



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Mark J. Prak, Esq.
Charles F. Marshall, Esq.
Brooks Pierce
1600 Wells Fargo Capitol Center
150 Fayetteville Street
Raleigh, North Carolina 27601

NOV 25 2013

RE: MUR 6703
WCVB-TV, Channel 5
Hearst Stations, Inc.

Dear Messrs Prak and Marshall:

On December 11, 2012, the Federal Election Commission notified your clients, WCVB-TV, Channel 5 and Hearst Stations, Inc., of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On November 19, 2013, the Commission found, on the basis of the information in the complaint and information provided by you, that there is no reason to believe WCVB-TV, Channel 5 and Hearst Stations, Inc. 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 Elena Paoli, the attorney assigned to this matter at (202) 694-1548.

Sincerely,

A handwritten signature in cursive script that reads "Susan L. Lebeaux".

Susan L. Lebeaux
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: WCVB-TV, Channel 5 ("WCVB") MUR: 6703
Hearst Stations, Inc.

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by Daniel Fishman. *See* 2 U.S.C. § 437g(a)(1).

II. FACTS

Complainant was a registered candidate in the 2012 election in Massachusetts's Sixth Congressional District. *See* Daniel Fishman Statement of Candidacy (July 3, 2012); Compl. at 2. WCVB is a television station owned by Hearst Stations, Inc. Resp. at 2. Andrew Vrees is WCVB's news director, and Rosemary Lappin is a senior news producer at WCVB.

In September or early October 2012, WCVB began planning to host a debate between Congressional candidates in the sixth district on its regularly scheduled public affairs program "On the Record." Rosemary Lappin Decl. at 1 (Jan. 30, 2013); Andrew Vrees Decl. at 1 (Jan. 29, 2013). Vrees avers that, in preparing for the debate, he researched objective written criteria WCVB had used previously for the 2010 Senate debate and for the 2010 gubernatorial debate. He further avers that he discussed these criteria with Rosemary Lappin, and they agreed to use them as a "base, or a guide to formalize the objective criteria for the October 25, 2012, debate." Vrees Decl. at 2 and Vrees, Ex. A (previous criteria); *see also* Lappin Decl. at 1-2.

In an October 11, 2012, e-mail, Lappin informed each of the three candidates in the Sixth Congressional District election, including Complainant, that WCVB's "On the Record" show would host a half-hour candidate debate on October 25, 2012. Compl. at 1; Lappin Decl. at 2,

1 Ex. A (e-mails). Lappin's e-mail listed the following criteria for participation: (1) at least three
2 campaign staff; (2) daily campaign schedule; (3) regular communication with news media; (4)
3 campaign contributions of at least \$50,000; and (5) a showing of at least 10% in two of the latest
4 independent polls. Lappin Decl., Ex. A. The e-mail also stated that "[a] candidate must fulfill
5 all these requirements to participate." *Id.*

6 Complainant responded to Lappin's e-mail later the same day, stating in part, "before I go
7 public with my rebuttal, I just want to make clear that you are deliberately not inviting a
8 campaign that is gaining traction every day." *Id.* Lappin responded by e-mail the next day: "I
9 understand that you feel your campaign is gaining traction. WCVB-TV has set the 6th
10 Congressional Debate criteria. On behalf of Channel 5 management and myself, if you meet
11 them all by Monday, October 22 you will be included." *Id.* Lappin states that she investigated
12 whether the candidates met each of the criteria, determined that Complainant failed to meet most,
13 if not all, of them, and did not receive any information from Complainant between October 11
14 and 22, 2012, regarding his ability to meet them. On or about October 22, 2012, Lappin notified
15 Complainant that he did not meet several of the criteria and therefore was not eligible to
16 participate in the October 25, 2012, debate. Lappin Decl. at 3.

17 Complainant argues that two weeks' notice does not constitute pre-established criteria,
18 and that "the requirements seem tailor made to exclude my campaign, which makes them not
19 objective." Compl. at 2. Complainant also specifically challenges three participation criteria.
20 First, he states that the polling criteria was impossible to achieve because at the time of the

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1 October 11, 2012, e-mail announcing the criteria, there were not already two independent polls
2 showing support for his candidacy of at least 10%.¹ *Id.* Complainant maintains that his
3 internal polling indicated his support at over 10%, and polls that excluded him showed well over
4 30% of the voters undecided.² *Id.*

5 Second, Complainant alleges that the \$50,000 in contributions criterion was not objective
6 because “[t]here is no evidence that \$50,000 is a number that indicates a competitive campaign,”
7 and “[w]ith modern citizen based journalism, Social Media and Youtube, the opinion that a
8 campaign MUST raise cash above and beyond the FEC’s requirements for official candidacy
9 status is not objective.” *Id.* He maintains that before WCVB created its debate criteria, “which
10 seem[] designed to exclude my campaign,” he was on the public record stating that he wanted to
11 rely mostly on volunteer spending and would not accept corporate contributions, making it easy
12 for WCVB to “pick a criteria my campaign had announced it was unwilling to meet.” *Id.* at 2-3.
13 Although he admits he did not raise enough funds to satisfy the criterion, Complainant states that
14 he could have contributed \$50,000 to his campaign, “but I saw that as a betrayal [of] the
15 principles I was running on.” *Id.* at 3.

16 Finally, Complainant alleges that the criterion of “‘regular communication’ with the news
17 media is such a vague description that it lends itself to being used in a discriminatory manner.”
18 *Id.* He states that his campaign issued regular press releases, had discussions with editors of the

¹ The Complaint actually states, “there had not been two independent polls indicating my support at *less than* 10%, so the criteria was impossible to achieve.” Compl. at 2 (emphasis added). Taking the statement in context, we believe that Complainant meant to refer to polls indicating support of *at least* 10 percent.

² According to her declaration, Lappin consulted a *Boston Globe* poll taken on October 1, 2012, and a WBUR poll taken September 12, 2012. Lappin, Decl. at 3. Among likely voters, the *Boston Globe* poll showed support of 37% for Richard Tisei, 31% for John Tierney, 2% for other, and 30% undecided. http://www.boston.com/multimedia/2012/10/01/poll/poll_web_monday_final.pdf. The WBUR poll showed voters’ initial preferences to be 39% for Tierney, 32% for Tisei, and 6% for Complainant. http://www.wbur.org/files/2012/09/0912_6th-topline-results.pdf. See Exhibit B to Lappin Decl. (spreadsheet showing part of Lappin’s research).

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1 major papers in the Sixth District, conducted numerous television interviews, and that he had
2 participated in debates with the other candidates in the election. *Id.* Complainant concludes by
3 stating that he thinks this matter is “very similar to *La Botz v. FEC* [889 F. Supp. 2d 51 (D.D.C.
4 2012)]” (“*La Botz*”). *Id.*

5 Respondents contend the debate participation criteria were both pre-established and
6 objective, that Complainant did not meet them, that the criteria were not designed to exclude
7 Complainant, and that this matter is not akin to *La Botz*. Resp. at 5-9.

8 III. LEGAL ANALYSIS

9 Corporations may not make contributions to federal candidates, 2 U.S.C. § 441b(a), but
10 funds used or provided “to defray costs incurred in staging candidate debates in accordance with
11 the provisions of 11 C.F.R. §§ 110.13 and 114.4(f)” are not considered contributions.
12 11 C.F.R. § 100.92. “Broadcasters (including a cable television operator, programmer
13 or producer), *bona fide* newspapers, magazines and other periodical publications” are among the
14 “staging organizations” specifically permitted to stage candidate debates, provided that they are
15 not owned or controlled by a political party, political committee or candidate. 11 C.F.R.
16 § 110.13(a)(2).

17 WCVB is a broadcaster owned by Hearst Stations, Inc., and neither entity is owned or
18 controlled by a political party, political committee, or candidate, *see* Resp. at 4, and therefore
19 WCVB qualifies as a debate staging organization pursuant to 11 C.F.R. § 110.13(a). The debate
20 regulations leave the structure of the debate to the discretion of the staging organization,
21 provided that the debate includes at least two candidates, and the organization does not structure
22 the debates to promote or advance one candidate over another. *See* 11 C.F.R. § 110.13(b).

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Further, the staging organization must use pre-established objective criteria to determine which candidates may participate in a debate. *See* 11 C.F.R. § 110.13(c).

WCVB's October 25, 2012, debate included two candidates, and there is no indication that WCVB arranged the debate in a manner that promoted or advanced one candidate over another. The sole issue in this matter is whether WCVB used pre-established objective criteria as a basis for excluding Complainant from the debate. The record in this matter supports the conclusion that the selection criteria used by WCVB were both pre-established and objective, and thus complied with the applicable regulations.

To establish that the criteria were pre-established, the Commission has stated that, "[s]taging organizations must be able to show that their objective criteria were used to pick the participants, and that the criteria were not designed to result in the selection of certain pre-chosen participants." Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 Fed. Reg. 64,259, 64,262 (Dec. 14, 1995). Reducing the objective criteria to writing is "well advised." *Id.* Similarly, 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, it appears that they must be free of 'content bias,' and not geared to the 'selection of certain pre-chosen participants.'" *See* First Gen. Counsel's Rpt. at 23, MURs 4956, 4962, 4963 (Union Leader Corp., *et al.*).

WCVB's debate criteria are, on their face, free of any content-bias designed to exclude any particular candidate. According to Vrees's declaration, "[i]t was important, from a newsgathering and public interest perspective, for [WCVB] to focus its limited airtime on the candidates whose campaigns had generated a sufficient level of interest and support among voters and in the media. The criteria we used provided an objective benchmark for us to make

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1 that determination.” Vrees Decl. at 2. There is no information showing that WCVB was
2 influenced by any other considerations or, more specifically, that it chose the criteria with the
3 intent to exclude Complainant from the debate. Indeed, Lappin told Complainant that he could
4 have until October 22, 2012, eleven days from the notification and three days before the debate,
5 to show he met the requirements. Lappin Decl., Ex. A.

6 WCVB’s debate criteria are also consistent with Commission-approved objective criteria
7 specified in previous matters, which include standing in the polls, the level of campaign activity
8 by the candidate and the candidate’s fundraising ability. See MURs 4956, 4962, and 4963
9 (Union Leader Corporation, *et al.*) (significant candidate and campaign organization presence);
10 MUR 5395 (Dow Jones, *et al.*) (active campaigning, ability to fundraise, and standing in public
11 polls); and MUR 5650 (University of Arizona) (level of campaign activity and significant voter
12 interest). See also *La Botz*, 889 F. Supp. 2d at 63-64; *Buchanan*, 112 F. Supp. 2d. at 74
13 (concluding that polling data is objective); *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S.
14 666, 682 (1998) (citing lack of financial support as an objective indicator). Moreover,
15 Respondents here have presented evidence that the criteria used here were based on, or guided by
16 written criteria used in two previous debates, which further refutes the allegation that the criteria
17 were specifically designed to exclude any particular candidate in this election. See Lappin Decl.
18 at 1-2; Vrees Decl. at 2 and Ex. B.

19 In this instance, WCVB informed each of the candidates that he would be required to
20 fulfill all of WCVB’s debate participation criteria in order to participate in the debate.
21 Accordingly, because the Complainant’s failure to meet any single one of WCVB’s criteria
22 would have been sufficient for WCVB to exclude him from the debate, the Commission need not
23 address each and every one of WCVB’s debate participation criteria. Rather, it suffices only to

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1 address WCVB's use of polling data, a criterion which the Commission has consistently
2 concluded is consistent with seeking debate participants whose campaigns have generated a
3 modest measure of voter interest and support. Specifically, the Commission concludes that
4 requiring a showing of 10% in two recent independent polls for participation in the debate is both
5 objective and reasonable. *See Buchanan v. FEC*, 112 F. Supp. 2d. 58, 73-75 (D.D.C. 2000)
6 (finding that the use of 15% showing of support in independent poll was objective and
7 reasonable). The Complainant does not dispute that he failed to satisfy this criterion. *See supra*
8 p. 3 n. 2. Accordingly, Respondents' debate criteria use of a polling data threshold was both
9 objective and pre-established within the meaning of the Commission's debate regulations.

10 Finally, contrary to Complainant's assertion, this matter is not similar to *La Botz*. In that
11 case, a district court remanded a complaint to the Commission that alleged that the Ohio News
12 Organization ("Ohio News") and its member newspapers improperly excluded the complainant
13 from three televised debates. The district court in *La Botz* concluded that Ohio News had not
14 provided the Commission with sufficient evidence that Ohio News had used pre-established
15 criteria to select debate participants, and that there was some evidence that Ohio News may have
16 used major party affiliation as the sole criterion. Here, however, Respondents submitted
17 declarations showing that WCVB had not only relied on previously written objective criteria, but
18 that WCVB had also provided these criteria to Complainant and to the other candidates in
19 writing in advance of the debate. Additionally, there is no allegation here that WCVB used
20 major party affiliation as a criterion at all. Moreover, the evidence in this matter was provided
21 through the declarations of WCVB's Vrees and Lappin, which are based on first-hand
22 knowledge, are consistent with each other, and are supported by contemporaneous documentary
23 evidence.

- 1 Therefore, there is no reason to believe that WCVB-TV, Channel 5 and Hearst Stations,
2 Inc. violated 2 U.S.C. § 441b(a).³

³ Since Complainant challenged the Respondents' debate criteria pursuant to 11 C.F.R. §110.13, we analyzed whether the Respondents satisfied the requirements of the debate exemption. In addition to maintaining that the October 25, 2012, debate fell within the debate exemption, Respondents also assert that it fell within the media exemption at 2 U.S.C. § 431(9)(B)(i), which excludes the cost of any "news story, commentary, or editorial distributed through the facilities of any broadcasting station" from the definition of "contribution" or "expenditure," where the entity is not owned or operated by a political committee and is operating within its "legitimate press function." See Resp. at 3-4; see also *Readers Digest Ass'n, Inc. v. FEC*, 589 F. Supp. 1210, 1214 (S.D.N.Y.). Because we concluded that the debate exemption applied, we did not also analyze the applicability of the media exemption.

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