover, Respondent states that the October 10, 2008, interview  
12 with Kay Barnes, which is the subject of the complaint, enjoys First Amendment protection  
13 under the "press exemption "

14 As discussed in more detail below, Public Television's airing of the October 10, 2008,  
15 interview with Kay Barnes did not constitute a debate, and therefore was not subject to the  
16 Commission's debate staging regulations Additionally, Public Television falls within the press  
17 exemption, as it a press entity that is not owned or controlled by any political party, committee,  
18 or candidate, and the television program in question was a legitimate press activity Therefore,  
19 we recommend that the Commission find no reason to believe that Public Television-19, Inc

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<sup>1</sup> Although complainant was on the state primary and general election ballot, his committee's FEC disclosure reports show that he neither raised nor spent more than \$5,000, therefore, he did not meet the definition of "federal candidate" at 2 U S C § 431(2)(A) However, in the past, the Commission has proceeded with "debate" cases where a candidate was qualified for the state ballot, although not a "candidate" according to the Federal Election Campaign Act, as amended ("the Act") See MUR 5650 (University of Arizona) and MUR 6072 (Northland Regional Chamber of Commerce)(same complainant)

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1 violated the Federal Election Campaign Act of 1971, as amended ("the Act"), or the  
2 Commission's regulations, and close the file in this matter

3 **II. DISCUSSION**

4 **A. Factual Background**

5 Public Television is a non-profit 501(c)(3) corporation that owns the license to operate  
6 both analog and digital broadcasting for the noncommercial and educational television station  
7 KCPT Channel 19 Originally formed as an instructional television station owned and operated  
8 by the Kansas City Missouri School District, Public Television eventually became a Public  
9 Broadcasting Service ("PBS") member in 1970 and has transmitted national PBS programs ever  
10 since See <http://www.kcpt.org/about/index.shtml> In addition to national PBS programming,  
11 KCPT also broadcasts a variety of local programs reflecting issues facing the Kansas City  
12 metropolitan area Included among these programs is "Kansas City Week in Review"  
13 ("KCWR"), a 30-minute public affairs program that has aired continuously on KCPT on Fridays  
14 evenings at 7 30 p m since October 1992 Public Television Response at 8 Its format is similar  
15 in scope to Sunday network news programs like NBC's "Meet the Press" and CBS's "Face the  
16 Nation" as moderator Nick Haines conducts interviews with Kansas City area newsmakers and  
17 engages in panel discussions with local journalists KCPT states in response to the complaint  
18 that it does sell any airtime for commercial, political, or issue advertisements given its status as a  
19 public broadcast station *Id* at 2, footnote 5

20 According to the response, in July 2008, KCPT was contemplating staging a debate of  
21 selected candidates for the 2008 general election to the United States House of Representatives  
22 for Missouri's Sixth Congressional District Complainant David Browning called Respondent  
23 during that month, requesting inclusion in the anticipated debate *Id* at 6 At that time, Susan

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1 Stanton, KCPT Interim CEO and President, notified Mr Browning during their phone  
2 conversation that KCPT had not yet determined whether it would proceed with or cancel the  
3 contemplated debate *Id* On July 29, 2009, KCWR moderator Nick Haines attempted to contact  
4 Browning by telephone and left a voicemail message, reiterating that KCPT had not yet decided  
5 whether it would proceed with the debate "because the incumbent candidate had not responded  
6 to KCPT's overtures " *Id* Mr Haines also offered to send the complainant a copy of  
7 KCPT(TV)'s debate policy

8 The Respondent states that it devised its debate policy in 2000 after consulting with PBS  
9 stations throughout the country and the PBS Best Practices in Journalism Unit *Id* at 4 The  
10 policy establishes certain criteria that candidates must satisfy to be eligible to participate in  
11 KCPT sponsored debates The first criterion qualifies candidates who can demonstrate public  
12 support of seven percent or more in one public opinion poll *Id* If a candidate has met this  
13 threshold, to be eligible for participation, he or she must also meet at least three of the following  
14 criteria (1) file a campaign finance report revealing 20 contributions unrelated to the candidate  
15 or candidate's family, (2) maintain a candidate website detailing biography and issues,  
16 (3) minimum of 25 yard signs promoting candidacy in 25 different locations in the area that  
17 candidate would serve, (4) demonstrate participation in other candidate forums, not just televised  
18 debates, and (5) demonstrate community engagement by staging 12 campaign related events,  
19 news conferences or neighborhood association meetings *Id* at 4-5 Based on Mr Haines's  
20 review of Mr Browning's public opinion poll support levels, the complainant's campaign failed  
21 to meet the polling requirement, as he had registered only 4% public support at the time  
22 Respondent considered holding a debate Thus, the other criteria were not triggered, but if they  
23 were, the only criterion complainant satisfied was his publication of a campaign website On

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1 August 18, 2009, Mr Haines sent a letter to the complainant explaining KCPT's candidate  
2 selection process for its debates and attached a copy of its debate policy Public Television  
3 Response, Exhibit B

4 On August 25, 2008, the Graves campaign notified Respondent that the incumbent  
5 candidate would not participate in the anticipated candidate debate According to the  
6 Respondent, it then determined that "proceeding with the contemplated debate without the  
7 incumbent would not serve the public interest or KCPT(TV) viewers' needs" and "terminated its  
8 plans to stage a candidate debate" *Id* at 7 Subsequently, KCWR's October 10, 2008, edition  
9 included Nick Haines's 11-minute interview with Democratic nominee Kay Barnes After the  
10 interview, the remainder of the 30-minute program focused on a roundtable panel discussion  
11 with Mr Haines and two local journalists about the Missouri congressional race between Graves  
12 and Barnes and other unrelated topics *Id* at 9, Exhibit D

13 The complaint argues that this program constituted a debate, noting that the Kansas City  
14 Star newspaper, Time Warner Cable's "On Demand" TV description of the KCWR's  
15 October 10, 2008, program, and even the Barnes campaign website in a press release all describe  
16 the program as such Complaint at 2 Moreover, the complaint alleges that moderator Nick  
17 Haines described the interview with Kay Barnes as a debate on the broadcast, and notes that Kay  
18 Barnes was seated next to one "empty chair" to represent the absent incumbent candidate *Id* at  
19 3

20 Respondent disputes these allegations in its response With respect to the classifications  
21 of the program as a "debate" by the Kansas City Star and the Barnes campaign, Respondent  
22 states that the complaint can cite no authority that would bind the Commission to subject the  
23 interview in question to the provisions of Sections 110 13 and 114 4(f) based on these second-

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1 hand descriptions Public Television Response at 9 Additionally, Public Television maintains  
2 that "Mr Haines did not describe the Kay Barnes Interview as a 'debate,'" noting that the  
3 moderator used the term "debate" "in the context of criticizing Representative Graves's refusal  
4 to participate in any televised debate during the election," not to suggest that the interview to  
5 follow constituted a candidate debate *Id* at 10 Finally, it contends that the complaint's  
6 characterization of the KCWR set as "evidence of an attempt to substitute an 'empty chair' for a  
7 debate-necessary second candidate is not only absurd, but clearly insufficient to deem the Kay  
8 Barnes' interview as a debate " *Id* Respondent adds that the imagery of Kay Barnes and the  
9 empty chair was visible for only nine seconds at the beginning of the interview, when the camera  
10 panned in on the entire desk where the moderator was interviewing Ms Barnes *Id* It further  
11 states that the reason for the third chair becomes evident in the next segment of the program, as  
12 the moderator conducted a panel roundtable discussion with two journalists *Id* See also  
13 Exhibit D A review of a video of the program confirms Respondent's account of the broadcast  
14 *Id*

15 **B. Analysis**

16 The Act prohibits corporations from making contributions or expenditures from their  
17 general treasury funds in connection with any election of any candidate for Federal office  
18 2 U S C § 441b(a) The Act defines "contribution" and "expenditure" to include any gift of  
19 money or "anything of value" made for the purpose of influencing any election for Federal  
20 office, but excludes any cost "incurred in covering or carrying a news story, commentary, or  
21 editorial by any broadcasting station (including a cable television operator, programmer, or  
22 producer), unless the facility is owned or controlled by any political party, political  
23 committee, or candidate " 2 U S C § 431(8)(A)(i), (9)(A)(i), and (9)(B)(i), 11 C F R §§ 100 52,

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1 100 73, 100 111(a), and 100 132 This exclusion is known as the "press exemption " or "media  
2 exemption " The term "anything of value" includes in-kind contributions 11 C F R  
3 § 100 52(d)(1)

4 Any party claiming the press exemption is subject to a two-part test First, the  
5 Commission asks whether the entity engaging in the activity is a "press entity" within the  
6 meaning of the Act and the Commission's regulations In determining whether an entity is a  
7 press entity, the Commission has focused on whether it is in the business of producing on a  
8 regular basis a program that disseminates news stories, commentary, and/or editorials See  
9 Advisory Opinions 2008-14 (Melothe, Inc ), 2007-20 (XM Satellite Radio Inc ), and 2005-19  
10 (The Inside Track) Second, the Commission, in determining the exemption's scope, asks (a)  
11 whether the press entity is owned or controlled by a political party, committee, or candidate, and,  
12 if not, (b) whether the entity was functioning within the scope of a legitimate press entity at the  
13 time of the alleged violation If the press entity is independent of any political party, committee,  
14 or candidate, and if it was acting as a legitimate press entity at the time of the alleged violation, it  
15 is exempt from the Act's restrictions on corporate contributions and expenditures, and the  
16 Commission's inquiry should end See *Reader's Digest Association v FEC*, 509 F Supp 1210,  
17 1215 (S D N Y 1981), *FEC v Phillips Publishing*, 517 F Supp 1308, 1312-13 (D D C 1981),  
18 Advisory Opinions 2008-14 (Melothe, Inc ), 2005-19 (The Inside Track), and 2005-16 (Fired  
19 Up')

20 A corporation's costs of staging candidate debates are also exempt from the definitions of  
21 "contribution" and "expenditure," at 11 C F R §§ 100 92 and 100 154, respectively, and the  
22 consequences that flow from making contributions and expenditures, provided that the debates  
23 meet the "safe harbor" requirements of 11 C F R §§ 110 13 and 114 4(f) The Commission's

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1 regulations at section 110 13 also provide that broadcasters may stage candidate debates  
2 provided that they are not owned or controlled by a political party, political committee or  
3 candidate 11 C F R § 110 13(a)(2) The debates must include at least two candidates and not  
4 be structured to promote or advance one candidate over another 11 C F R §§ 110 13(b)(1) and  
5 (2) Organizations that stage candidate debates must use pre-established objective criteria to  
6 determine which candidates may participate in the debate 11 C F R § 110 13(c)

7 In this matter, the complaint alleges that Public Television, through its television station  
8 KCPT, violated 11 C F R §§ 110 13 by staging a debate designed to promote some candidates  
9 over others, and by selecting candidates without pre-existing pre-established criteria in selecting  
10 the candidates that appeared at the debate Neither of these allegations appears to be supported  
11 by the facts Although Respondent acknowledges that it originally contemplated staging a  
12 debate with Representative Graves and Ms Barnes, the only candidates satisfying Public  
13 Television's pre-existing objective criteria for selecting candidates, when the incumbent  
14 candidate would not participate in the anticipated debate, KCPT was left with only one candidate  
15 who satisfied its own selection criteria Accordingly, it terminated its plan to stage a candidate  
16 debate As no debate occurred, Respondent was not subject to the Commission's debate staging  
17 regulations

18 Instead, Public Television's October 10, 2008, interview of candidate Kay Barnes  
19 represented activity that falls within the "press exemption " See 2 U S C § 431(8)(A)(i),  
20 (9)(A)(i), and (9)(B)(i), 11 C F R §§ 100 73 First, Public Television is a press entity because it  
21 regularly produces and airs news stories and talk shows The program that featured the  
22 interview, KCWR, has been on the air continuously for nearly 17 years, and focuses on  
23 newsworthy issues In addition to KCWR, KCPT airs numerous local and national news and

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1 public affairs programs including, but limited to, "Frontline," "The Newshour with Jim Lehrer,"  
2 "Washington Week in Review" and "Ruckus," another local public affairs program. Further,  
3 Public Television specifically denies that it is owned or controlled by any political party,  
4 political committee, or candidate, *see* Public Television Response at 8, and neither the complaint  
5 nor the available evidence suggests otherwise. Finally, the October 10, 2008, edition of the  
6 KCWR constituted legitimate press activity. It included an interview with a candidate in a  
7 manner similar to other television news programs like "Meet the Press" or "60 Minutes." *See*  
8 Public Television Response, Exhibit D. The fact that the program featured an interview with a  
9 candidate is immaterial, as on-air interviews of candidates fall within the bounds of the press  
10 exemption. *See, e.g.,* MUR 5569 (John and Ken Show). Because the alleged activity in this  
11 matter falls squarely within the press exemption, we recommend that the Commission find no  
12 reason to believe that Public Television 19 violated the Federal Election Campaign Act of 1971,  
13 as amended, or the Commission's regulations and close the file.

14 **III. RECOMMENDATIONS**

- 15 1 Find no reason to believe that Public Television 19, Inc. violated the Federal Election  
16 Campaign Act of 1971, as amended, or the Commission's regulations.  
17  
18 2 Approve the attached Factual and Legal Analysis.  
19  
20 3 Approve the appropriate letter.  
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4 Close the file

Thomasena P Duncan  
General Counsel

Ann Marie Terzaken  
Associate General Counsel  
for Enforcement

6/9/09  
Date

BY

  
Stephen A Gura  
Deputy Associate General Counsel

  
Susan L. Lebeaux  
Assistant General Counsel

  
Roy Q Lockett  
Attorney

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