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November 5, 2018

Mr. Jeff S. Jordan  
Assistant General Counsel  
Office of Complaints Examination and Legal Administration  
Federal Election Commission  
1050 First Street, N.E.  
Washington, D.C. 20463

2018 NOV 15 PM 2:03  
GENERAL COUNSEL

Re: MUR 7412

Dear Mr. Jordan:

We are writing on behalf of NBC News and MSNBC, which are divisions of NBCUniversal Media LLC (NBCUniversal Media, LLC, NBC News, and MSNBC collectively referred to as "NBC"). NBC News and MSNBC are referred to in a complaint filed by the National Libertarian Committee (the "Complaint") alleging that the staging organization of the commander-in-chief forum aired by MSNBC and the NBC Network on September 7, 2016 (the "Forum") violated the Federal Election Campaign Act ("FECA") and Federal Election Commission (the "Commission" or "FEC") regulations. In particular, the Complaint alleges that the organizers of the Forum did not utilize pre-established objective criteria to determine which candidates could participate in the Forum, and also alleges that the organizers were required to disclose the criteria. We note that neither NBC News, MSNBC, nor NBCUniversal Media, LLC is named as a respondent in the complaint; however, we submit this response to address any implication that any of them may have violated federal law by producing or airing the Forum.

The Law

FECA prohibits corporations from making contributions or expenditures in connection with a federal election. 52 U.S.C. § 30118(a). FECA and Commission regulations define the terms "contribution" and "expenditure" to include "anything of value" provided to a candidate or campaign committee in connection with a federal election, including the use of corporate

resources. *See* 52 U.S.C. § 30118(b). However, there are numerous exemptions from FECA's prohibition on the use of corporate resources, including but not limited to (1) an exemption permitting bona fide media organizations to incur costs associated with producing and distributing news stories, commentary, or editorials (the "Press Exemption") and (2) an exemption permitting certain broadcasters and nonprofit organizations to use corporate resources to stage candidate debates meeting certain criteria contained in 11 C.F.R. § 110.13 (the "Debate Regulation"). 11 C.F.R. §§ 100.73, 100.132; 11 C.F.R. § 110.13.

### **The Forum was Covered Under the Press Exemption**

As a bona fide news organization, NBC is permitted under FECA's Press Exemption to utilize its corporate resources to produce and broadcast news stories, commentary, and editorials that fit within its legitimate press function. As such, NBC is not required to rely on the Debate Regulation when hosting debates.

As noted above, the Press Exemption excludes from the definitions of contribution and expenditure any costs associated with producing and distributing, among other things, news stories. In numerous advisory opinions, the Commission has applied the press exemption using a two-step analysis that considers (1) whether the person engaging in the activity is a press entity and (2) whether such person is owned or controlled by a political party, political committee, or candidate, and whether the activity is part of such person's legitimate press function. *See e.g.*, Advisory Opinion 2016-01 (Ethiq), Advisory Opinion 2005-16 (Fired Up), Advisory Opinion 2004-07 (MTV). If the activity in question is a legitimate press function conducted by a press entity that is not controlled by a political party, political committee, or candidate, the Press Exemption applies and the costs of that activity are neither a contribution nor an expenditure under FECA.

NBC's production and broadcast of the Forum fit squarely within the Press Exemption. As an internationally recognized, bona fide news organization that is not owned or controlled by a political party, political committee, or candidate, there is no question about NBC's status as a press entity. Indeed, there is no allegation in the Complaint to the contrary. As for the Forum, it consisted of separate back-to-back question-and-answer sessions conducted with two presidential candidates running in the 2016 general election. NBC maintained complete operational and editorial control over the Forum at all times. Affidavit of Susan Weiner at 3. For example, NBC personnel determined the format and mediated both sessions of the Forum. *Id.* Accordingly, the content and structure of the Forum was entirely consistent with the Commission's interpretation of a legitimate press function. In fact, a 1996 Commission Advisory Opinion found that a series of television programs structured in a similar manner as the Forum was covered under the Press Exemption (the "Belo Opinion"). *See* Advisory Opinion 1996-41 (Belo). As was the case with the Forum, the programs in the Belo Opinion were produced and broadcast by a news organization and featured question-and-answer sessions with federal candidates where the candidates appeared separately. Given the similarities between the programs involved in the Belo Opinion and the Forum, it is clear that the Forum was well within the scope of FECA's Press Exemption. As a result, NBC's use of corporate resources in producing and broadcasting the Forum did not constitute a violation of FECA.

**The Forum Under the Debate Regulation**

As discussed above, NBC's Press Exemption results in the organization not needing to rely upon the Debate Regulation to produce or broadcast candidate debates or interviews such as the Forum. However, NBC did ultimately assess invitees to the Forum against objective criteria established by the Commission on Presidential Debates ("CPD").

NBC initially decided to, and did, invite Donald Trump and Hillary Clinton to participate in the Forum. Subsequently, after receiving inquiries seeking clarification as to the process for selecting the candidates, NBC reviewed the polling threshold that the CPD uses to decide which candidates to invite to presidential debates held under its auspices. Affidavit at 4. NBC selected this threshold given that it is well established and publicly available. *Id.*

The CPD had announced its non-partisan candidate selection criteria for the 2016 general election on October 28, 2015. In order to qualify under the criteria, a candidate was required to (1) appear on a sufficient number of state ballots to have a mathematical chance of winning a majority vote in the Electoral College, and (2) have a level of support of at least 15 percent of the national electorate as determined by five selected national public opinion polling organizations, using the average of those organizations' most recently publicly-reported results at the time of the determination.<sup>1</sup> The five polling organizations were ABC News/The Washington Post, NBC News/The Wall Street Journal, CBS News/The New York Times, Fox News, and CNN-Opinion Research Corporation. *Id.*

As noted above, NBC reviewed the CPD threshold after the issue arose as to its selection of candidates to participate in the Forum and, in so doing, determined that Donald Trump and Hillary Clinton were the only two candidates polling at fifteen percent or above at that time. Affidavit at 5. NBC's determination was based on a review of certain publicly available polling data, although it is not clear whether the five specific polls cited in the CPD criteria were used. *Id.* Indeed, polling from that time period confirms that NBC's determination was correct; Mr. Johnson fell far short of the CPD's fifteen percent threshold in the polls cited for use in its criteria. A summary of the results of these polls as applied to Mr. Johnson follows:<sup>2</sup>

<b>Polling Organization</b>	<b>Date</b>	<b>Result for Mr. Johnson</b>
ABC News/The Washington Post	8/1/16 – 8/4/16	8%
NBC News/The Wall Street Journal	7/31/16 – 8/3/16	10%
CBS News/The New	7/29/16 – 7/31/16	10%

<sup>1</sup> Commission on Presidential Debates: An Overview, <http://www.debates.org/index.php?page=overview> (last visited October 24, 2018).

<sup>2</sup> Complete polling information (other than the CBS News/The New York Times poll) is available at: [https://www.realclearpolitics.com/epolls/2016/president/us/general\\_election\\_trump\\_vs\\_clinton\\_vs\\_johnson\\_vs\\_stein-5952.html](https://www.realclearpolitics.com/epolls/2016/president/us/general_election_trump_vs_clinton_vs_johnson_vs_stein-5952.html); the CBS News/The New York Times poll is available at: <https://www.scribd.com/document/319856901/CBS-News-poll-Toplines-Post-Dem-Convo-Poll-Morning>.

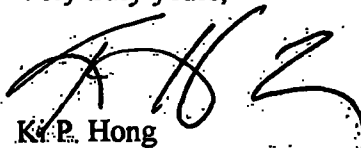
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York Times		
Fox News	8/28/16 – 8/30/16	9%
CNN-Opinion Research Corporation	7/29 – 7/31	9%
Average:		9.2%

Finally, the Complaint also alleges that it constituted a FECA violation for the organizers of the Forum not to publicly disclose their candidate selection criteria. Complaint at 43. While doing so is a suggested practice, the Commission has noted that staging organizations are not required to reduce their candidate selection criteria to writing and distribute that document. 60 Fed. Reg. 64260, 64262.

Given the facts and analysis above, we respectfully request that the Commission dismiss the Complaint with no further action. Please do not hesitate to contact us with any questions or requests for additional information.

Very truly yours,



Kit P. Hong



Charles M. Ricciardelli

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**Affidavit of Susan Weiner**

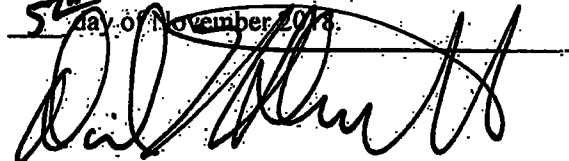
I, Susan Weiner, under the penalty of perjury, hereby swear that, to the best of my knowledge and belief:

1. At all times relevant to the facts that form the basis of Federal Election Commission MUR 7412 as they pertain to NBC (as defined below), I held, and continue to hold, the position of General Counsel of the NBCUniversal News Group and Executive Vice President of NBCUniversal. MSNBC, the NBC Network, and NBC News are divisions of NBCUniversal Media, LLC (collectively, "NBC").
2. On September 7, 2016, a "Commander-in-Chief Forum" (the "Forum") was televised on MSNBC and also presented on the NBC Network by NBC News. The Forum featured two candidates for president in the 2016 general election, Donald Trump and Hillary Clinton.
3. NBC determined that the Forum would consist of separate back-to-back question-and-answer sessions with then-candidates Donald Trump and Hillary Clinton on national security, military affairs and veterans' issues. At all times, NBC maintained complete editorial and operational control over the Forum. For example, NBC personnel determined the format and mediated both sessions of the Forum. Each candidate was interviewed separately, and they did not appear on the stage together at any point in time.
4. After receiving inquiries seeking clarification as to the process for selecting the candidates to participate in the Forum, NBC reviewed the polling threshold that the Commission on Presidential Debates ("CPD") uses to decide which candidates to invite to presidential debates held under its auspices. NBC selected this threshold given that it is well established and publicly available.
5. At that time, I determined that Donald Trump and Hillary Clinton were the only two candidates polling at fifteen percent or above at that time. I based this determination on a review of certain publicly available polling data, although I do not recall whether I consulted the five specific polls cited in the CPD's criteria.

  
Susan Weiner

Sworn to and subscribed before me this

5 day of November, 2016.



Notary Public

**DAVID N. STERNLICHT**  
Notary Public, State of New York  
No. 02ST606045  
Qualified in Westchester County  
Commission Expires Oct. 30, 2022

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