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August 20, 2015

Federal Election Commission
Office of Complaints, Examination
and Legal Administration
Attn: Frankie Hampton, Paralegal
999 E Street, N.W.
Washington DC 20463

Re: MUR 6952

To Whom It May Concern:

We are legal counsel to Fox News Network, LLC ("Fox News" or "Respondent") in the above-captioned Matter Under Review ("MUR"). This submission constitutes a response to the complaint filed with the Federal Election Commission ("FEC") by Mark W. Everson ("Complainant"), a Republican presidential candidate, on August 4, 2015, alleging that Fox News did not conform to FEC regulations when it staged and broadcast a Republican presidential primary debate on August 6, 2015. As explained below, the complaint fails properly to allege, much less demonstrate, any violation of FEC regulations and should be dismissed. In fact, Complainant's only grievance appears to be that the pre-existing criteria announced in advance of the debate and applied evenhandedly by Fox News in selecting the candidates for the debate failed to include a criterion that he would have preferred and that would have favored him.¹

As of July 27, 2015, the date on which Fox News announced its decision further to relax the criteria for candidate participation as to what has been referred to as the "second tier" of the August 6th debate, there were already approximately 130 declared Republican presidential candidates.² In order for the debate forum to provide a

¹ It should be noted that the Complainant's insistence that the Commission compel his inclusion in the August 6th debate is both beyond the scope of the Commission's authority and moot at this point.

² See FEC web-site, "New Statements of Candidacy", <http://www.fec.gov/data/Form2Filer.do?format=html>. See also attachments A and B. We note that

meaningful opportunity for public discourse, it was indisputably necessary to limit participation. Fox News endeavored to be inclusive to the extent practicable, and in response to growing public interest in hearing from a broad array of candidates, modified its debate criteria twice – each time adopting more-inclusive criteria. Ultimately, 17 Republican candidates were selected to participate in the debate, 10 in the so-called first tier and 7 in the second tier.

Complainant, presumably like each of the other 112 or so candidates who did not qualify, is understandably disappointed that he could not satisfy even the relaxed eligibility criteria affirmatively adopted by Fox News to accommodate a greater number of candidates than originally planned. However, his failure to qualify for the debate under objective criteria does not mean that Fox News failed to comply with the law. More specifically, Fox News did not structure the debate to “promote or advance” one candidate over another, and the pre-existing criteria Fox News used for selecting debate participants – announced 10 days in advance of the August 6th debate -- are consistent with the FEC regulations governing such events. That clear compliance in and of itself mandates against finding reason to believe. We further respectfully suggest that, for the reasons articulated by Commissioners Goodman, Hunter and Petersen in their Statement of Reasons, dated December 19, 2013, in regard to MUR 6703, the “Press Exemption,” embodied in 52 U.S.C. § 30101(9)(B)(i), also precludes FEC action in this matter.

Facts

The Republican National Committee announced in January 2015 plans for 12 Republican presidential debates throughout 2015-16, to be hosted by various news organizations. Fox News was selected to stage the first debate on August 6, 2015. Although Fox News had initially decided to host a single debate consisting of the 10 Republican candidates with the highest average of the five most-recent national polls (as recognized by Fox News)³ leading up to August 4th, Fox News announced on June 11th that it would expand the opportunity for candidate participation by staging and broadcasting a second debate earlier the same evening. This second debate would be open to those presidential candidates who did not place among the top ten, but nonetheless were scoring 1% or higher in an average of the five most recent national polls (as recognized by Fox News) leading up to August 4.

Complainant does not contest the fact that Fox News twice made the eligibility rules for the second tier debate more lenient.

³ Such polling must be conducted by major, nationally recognized organizations that use standard methodological techniques. In addition, candidates must (i) meet all Constitutional requirements, (ii) announce and register a formal campaign for president; (iii) file all necessary paperwork with the Federal Election Commission (“FEC”) and (iv) have paid all necessary federal and state filing fees.

On July 27, 2015, 10 days before the August 6th debates, Fox News again sought to expand the opportunity for candidate participation, this time announcing that it would relax the eligibility criteria even further for the second tier debate. Rather than limiting participation to those candidates polling at 1% or higher, Fox News announced that it was lowering the bar to allow for the inclusion of 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. As a result of Fox News' decision, several additional candidates, who according to projections at the time would not have been otherwise eligible, were able to participate in the August 6th debate.

Legal Analysis

Corporations may not make contributions to federal candidates, 52 U.S.C. § 30118, but funds used or provided "to defray costs incurred in staging candidate debates in accordance with the provisions of 11 C.F.R. §§ 110.13 and 114.4(f)" are not considered contributions. 11 C.F.R. § 100.92. "Broadcasters (including a cable television operator, programmer or producer), bona fide newspapers, magazines and other periodical publications" are among the "staging organizations" specifically permitted to stage candidate debates, provided they are not owned or controlled by a political party, political committee or candidate. 11 C.F.R. § 110.13(a)(2).

Fox News owns and operates two national cable television networks, i.e., the Fox News Channel and the Fox Business Network, among other things, and is a subsidiary of Twenty-First Century Fox, Inc. Since neither entity is owned or controlled by a political party, political committee or candidate, Fox News qualifies as a debate staging organization pursuant to 11 C.F.R. § 110.13(a). The FEC's debate regulation leaves the structure of the debate to the discretion of the staging organization, provided that the debate includes at least two candidates, and the organization does not structure the debates to promote or advance one candidate over another. 11 C.F.R. § 110.13(b). Additionally, the staging organization must use *pre-established objective criteria* for the selection of candidates to participate in a debate. 11 C.F.R. § 110.13(c).

Fox News satisfied each of these requirements as to the August 6th debate. 17 candidates participated overall in the debates (10 in the top tier and seven in the second tier), and the debate was not structured in a manner to favor or advance one candidate over another.

Fox News also adopted and applied an objective criterion for determining which candidates could participate in the debate and announced these criteria 10 days before the August 6th debate. The criteria, as noted above, opened the debate to declared Republican presidential candidates whose names were consistently being offered to respondents in

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major national polls (as recognized by Fox News) leading up to August 4. These criteria are consistent with criteria acceptable to the FEC and courts over the years.

“The choice of which objective criteria to use is largely left to the discretion of the staging organization.” *Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates*, 60 Fed. Reg. 62259, 62262 (Dec. 14, 1995). In *Buchanan v. Federal Election Commission*, the court explained that the FEC debate regulation “does not spell out precisely what the phrase ‘objective criteria’ means,” but added that it “gives the individual organizations leeway to decide what specific criteria to use.” 112 F. Supp. 2d 58, 73 (D.D.C. 2000) (citing *Perot v. FEC*, 97 F.3d 553, 560 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1210 (1997) (internal quotations omitted).

Similarly, the FEC has stated in a number of enforcement cases that, “to qualify as ‘objective,’ the 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.’” MUR 6703, Factual and Legal Analysis at 5 (2013) (citing First Gen. Counsel’s Rpt. at 23, MURs 4956, 4962, 4963) (internal quotations omitted).

The district court in *Buchanan* acknowledged and did not object to the FEC’s acceptance of criteria that have included: “professional opinions of Washington bureau chiefs of major newspapers, news magazines 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.” *Buchanan*, 112 F. Supp. 2d at 78 n.11. A selection criteria limiting debate participants to candidates: (1) who are declared; and (2) whose names were constantly being offered to respondents in major national polls is consistent with the FEC debate regulation as interpreted by the FEC and courts.

As indicated at the outset of this response, Complainant does not really seem to challenge whether the Fox News criteria were pre-existing and objective. Rather, he appears to be arguing that, if only Fox News had used an online RNC “straw poll” as the sole debate criterion, he would have been included. Complainant’s attraction to the online straw poll is clearly self-serving: it identifies 18 prospective presidential candidates (including Complainant), whereas the Fox News criteria resulted in 17 debate participants.

Complainant also questions “what triggered the last minute decision to discard an objective standard for a fuzzy one?”—suggesting without evidence that it was revised in some way so as to exclude him. Compl. 4. But this is an illogical assertion by

complainant, because if Fox News had not relaxed the selection criteria on July 27th, *i.e.*, had it continued to use the criteria previously announced on June 11, 2015, he most certainly would not have been eligible to participate in the debate because he was not scoring 1% in any polls conducted by major, nationally recognized organizations.

Complainant accurately notes that Fox News modified the June 11th selection criteria (which would have excluded complainant in any event) to accommodate more candidates, but he mistakenly believes, that this is somehow unlawful. It is not. In fact, it has been long-established that “[t]he 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 conduct a meaningful debate.” *Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates*, 60 Fed. Reg. 62259, 62262 (Dec. 14, 1995). In this case, Fox News modified its selection criteria, not to constrict participation but instead to expand the opportunity for more candidates to participate. Unfortunately, complainant simply did not meet the more lenient criteria.

While it is demonstrably clear as we have shown that Fox News complied with the FEC debate regulation, the fact of this complaint, and complaints like it, beg the legal question of whether FECA permits the regulation of a news organization when that organization is staging and broadcasting a candidate debate. As explained in the Statement of Reasons issued by Commissioners Lee Goodman, Caroline Hunter and Matthew Peterson on December 13, 2013 (MUR 6703), FECA’s “Press Exemption” (consistent with the First Amendment to the United States Constitution) excludes from the definition of expenditure, “any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political candidate, or candidate.” 52 U.S.C. § 30101(9)(B)(i). As a news organization that is not owned or controlled by any political party, political committee or candidate, staging and broadcasting a candidate debate would certainly seem to be a legitimate “press function” for Fox News and within the ordinary course of its regular business activities. While the Commission has declined in the past to apply the Press Exemption to complaints alleging violation of the debate rule by broadcasters, the insubstantial nature of the instant case and the possibility of similar claims by the increasingly-expansive universe of disappointed actual and would-be candidates suggests that the time is ripe for the Commission to do so in this case and dismiss the complaint for absence of jurisdiction.

In any event, the criteria applied by Fox were entirely proper and the complaint is without merit. The Commission should find no reason to believe that a violation has occurred and should accordingly dismiss Mr. Everson's complaint.

Respectfully submitted,

A handwritten signature in cursive script that reads "Stuart M. Gerson".

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FOX NEWS AND FACEBOOK PARTNER TO HOST FIRST REPUBLICAN PRESIDENTIAL PRIMARY DEBATE OF 2016 ELECTION

Network Announces Entry Criteria

Anchor Bret Baier, Megyn Kelly and Chris Wallace to Moderate

FOX News Channel (FNC) and Facebook announced today that they will present the first Republican presidential primary debate in conjunction with the Ohio Republican Party on August 6, 2015. The debate will be presented live from the Quicken Loans Arena in Cleveland, OH from 9-11 PM/ET on FNC along with FOX News Radio, FOX News Mobile and FOXNews.com.

Moderated by *Special Report* anchor Bret Baier, *The Kelly File* anchor Megyn Kelly and *FOX News Sunday* host Chris Wallace, the debate will feature Facebook data illustrating how the issues of the day are resonating with people on today's largest platform for political conversation. FOX News viewers and Facebook users will also be able to share images and video questions via Facebook, some of which will be used to help formulate questions for the candidates and broadcast during the debate.

FOX News' Executive Vice President of News Editorial Michael Clemente announced the entry criteria as follows.

- Must meet all U.S. Constitutional requirements, and
- Must announce and register a formal campaign for president; and
- Must file all necessary paperwork with the Federal Election Commission (FEC); and
- Must have paid all necessary federal and state filing fees; and
- Must place in the top 10 of an average of the five most recent national polls, as recognized by FOX News leading up to August 4th at 5 PM/ET. Such polling must be conducted by major, nationally recognized organizations that use standard methodological techniques.

Clemente also noted that FNC will provide additional coverage and air time on August 6th to those candidates who do not place in the top 10.

A top five cable network, FNC has been the most-watched news channel in the country for more than 13 years and according to Public Policy Polling, is the most trusted television news source in the country. Owned by 21st Century Fox, FNC is available in more than 90 million homes and dominates the cable news landscape routinely notching the top ten programs in the genre.

Adding to the announcement, Andy Mitchell, Director, News and Global Media Partnerships at Facebook, said, "Facebook's scale and foundation in real identity give Fox News and the Republican contenders for the nomination the opportunity to open up the debate to Americans in a new and unique way. FOX News hosts often take to Facebook to connect with viewers authentically; their using Facebook to bring those viewers into this debate demonstrates how the platform has become an essential part of the political process."

Matt Borges, Chairman of the Ohio GOP said, "We are thrilled to host the first debate in Ohio. The road to the GOP nomination begins in Ohio this August and culminates with the Republican National Convention almost a year later. A Republican can't win the White House without carrying our state, so there's no better place to host the first primary debate."

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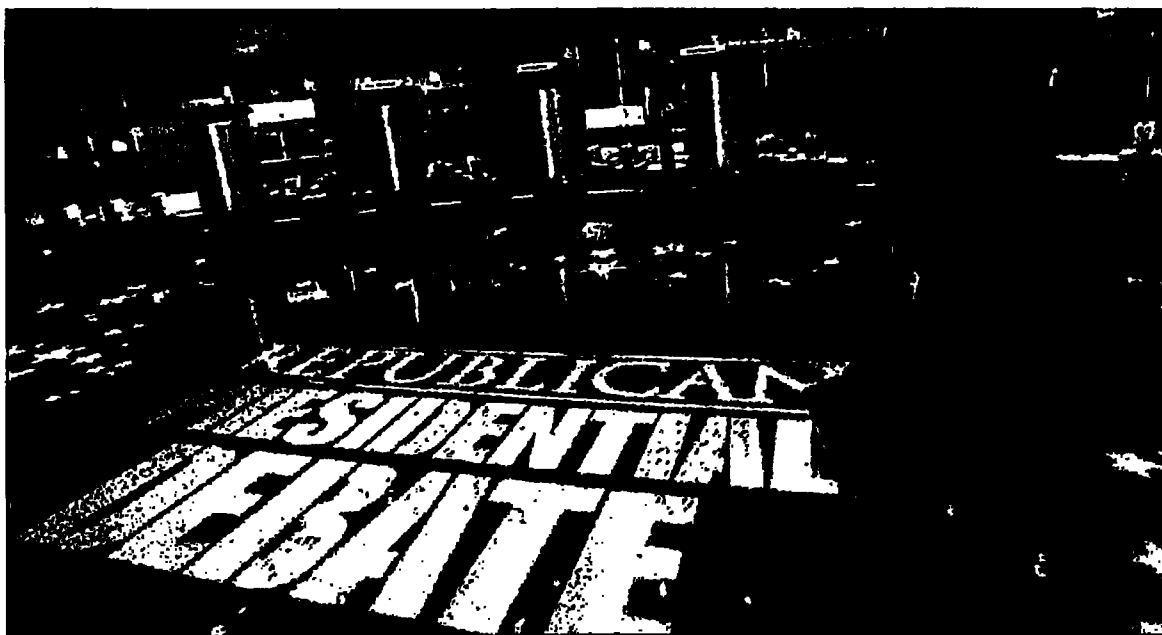
POLITICO

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Fox lowers threshold for early debate

The change serves to guarantee the presence of candidates such as Lindsey Graham and Carly Fiorina.

By MIKE ALLEN | 7/28/15 6:39 PM EDT | Updated 7/30/15 10:49 AM EDT



Getty

Fox News is opening its 5 p.m. debate to all the announced Republican candidates who fail to make the cut for the Aug. 6 prime-time event, removing a requirement that participants reach at least 1 percent in polling.

The change amounts to an insurance policy for candidates who were in danger of being disqualified from the vital first debate based on low polls – Carly Fiorina, former New York Gov. George Pataki and Sen. Lindsey Graham (R-S.C.).

The announcement by Michael Clemente, Fox News Executive Vice President, News, means that all 16 announced candidates will qualify for Cleveland — either the 5 p.m. undercard, or the 9 p.m. main event.

The 9 p.m. debate will include the 10 candidates with the highest average in national polls, as determined by Fox News. The 5 p.m. forum will now include all the rest.

According to a POLITICO analysis of the latest national polling, the prime-time participants today would be Donald Trump, Jeb Bush, Wisconsin Gov. Scott Walker, Sen. Marco Rubio (R-Fla.), Sen. Ted Cruz (R-Tex.), Sen. Rand Paul (R-Ky.), Mike Huckabee, Ben Carson, New Jersey Gov. Chris Christie and Rick Perry.



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The next three, who would currently be relegated to 5 p.m., are Ohio Gov. John Kasich, Rick Santorum and Louisiana Gov. Bobby Jindal. They are followed by Fiorina, Pataki and Graham.

All of the candidates have been getting extensive Fox airtime. Here's a tally of the total combined Fox News Channel and Fox Business Network appearances — several for an hour — by each of the hopefuls since their official campaign launches:

1) Paul, 35 ... 2) Huckabee, 31 ... 3) Trump, 30 ... 4) Perry, 24 ... 5-6) Fiorina and Jindal, 20 each ... 7) Cruz, 17 ... 8) Santorum, 16 ... 9) Rubio, 14 ... 10-11) Carson and Graham, 12 each ... 12-13) Kasich and Pataki, 11 each ... 14) Christie, 7 ... 15) Walker, 4 ... 16) Bush, 3.

"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 respondents in major national polls, as recognized by Fox News," said Clemente in a statement.

"Although we are relaxing one component of our entry criteria — the requirement that candidates must score 1% or higher in an average of five most recent national polls — all other components of the criteria remain in effect for the 5 PM/ET debate. Participants must meet all U.S. Constitutional requirements; must announce and register a formal campaign for president; and must file all necessary paperwork with the Federal Election Commission (FEC), including financial disclosure.



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"As for the 9 PM/ET debate, all components of the original criteria remain unchanged - including the requirement that participants must place in the top 10 of an average of the five most recent national polls, as recognized by FOX News, leading up to August 4th at 5PM/ET. Such polling must be conducted by major, nationally recognized organizations that use standard methodological techniques.

"Everyone included in these debates has a chance to be President of the United States and we look forward to showcasing all of the candidates in the first primary event of the 2016 election season."

The 5 p.m. debate, which will last an hour, will be moderated by Bill Hemmer and Martha MacCallum. The 9 p.m. debate will run about 90 minutes (two hours with commercial breaks and introductions), and be moderated by Bret Baier, Megyn Kelly and Chris Wallace.

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