

12044313752

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

FIRST GENERAL COUNSEL'S REPORT

MUR: 6493
DATE COMPLAINT FILED: August 22, 2011
DATE OF NOTIFICATION: August 25, 2011
LAST RESPONSE RECEIVED: October 21, 2011
DATE ACTIVATED: March 13, 2012

EXPIRATION OF SOL:
August 11, 2016 (earliest)
August 11, 2016 (latest)

COMPLAINANT:

Fred Karger

RESPONDENTS:

Fox News Channel
Rupert Murdoch
Roger Ailes
Michael Clemente

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 431(9)(B)(i)
2 U.S.C. § 441b(a)
11 C.F.R. § 100.42,
11 C.F.R. § 100.92
11 C.F.R. § 100.154
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

Fox News Channel ("Fox") sponsored a debate in Iowa for Republican presidential candidates on August 11, 2011, but excluded the Complainant, Presidential candidate Fred Karger. The primary issue in this matter is whether Fox used pre-established and objective

RECEIVED
FEDERAL ELECTION
COMMISSION
2012 MAY 14 PM 3:17
CELA

1 criteria, as required by 11 C.F.R. § 110.13(b)-(c), in rejecting Karger's request to participate in
2 Fox's Iowa debate. See Complaint at 3.

3 The Commission's regulations provide a basis for the news media to stage debates
4 without being deemed to have made prohibited corporate contributions to the candidates taking
5 part in those debates in violation of 2 U.S.C. § 441b(a). See 11 C.F.R. § 110.13; *Corporate and*
6 *Labor Organization Activity; Express Advocacy and Coordination with Candidates*, 60 Fed. Reg.
7 64,260, 64,261 (Dec. 14, 1995) (hereinafter, "FEC Explanation and Justification"). The
8 complaint alleges that Fox made a prohibited corporate contribution by failing to abide by its
9 stated candidate debate criteria when it refused to accept both online polls and a three-month-old
10 poll submitted by Karger. For the reasons stated below, we recommend that the Commission
11 find no reason to believe that Respondents violated 2 U.S.C. § 441b(a), and close the file.

12 **II. FACTS**

13 Fred Karger is a registered candidate seeking the Republican nomination for President.
14 See Fred Karger Statement of Candidacy dated Mar. 23, 2011; Complaint at 2. Fox is a news
15 service in operation since October 7, 1996, that is owned by News Corp. See
16 <http://press.foxnews.com/corporate-info/>. Fox transmits news reports via a cable news channel,
17 broadcast television affiliates, and an internet site. Rupert Murdoch is the CEO and Chairman of
18 News Corp., and Roger Ailes and Michael Clement are officers of Fox.

19 On August 11, 2011, Fox sponsored a Republican Presidential candidate debate in Iowa.
20 Before the debate, Fox announced that prospective participants must have "garnered at least an
21 average of one percent in five national polls based on most recent polling leading up to the
22 registration day," which was Tuesday, August 9, 2011. See Complaint at 2; Response at 1.
23 Karger submitted five polls to Fox -- three of which were online polls -- that showed his support

12044313753

1 was between "less than 1%" and two percent. See Complaint at 3. Fox stated that it would not
2 accept the three online polls that Karger submitted and rejected a fourth poll because it was not
3 recent enough. *Id.* Fox informed Karger that it would not permit him to participate in the Iowa
4 debate because it decided that Karger did not meet its criteria for participation.¹ *Id.*

5 The Complaint alleges that, after Karger asked to participate in the Iowa debate, Fox
6 changed the criteria by: (1) refusing to consider the online polls that allegedly would have
7 qualified Karger to participate in the Iowa debate; and (2) disregarding a three-month old Fox
8 News poll conducted on April 28, 2011, which supported Karger's application, on the ground
9 that it was not recent enough relative to the date of the debate, even though Fox permitted
10 another candidate to participate in an earlier debate using an older poll. Complaint at 3-4.

11 Respondents contend that: (1) the debate criteria were pre-established, objective, and
12 permissible; (2) Fox never intended to consider online polls to qualify candidates for its debate;
13 (3) the April 28 excluded Fox poll was not recent enough to be considered; (4) Fox did not
14 modify its criteria to exclude Karger; (5) Karger was excluded because he failed to meet the pre-
15 established criteria; and (6) the Complaint does not allege any violations by Rupert Murdoch or
16 Roger Ailes in their individual capacities. Response at 3-8.

17

¹ The following candidates participated in the debate: Michelle Bachmann; Jon Huntsman; Newt Gingrich; Tim Pawlenty; Mitt Romney; Ron Paul; Rick Santorum; and Herman Cain. According to the national polling information compiled by Politico.com and PollingReport.com, included in the Complaint as Attachments 29 and 30, respectively, each of these candidates had sufficient support in published national polls, distinguishing them from Karger, who was not included in any polls compiled by Politico.com, was not consistently included in the polls compiled by PollingReport.com, and was generally polling at 0-1% in every poll in which he was included. Fox also excluded Thaddeus McCotter from the Iowa debate for failing to meet its stated eligibility criteria; reportedly, McCotter's request also cited online polls. See Kathie Obradovich, *There Should Be No Debate Over Rules*, Des Moines Register, Aug. 9, 2011 (attached to Complaint).

III. Legal Analysis

A. Fox's Compliance with the Commission's Debate Regulations

Corporations may not make contributions to federal candidates, 2 U.S.C. § 441b(a), 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. *See* 11 C.F.R. §§ 100.92, 100.154. "Broadcasters (including a cable television operator, programmer or producer), *bona fide* newspapers, magazines and other periodical publications" are specifically permitted to stage candidate debates. 11 C.F.R. § 110.13(a)(2).

Fox is a broadcaster, not owned or controlled by a political party, political committee, or candidate, and therefore qualifies as a debate staging entity pursuant to 11 C.F.R. § 110.13(a). *See* 11 C.F.R. § 110.13(b). The debate regulations leave the structure of the debate to the discretion of the staging organization, provided that the debate includes at least two candidates, the organization does not arrange the debates in a manner that promotes or advances one candidate over another, and the criteria for candidate selection are objective and pre-established. *See* 11 C.F.R. §§ 110.13(b)-(c). There is no information suggesting that Fox structured the Iowa debate to promote one candidate above another. The sole issue in this matter is whether Fox used objective and pre-established candidate selection criteria as a basis for excluding Karger from the debate.

Fox's debate criteria required that, in addition to meeting "all U.S. Constitutional requirements" and registering with the Commission, prospective debate participants must have "garnered at least an average of one percent in five national polls based on most recent polling leading up to the registration day." Complaint at 3; Response at 1. Fox's published selection criteria are both objective and consistent with Commission-approved criteria specified in past

12044313755

1 matters, which include the percentage of votes by a candidate received in a previous election; the
2 level of campaign activity by the candidate; the candidate's fundraising ability and/or standing in
3 the polls; and the candidate's eligibility for ballot access.² See MURs 4956, 4962, and 4963
4 (Union Leader Corporation, *et al.*); MUR 5395 (Dow Jones, *et al.*); and MUR 5650 (University
5 of Arizona).

6 Karger submitted the following five polls to Fox in an effort to qualify for its Iowa
7 debate:³

- 8 (1) a Harris Poll dated August 4, 2011, indicating 2% support;⁴
9 (2) a Zogby Poll dated July 25, 2011, indicating 1% support;
10 (3) a Zogby Poll dated May 23, 2011, indicating 1% support;
11 (4) a Fox News Poll dated April 28, 2011, indicating 1% support; and
12 (5) a McClathy-Marist Poll dated June 29, 2011, indicating "less than 1%" support.
13

14 Relying on its selection criteria, Fox rejected Karger's request to participate in the debate,
15 asserting that, as online surveys, the August 4 Harris interactive poll, and the July 25 and May
16 23, Zogby polls, did not meet Fox's debate criteria. See Complaint at 3. Additionally, Fox

² In prior matters, we have noted that objective selection criteria are "not require[d] [to contain] rigid definitions or required percentages." See MURs 4956, 4962, 4963 (Union Leader Corp., *et al.*), First General Counsel's Report at 19 (FGCR, Union Leader MURs). "'Objective' does not mean that the candidate selection criteria must be stripped of all subjectivity or be judged only in terms of tangible, arithmetical cut-offs. Rather, it appears they must be free of 'content bias,' and not geared to the 'selection of certain pre-chosen participants.'" *Id.* at 23.

³ The Complaint also stated, "After first contacting Fox News Channel, [Karger] polled at 1% in an additional Synovate poll (Attachment 13), which was released on August 8, 2011." Complaint at 3. The Complaint appears to suggest that this poll was released after Karger sought Fox's permission to participate in its debate. It is unclear whether this poll was immune to Fox's selection criteria. The Respondents did not address this poll in their response to Karger at that time or in their Response to the Complaint. Information about the Synovate Poll, an online poll like the Zogby poll, can be found in a five page document that is Attachment 13 to the Complaint. The footer on the first page and the title of the charts in Attachment 13 state "Fred Karger for President" and "Republican Candidate Study," which may indicate that this poll was commissioned by Karger's campaign.

⁴ The August 4, 2011, "Harris Poll", upon which Karger's request also relied, may also be a poll commissioned by Karger rather than the official weekly Harris Poll. It is not listed on the Harris Interactive, Inc. website along with the official Harris polls, and the results, which are Attachment 8 to the Complaint, indicate that they are for a "QuickQuery," which the Harris website describes as "an innovative online omnibus research product that lets you ask questions and get accurate, projectable answers, from more than 2,000 adult respondents nationwide within two business days." See <http://www.harrisinteractive.com/Products/HarrisPollQuickQuery.aspx>

1 contended that Fox's April 28 poll was not recent enough. *See id.* The only remaining poll, the
2 June 29 McClathy-Marist Poll, showed less than 1% support for Karger. *See id.*

3 **1. Fox's Exclusion of Online Polls**

4 The Complaint alleges that Fox failed to use pre-established criteria because Fox
5 allegedly changed the eligibility criteria to exclude online polls after Karger requested to
6 participate in Fox's August 11 debate. Complaint at 3. The Complaint points out that the debate
7 eligibility criteria that Fox published at the time Karger applied to participate in the debate failed
8 to specify that Fox would not consider online polls. *See* Complaint at 3.

9 The Respondents acknowledge that the published criteria did not specify that Fox would
10 reject online polls. But respondents maintain that they did not include this detail in the published
11 criteria because it was "widely understood" at Fox that online polls would not be accepted and
12 the one percent polling threshold made it necessary to use "accepted, standardized polling
13 methods." Response at 6.

14 According to Respondents, online polls "are widely regarded as having less accuracy
15 than standard telephone polling." *Id.* at 5. Fox considered online polls to be inappropriate for
16 the purpose of determining the participants in its debates because the polling threshold was low
17 (1%), "and thus the use of accepted, standardized polling methods was important[.]" *Id.* at 6.⁵
18 Fox explained that its press release announcing the eligibility criteria failed to state that Fox

⁵ Respondents explain that Fox's "1% polling threshold was reasonably designed to exclude those candidates who truly appeared to have no chance of winning the Republican nomination" and that, as part of its selection process, Fox "appropriately identified those sources of polling results it believed would provide current and reliable polling data." Response at 4.

1 would not accept online polls because "online polls are generally not considered to be
2 qualitatively similar to other accepted polling methods." *Id.*⁶

3 In support of these contentions, the Response includes the sworn Declaration of
4 respondent Michael Clemente, Fox's Senior Vice President of News. Clemente's Declaration
5 states that: (1) the criteria were the "sole factors used" to determine which candidates were
6 eligible for Fox News debates; (2) "It was widely understood by those at Fox News Channel
7 involved with the selection of participants for the Debate (and by all other major national
8 television news organizations) that online polls would not be accepted to demonstrate a
9 candidate met the 1% polling threshold specified in the criteria"; (3) the published debate
10 eligibility criteria did not specify that Fox would not consider online polls because "it is
11 generally understood in the television news industry and elsewhere that online polls are not as
12 accurate or qualitatively similarly to standard phone polling methods"; (4) no candidate was
13 permitted to qualify using online polls; (5) Fox did not adopt the exclusion of online polls to
14 exclude Karger; and (6) no candidates were permitted to participate in the August 11 debate
15 unless they satisfied Fox's eligibility criteria. Declaration of Michael Clemente (attached to
16 Response) at 1-2. There is no record evidence to contradict Clemente's sworn declaration.

17 Based on all of the available information, it appears that Fox's pre-established debate
18 eligibility criteria included a low (1%) polling threshold that all candidates had to satisfy using
19 traditional polls and that Fox applied this criterion to all candidates consistently. Nor is there
20 any information establishing that requiring traditional polls to meet a low threshold resulted in
21 content bias or the selection of certain pre-chosen participants; therefore, this criterion is

⁶ The Commission need not decide whether online polls are considered reliable or generally-accepted by other debate sponsors because the sole issue in this matter is whether Fox's criteria were pre-established and objective (i.e., free of content bias, and not geared to the selection of certain pre-chosen participants).

1 objective. Finally, in rejecting Karger's online polls, Fox was implementing objective and pre-
2 established criteria. Accordingly, we recommend that the Commission determine that there is no
3 reason to believe that Fox News Channel violated 2 U.S.C. § 441b(a) by failing to comply with
4 11 C.F.R. § 110.13, based on its refusal to consider online polls when determining Karger's
5 eligibility to participate in its August 11, 2011, debate.

6 2. Fox's Exclusion of the April 28, 2011, Fox Poll

7 The Complaint also alleges that Fox changed the debate eligibility requirements to
8 exclude Karger by refusing to consider an April 28 Fox News poll showing that he had 1%
9 support on the ground that the poll was not recent enough. Complaint at 4. The Complainant
10 asserts that Fox selectively excluded this poll, which was three months old at the time of
11 submission by Karger, as evidenced by the fact that Fox permitted another candidate to
12 participate in an earlier Fox debate using a five-month-old poll. *Id.* at 4-5.

13 Respondents counter that the criteria clearly stated that "candidates would be required to
14 use the most recent polling data to meet the 1% threshold" and that the Complaint's contentions
15 regarding the age of polls used to qualify another candidate in an earlier debate are "wholly
16 irrelevant" to this matter. Response at 7-8.

17 Fox's debate eligibility criteria do not specify how "recent" polls must be in order to be
18 considered; they state that the minimum level of support, an average of 1% in five national polls,
19 must be "based on most recent polling leading up to the registration day." Complaint at 2;
20 Response at 1.

21 The Complaint itself includes information that suggests that there may have been national
22 polls more recent than the April 28 Fox poll. The Complaint alludes to a Fox statement
23 indicating that Fox excluded its own April poll because there were subsequent Fox polls in

12044313759

1 which Karger received less than 1% support. Complaint at 4; *see also id.* at 3 (quoting a Fox
2 press release in which Fox explained that it "offered up Mr. Karger's name in polls conducted in
3 June and July, but he did not register in either."). The existence of additional polls in June and
4 July indicates that the April 28 Fox poll on which Karger relied was not, in fact, among the
5 "most recent" national polls conducted before "registration day" for the August 11 debate and –
6 based on its established criteria – that Fox appropriately excluded it.⁷

7 It is not surprising that different candidates needed to use polls of different ages to
8 qualify for Fox's debates in the early stages of the election cycle because the field of potential
9 candidates was uncertain and each candidate was not included in every poll. For example, the
10 Complaint includes a list of 19 polls that were conducted in advance of a Fox debate held on
11 April 29, 2011. Complaint at 5-6. This list indicates that another candidate who participated in
12 that debate was not included in 13 of the 19 listed polls and was not included in six of the ten
13 polls issued most recently before that debate. *Id.* This example demonstrates that to obtain the
14 "most recent" polling data, it may be necessary to look farther back in time for some candidates
15 than for others. Thus, the fact that Fox considered a five-month-old poll for one candidate at one
16 point earlier in the election cycle and did not consider a three-month-old poll for Karger later in
17 the cycle does not, by itself, indicate that Fox did not use pre-established and objective criteria.

18 In short, there is no reason to believe that Fox News Channel violated 2 U.S.C. § 441b(a)
19 by failing to comply with 11 C.F.R. § 110.13 based on its refusal to consider the April 28 Fox
20 poll in determining that Karger was ineligible to participate in the August 11 debate.

⁷ Karger's debate application cited a July 25, 2011, Zogby online poll that indicated that Karger received 1% support, *see* Complaint at 2, but did not cite three Zogby online polls in June and July that indicated that Karger's support was 0% or less than 1%. *See* Complaint at Attachment 10. Even if Fox did not exclude online polls and considered the five "most recent" polls, including online polls, before the Iowa debate application deadline, it is not clear whether Karger would have met the 1% threshold.

* * * *

Accordingly, the Office of General Counsel recommends that the Commission find no reason to believe that, by excluding Karger from the August 11 debate, Fox violated the Act or Commission regulations.

B. Rupert Murdoch, Roger Ailes, and Michael Clemente

The Complaint did not make any factual allegations indicating that News Corporation CEO and Chairman Rupert Murdoch and Fox News Channel President Roger Ailes, violated 2 U.S.C. § 441b in their individual capacities. Response at 2. Nor did it include allegations establishing that Fox News Channel Senior Vice President of News Michael Clemente, who developed Fox's debate eligibility criteria in connection with his official duties at Fox, Clemente Declaration at ¶¶ 2-3, violated 2 U.S.C. § 441b in his individual capacity. Moreover, because Fox New Channel did not make a contribution or expenditure prohibited by Section 441b, it follows that none of these corporate officers consented to a contribution or expenditure prohibited by 2 U.S.C. § 441b. Accordingly, we recommend that the Commission conclude that there is no reason to believe that Murdoch, Ailes, or Clemente violated 2 U.S.C. § 441b in connection with Fox's exclusion of Karger from its August 11 Iowa debate.

IV. RECOMMENDATIONS

1. Find no reason to believe that Fox News Channel, Rupert Murdoch, Roger Ailes, or Michael Clemente made corporate contributions in violation of 2 U.S.C. § 441b.
2. Approve the attached Factual and Legal Analysis.

3. Approve the appropriate letters.

4. Close the file.


Anthony Herman
General Counsel

5/14/12
Date

BY:


Daniel A. Petalas
Associate General Counsel


Mark Shonkwiler
Assistant General Counsel


Michael A. Columbo
Attorney

12044313762