



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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VIA FAX and
FIRST CLASS MAIL

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RE: MUR 6493
Fox News Channel
Rupert Murdoch
Roger Ailes
Michael Clemente

Dear Mr. Noble:

On August 25, 2011, the Federal Election Commission notified your clients, Fox News Channel, Rupert Murdoch, Roger Ailes, and Michael Clemente, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On May 24, 2012, the Commission found, on the basis of the information in the complaint and information provided by you, that there is no reason to believe your clients violated 2 U.S.C. § 441b(a). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Michael Columbo, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Mark D. Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3 **FACTUAL AND LEGAL ANALYSIS**
4

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6 In the Matter of)
7) MUR 6493
8 Fox News Channel)
9 Rupert Murdoch)
10 Roger Ailes)
11 Michael Clemente)
12

13 **I. GENERATION OF MATTER**
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15 This matter was generated based on a complaint filed with the Federal Election
16 Commission by Fred Karger. *See* 2 U.S.C. § 437g(a)(1).

17 **II. INTRODUCTION**

18 Fox News Channel ("Fox") sponsored a debate in Iowa for Republican
19 presidential candidates on August 11, 2011, but excluded the Complainant, Presidential
20 candidate Fred Karger. The primary issue in this matter is whether Fox used pre-
21 established and objective criteria, as required by 11 C.F.R. § 110.13(b)-(c), in rejecting
22 Karger's request to participate in Fox's Iowa debate. *See* Complaint at 3. The
23 Commission's regulations provide a basis for the news media to stage debates without
24 being deemed to have made prohibited corporate contributions to the candidates taking
25 part in those debates in violation of 2 U.S.C. § 441b(a). *See* 11 C.F.R. § 110.13;
26 *Corporate and Labor Organization Activity; Express Advocacy and Coordination with*
27 *Candidates*, 60 Fed. Reg. 64,260, 64,261 (Dec. 14, 1995) (hereinafter, "FEC Explanation
28 and Justification"). The complaint alleges that Fox made a prohibited corporate
29 contribution by failing to abide by its stated candidate debate criteria when it refused to
30 accept both online polls and a three-month-old poll submitted by Karger.

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1 For the reasons stated below, the Commission finds that there is no reason to
2 believe that Respondents violated 2 U.S.C. § 441b(a).

3 **III. FACTUAL BACKGROUND**

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

11 On August 11, 2011, Fox sponsored a Republican Presidential candidate debate in
12 Iowa. Before the debate, Fox announced that prospective participants must have
13 “garnered at least an average of one percent in five national polls based on most recent
14 polling leading up to the registration day,” which was Tuesday, August 9, 2011. *See*
15 Complaint at 2; Response at 1. Karger submitted five polls to Fox -- three of which were
16 online polls -- that showed his support was between “less than 1%” and two percent. *See*
17 Complaint at 3. Fox stated that it would not accept the three online polls that Karger
18 submitted and rejected a fourth poll because it was not recent enough. *Id.* Fox informed
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1 Karger that it would not permit him to participate in the Iowa debate because it decided
2 that Karger did not meet its criteria for participation.¹ *Id.*

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

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

1 **IV. LEGAL ANALYSIS**

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

3 Corporations may not make contributions to federal candidates, 2 U.S.C.
4 § 441b(a), but funds used or provided "to defray costs incurred in staging candidate
5 debates in accordance with the provisions of 11 C.F.R. §§ 110.13 and 114.4(f)" are not
6 considered contributions. *See* 11 C.F.R. §§ 100.92, 100.154. "Broadcasters (including a
7 cable television operator, programmer or producer), *bona fide* newspapers, magazines
8 and other periodical publications" are specifically permitted to stage candidate debates.
9 11 C.F.R. § 110.13(a)(2).

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

21 Fox's debate criteria required that, in addition to meeting "all U.S. Constitutional
22 requirements" and registering with the Commission, prospective debate participants must
23 have "garnered at least an average of one percent in five national polls based on most

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1 recent polling leading up to the registration day.” Complaint at 3; Response at 1. Fox’s
2 published selection criteria are both objective and consistent with Commission-approved
3 criteria specified in past matters, which include the percentage of votes by a candidate
4 received in a previous election; the level of campaign activity by the candidate; the
5 candidate’s fundraising ability and/or standing in the polls; and the candidate’s eligibility
6 for ballot access.² See MURs 4956, 4962, and 4963 (Union Leader Corporation, *et al.*);
7 MUR 5395 (Dow Jones, *et al.*); and MUR 5650 (University of Arizona).

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

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

² In prior matters measuring the objectivity of debate selection criteria, the Commission did “not require 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 brought to Fox’s attention before the debate. 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>

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2 Relying on its selection criteria, Fox rejected Karger's request to participate in the
3 debate, asserting that, as online surveys, the August 4 Harris interactive poll, and the July
4 25 and May 23, Zogby polls, did not meet Fox's debate criteria. *See* Complaint at 3.
5 Additionally, Fox contended that Fox's April 28 poll was not recent enough. *See id.* The
6 only remaining poll, the June 29 McClathy-Marist Poll, showed less than 1% support for
7 Karger. *See id.*

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

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

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

19 According to Respondents, online polls "are widely regarded as having less
20 accuracy than standard telephone polling." *Id.* at 5. Fox considered online polls to be
21 inappropriate for the purpose of determining the participants in its debates because the
22 polling threshold was low (1%), "and thus the use of accepted, standardized polling

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1 methods was important[.]” *Id.* at 6.⁵ Fox explained that its press release announcing
2 the eligibility criteria failed to state that Fox would not accept online polls because
3 “online polls are generally not considered to be qualitatively similar to other accepted
4 polling methods.” *Id.*⁶

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

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.

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 Based on all of the available information, it appears that Fox's pre-established
2 debate eligibility criteria included a low (1%) polling threshold that all candidates had to
3 satisfy using traditional polls and that Fox applied this criterion to all candidates
4 consistently. Nor is there any information establishing that requiring traditional polls to
5 meet a low threshold resulted in content bias or the selection of certain pre-chosen
6 participants; therefore, this criterion is objective. Finally, in rejecting Karger's online
7 polls, Fox was implementing objective and pre-established criteria.

8 Accordingly, the Commission determines that there is no reason to believe that
9 Fox News Channel violated 2 U.S.C. § 441b(a) by failing to comply with 11 C.F.R.
10 § 110.13, based on its refusal to consider online polls when determining Karger's
11 eligibility to participate in its August 11, 2011, debate.

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

13 The Complaint also alleges that Fox changed the debate eligibility requirements
14 to exclude Karger by refusing to consider an April 28 Fox News poll showing that he had
15 1% support on the ground that the poll was not recent enough. Complaint at 4. The
16 Complainant asserts that Fox selectively excluded this poll, which was three months old
17 at the time of submission by Karger, as evidenced by the fact that Fox permitted another
18 candidate to participate in an earlier Fox debate using a five-month-old poll. *Id.* at 4-5.

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

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

5 The Complaint itself includes information that suggests that there may have been
6 national polls more recent than the April 28 Fox poll. The Complaint alludes to a Fox
7 statement indicating that Fox excluded its own April poll because there were subsequent
8 Fox polls in which Karger received less than 1% support. Complaint at 4; *see also id.* at
9 3 (quoting a Fox press release in which Fox explained that it "offered up Mr. Karger's
10 name in polls conducted in June and July, but he did not register in either."). The
11 existence of additional polls in June and July indicates that the April 28 Fox poll on
12 which Karger relied was not, in fact, among the "most recent" national polls conducted
13 before "registration day" for the August 11 debate and – based on its established criteria –
14 – that Fox appropriately excluded it.⁷

15 It is not surprising that different candidates needed to use polls of different ages to
16 qualify for Fox's debates in the early stages of the election cycle because the field of
17 potential candidates was uncertain and each candidate was not included in every poll.
18 For example, the Complaint includes a list of 19 polls that were conducted in advance of
19 a Fox debate held on April 29, 2011. Complaint at 5-6. This list indicates that another
20 candidate who participated in that debate was not included in 13 of the 19 listed polls and

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.

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1 was not included in six of the ten polls issued most recently before that debate. *Id.* This
2 example demonstrates that to obtain the "most recent" polling data, it may be necessary
3 to look farther back in time for some candidates than for others. Thus, the fact that Fox
4 considered a five-month-old poll for one candidate at one point earlier in the election
5 cycle and did not consider a three-month-old poll for Karger later in the cycle does not,
6 by itself, indicate that Fox did not use pre-established and objective criteria.

7 In short, there is no reason to believe that Fox News Channel violated 2 U.S.C.
8 § 441b(a) by failing to comply with 11 C.F.R. § 110.13 based on its refusal to consider
9 the April 28 Fox poll in determining that Karger was ineligible to participate in the
10 August 11 debate.

11 * * * *

12 Accordingly, there is no reason to believe that, by excluding Karger from the
13 August 11 debate, Fox violated the Act or Commission regulations.

14 **C. Rupert Murdoch, Roger Ailes, and Michael Clemente**

15 The Complaint did not make any factual allegations indicating that News
16 Corporation CEO and Chairman Rupert Murdoch and Fox News Channel President
17 Roger Ailes, violated 2 U.S.C. § 441b in their individual capacities. Response at 2. Nor
18 did it include allegations establishing that Fox News Channel Senior Vice President of
19 News Michael Clemente, who developed Fox's debate eligibility criteria in connection
20 with his official duties at Fox, Clemente Declaration at ¶¶ 2-3, violated 2 U.S.C. § 441b
21 in his individual capacity. Moreover, because Fox New Channel did not make a
22 contribution or expenditure prohibited by Section 441b, it follows that none of these
23 corporate officers consented to a contribution or expenditure prohibited by 2 U.S.C. §

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- 1 441b. Accordingly, there is no reason to believe that Murdoch, Ailes, or Clemente
- 2 violated 2 U.S.C. § 441b in connection with Fox's exclusion of Karger from its August
- 3 11 Iowa debate.

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