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

**FIRST GENERAL COUNSEL'S REPORT**

MUR 6952  
DATE COMPLAINT FILED: 08/03/2015  
DATE OF NOTIFICATION: 08/05/2015  
DATE RESPONSE FILED: 08/26/2015  
DATE ACTIVATED: 09/23/2015

EXPIRATION OF SOL: 08/06/2020  
ELECTION CYCLE: 2016

**COMPLAINANT:**

Mark Everson

**RESPONDENT:**

Fox News Network, LLC

**RELEVANT STATUTES  
AND REGULATIONS:**

52 U.S.C. § 30101(9)(B)(i)<sup>1</sup>  
52 U.S.C. § 30118(a)  
11 C.F.R. § 100.52  
11 C.F.R. § 100.92  
11 C.F.R. § 100.111  
11 C.F.R. § 100.154  
11 C.F.R. § 110.1(g)  
11 C.F.R. § 110.13(a)-(c)  
11 C.F.R. § 114.4(f)

**INTERNAL REPORTS CHECKED:** None

**FEDERAL AGENCIES CHECKED:** None

**I. INTRODUCTION**

Complainant, a candidate for the Republican presidential nomination in 2016, alleges that Fox News Network, LLC ("Fox News"), violated the Commission's regulations governing candidate debates by excluding him from the debate it sponsored on August 6, 2015.<sup>2</sup> Specifically, the Complaint alleges that Fox News structured the debate in a manner that improperly promoted and advanced certain candidates in violation of 11 C.F.R. § 110.13(b)(2),

<sup>1</sup> On September 1, 2014, the Federal Election Campaign Act of 1971, as amended, was transferred from Title 2 to new Title 52 of the United States Code.

<sup>2</sup> Compl. at 1, 3.

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1 and failed to apply objective candidate selection criteria in violation of 11 C.F.R. § 110.13(c),  
2 focusing on what the Complaint terms as Respondent's "last minute" switch in the selection  
3 criteria.<sup>3</sup> Respondent denies the allegations and asserts that it modified its selection criteria to  
4 expand, not restrict, the opportunity for candidates to participate in the debate.<sup>4</sup>

5 For the reasons stated below, we recommend that the Commission find reason to believe  
6 that Respondent violated 52 U.S.C. § 30118(a) in connection with the debate and enter into pre-  
7 probable cause conciliation with Respondent.

## 8 II. FACTUAL AND LEGAL ANALYSIS

### 9 A. Factual Background

10 Complainant was a Republican candidate for President.<sup>5</sup> Fox News, a limited liability  
11 company ("LLC") registered with the State of New York, is a broadcaster that owns and operates  
12 two national cable television networks — the Fox News Channel and the Fox Business Network  
13 — and it is a subsidiary of Twenty-First Century Fox, Inc.<sup>6</sup>

14 In January 2015, the Republican National Committee announced plans for twelve  
15 Republican presidential debates to be hosted by various news organizations throughout 2015 and  
16 2016.<sup>7</sup> Respondent was selected to stage the first debate, which was to be held on August 6,

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<sup>3</sup> *Id.* at 3-7.

<sup>4</sup> Resp. at 1-3.

<sup>5</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>6</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>7</sup> Resp. at 2.

1 2015, at the Quicken Loans Arena in Cleveland, Ohio.<sup>8</sup> Fox News' Executive Vice President of  
2 News (Editorial) Michael Clemente announced that the entry criteria for that debate would  
3 require, among other things, that a candidate place in the top ten of an average of the five most  
4 recent national polls, as recognized by Fox News, leading up to August 4th.

5 On June 11, 2015, Respondent announced that it would expand the opportunity for  
6 candidate participation by staging and broadcasting an additional debate on August 6, 2015.<sup>9</sup>  
7 This additional debate would be open to Republican presidential candidates who did not poll  
8 among the top ten, and therefore did not qualify for the main debate, but who received the  
9 support of at least 1% of poll respondents in an average of the five most recent national polls, as  
10 recognized by Fox News, leading up to August 4.<sup>10</sup>

11 On July 27, 2015 — approximately six weeks after announcing the criteria for the  
12 second-tier debate and ten days before it was to be held — Respondent announced it was  
13 changing the eligibility criteria for the second-tier debate. Specifically, Respondent announced it  
14 was relaxing the requirement that a candidate poll at 1% in the five most recent national polls to  
15 require instead that the candidate's name be "consistently . . . offered to respondents in major  
16 national polls (as recognized by Fox News) leading up to August 4."<sup>11</sup> Mr. Clemente stated that  
17 this change of criterion resulted from "a concerted effort to include and accommodate the now  
18 16 Republican candidate field."<sup>12</sup>

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<sup>8</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>9</sup> Resp. at 2.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 3.

<sup>12</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

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1 Applying the new criterion, Respondent ultimately hosted seventeen candidates on  
2 August 6 — ten in the top-tier debate and seven in the second-tier debate.<sup>13</sup>

3 The Complaint questions Respondent's "last minute" switch to the requirement that  
4 candidates' names must be "consistently" offered to respondents in polls recognized by Fox  
5 News, and argues that "consistently" is not an objective standard, as required under the  
6 Commission's regulation.<sup>14</sup> The Complaint asserts that Respondent "does not provide any  
7 enlightenment or even any guidance to the candidates and their organizations on how it, as the  
8 sole arbiter, will define 'consistently'; nor does it give even a hint about which 'major national  
9 polls' it . . . will use to test eligibility."<sup>15</sup>

10 In addition, the Complaint alleges that Respondent has failed to demonstrate that its  
11 debate structure and selection process were not designed to result in the selection of  
12 pre-chosen participants, and asserts that a statement made by Clemente — that "[w]e made a  
13 concerted effort to include and accommodate" — confirms the opposite.<sup>16</sup>

14 Finally, the Complaint argues that Respondent could have used the Republican National  
15 Committee's on-line straw poll — which it argues is "a solid reflection of 'real' GOP candidates  
16 [that] objectively draws the line between serious and inconsequential candidates" — a choice  
17 that would have included Everson in the debate.<sup>17</sup>

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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." 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#ixzz3rse1FYIo> [hereinafter "POLITICO Article"] (attached to Response as Attachment B).

<sup>13</sup> Resp. at 2.

<sup>14</sup> Compl. at 4.

<sup>15</sup> *Id.* at 5.

<sup>16</sup> *Id.* at 5-6.

<sup>17</sup> *Id.* at 6.

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1 In response, the Respondent asserts that it did not structure the debate to “promote or  
2 advance” one candidate over another, and the pre-existing criteria it applied for selecting debate  
3 participants “are consistent with the FEC regulations governing such events.”<sup>18</sup>

4 **B. Legal Analysis**

5 The Federal Election Campaign Act of 1971, as amended (the “Act”), prohibits  
6 corporations from making contributions to federal candidates.<sup>19</sup> Funds used or provided “to  
7 defray costs incurred in staging candidate debates” are not contributions, provided that the  
8 debates are conducted “in accordance with the provisions of 11 C.F.R. [§§] 110.13 and  
9 114.4(f).”<sup>20</sup> Sections 110.13 and 114.4(f), respectively, provide in relevant part that a  
10 broadcaster (including a cable television operator, programmer, or producer) staging a candidate  
11 debate has “discretion” regarding how to structure its debate but “must use pre-established  
12 objective criteria to determine which candidates may participate in the debate.”<sup>21</sup> Thus, the

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<sup>18</sup> Resp. at 2.

<sup>19</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 Respondent 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>20</sup> See 11 C.F.R. § 100.92.

<sup>21</sup> *Id.* § 110.13(b)-(c); Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 Fed. Reg. 64,260, 64,262 (Dec. 14, 1995). As a general matter, spending by a broadcaster (including a cable television operator) to carry a news story, commentary, or editorial does not constitute a contribution. 11 C.F.R. § 100.73(a). Thus, in the context of a debate, the Commission’s regulations specifically note that media entities may “cover or carry” debates “as press entities.” See *id.* § 110.13(a)(2). When a media entity stages a debate, however, the Commission’s regulations require the staging organization to comply with the same rules as any other debate staging organization. See *id.* § 110.13(c) (setting forth candidate-invitation rules “[f]or all debates” and “staging organization(s)” (emphasis added)); MUR 5395 (Dow Jones, *et al.*) (explaining that the Commission analyzes the staging of debates by media entities under the debate regulations, and the coverage or broadcast of debates by such entities under the media exemption); Factual and Legal Analysis at 5-8, MUR 6703 (WCVB-TV, Channel 5) (analyzing whether a debate hosted by a media entity satisfied the requirements of the debate exemption where complainant challenged respondent’s debate criteria and where respondent asserted that the press exemption also applied); Factual and Legal Analysis at 4-10, MUR 6493 (Fox News Channel) (analyzing media entity’s challenged debate criteria under the Commission’s debate regulations). Requiring a media entity that stages a debate to use 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, such that the entity’s spending is properly exempt from treatment as a contribution. See 60 Fed. Reg. at 64,261 (noting

1 issues raised here are whether Respondent's criteria for inviting candidates to the second-tier  
2 debate were "objective" and "pre-established."

3 To qualify as "objective," criteria need not "be stripped of all subjectivity or be judged  
4 only in terms of tangible, arithmetical cut-offs. Rather, it appears that they must be free of  
5 'content bias,' and *not geared to the 'selection of certain pre-chosen participants.'*"<sup>22</sup> Likewise,  
6 as the Commission noted in promulgating section 110.13(c), to establish that the criteria were set  
7 in advance of selecting the debate participants, staging organizations "must be able to show that  
8 their objective criteria were used to pick the participants, and that the criteria *were not designed*  
9 *to result in the selection of certain pre-chosen participants.'*"<sup>23</sup> Accordingly, candidate selection  
10 criteria are neither "objective" nor "pre-established" within the meaning of section 110.13(c) if  
11 those criteria are designed to result in the selection of particular candidates whom the debate-  
12 staging organization has "pre-chosen."

13 The undisputed factual record presented here provides ample reason to believe that  
14 Respondent did not stage its second-tier debate in accordance with 11 C.F.R. § 110.13(c).  
15 Rather, in announcing the challenged revision to its polling criterion, Respondent conceded that  
16 it changed that requirement shortly before the scheduled event specifically to result in the

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that "the purpose of [the Commission's debate regulations] is to provide a specific exemption so that . . . the news media may stage debates, without being deemed to have made prohibited corporate contributions to the candidates taking part in debates"); Comm'rs Mason, Sandstrom, Smith, Toner, Statement of Reasons at 2-3, MUR 5224 (Boston Globe, WBZ-TV) (conducting "legitimate press function" inquiry by analyzing whether media entity that sponsored debate did so in compliance with section 110.13); *see generally* Advisory Op. 2010-08 (Citizens United) (noting criteria for application of media exemption); *Readers Digest Ass'n, Inc. v. FEC*, 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981) (same). Thus, in the context of debate staging, the Commission applies the specific rules of section 110.13, not simply the general media exemption of section 100.73(a). Indeed, if section 100.73(a) were construed to render debate staging activity by media entities *per se* exempt from the definition of contributions, the provisions in section 110.13 that specifically address debate staging by cable television operators and other media entities would be meaningless.

<sup>22</sup> First Gen. Counsel's Rpt. at 23, MURs 4956, 4962, 4963 (Union Leader Corp., *et al.*) (emphasis added); *see* Factual and Legal Analysis at 5, MUR 6703 (WCVB).

<sup>23</sup> 60 Fed. Reg. at 64,262 (emphasis added).



1 in a manner that would include them, the criterion was not “pre-established” under section  
2 110.13. *Second*, the same holds true for the objectivity of the altered polling criterion.  
3 Respondent abandoned a firm, numerical standard in favor of a less precise measure —  
4 “consistency” — only after it had become apparent that the numerical test would exclude certain  
5 high-profile participants, and did so to “include and accommodate the now 16 Republican  
6 candidate field.” That is, Respondent altered its criteria to cause the selection of a pre-chosen set  
7 of participants. A criterion that is altered specifically to fulfill a debate-staging entity’s  
8 subjective desire to invite certain candidates (but not others) is not “objective” within the  
9 meaning of section 110.13.<sup>27</sup>

10 In sum, the record reflects that Respondent used candidate-selection criteria designed to  
11 result in the inclusion of certain pre-chosen candidates, criteria that in context were neither  
12 objective nor pre-established. The second-tier debate therefore was not conducted in accordance  
13 with section 110.13 and the contribution exception of 11 C.F.R. § 100.92 does not apply.<sup>28</sup>  
14 Accordingly, we recommend that the Commission find reason to believe that Fox News  
15 Network, LLC, violated 52 U.S.C. § 30118(a).<sup>29</sup>

<sup>27</sup> The Commission has previously accepted the objectivity of a variety of non-numerical formulae where the selection criteria nonetheless remained content-neutral as applied. But none of those instances involved the exceptional combination of facts presented here: that is, abandoning a precise numerical polling standard in favor of a vague requirement on the eve of the debate for the admitted purpose of expanding the field to include candidates who would not otherwise satisfy that criterion. *Cf., e.g.*, MURs 4956, 4962, 4963 (Union Leader Corporation, *et al.*) (approving criteria such as significant candidate and campaign organization presence); MUR 5395 (Dow Jones, *et al.*) (approving criteria such as active campaigning, ability to fundraise, and standing in public polls); MUR 5650 (University of Arizona) (approving criteria such as level of campaign activity and significant voter interest).

<sup>28</sup> See Comm’rs Aikens, Thomas, Elliott, McDonald, McGarry, Statement of Reasons at 4, MURs 4451, 4473 (Comm’n on Presidential Debates, *et al.*).

<sup>29</sup> Respondent asserts that the debate at issue fell within the media exemption at 52 U.S.C. § 30101(9)(B)(i). Resp. at 2, 5. However, as explained above, *see supra* n.21, the Commission has previously concluded that the general media exemption does not afford media entities that elect to stage debates a license to disregard the debate staging rules that apply to all other debate-staging organizations.

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we recognize that Respondent was presented with a challenging and quickly evolving situation. The field included an unanticipated number of viable candidates with only negligible room to differentiate among reasonable contenders. In the face of these difficulties, as Respondent notes, it sought to broaden rather than restrict participation in its debates, an event that was the subject of exceptional public interest.<sup>31</sup>

<sup>31</sup> See POLITICO Article, *supra* (describing “overwhelming interest” in the event); Resp. at 1.

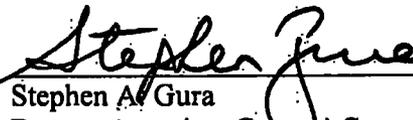
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**IV. RECOMMENDATIONS**

1. Find reason to believe that Fox News Network, LLC, violated 52 U.S.C. § 30118(a);
2. Approve the attached Factual and Legal Analysis;
3. Enter into conciliation with Fox News Network, LLC, prior to a finding of probable cause to believe;
4. Approve the attached conciliation agreement; and
5. Approve the appropriate letter.

3/30/16  
Date

  
Daniel A. Petalas  
Acting General Counsel

  
Stephen A. Gura  
Deputy Associate General Counsel  
for Enforcement

  
Mark Allen  
Assistant General Counsel

<sup>32</sup> Neither the Complaint nor the Response provides any information about the cost of the debates.