

1 **FEDERAL ELECTION COMMISSION**
2
3 **FIRST GENERAL COUNSEL'S REPORT**
4

5 **MUR 7412**

6 DATE COMPLAINT FILED: June 14, 2018

7 DATE OF NOTIFICATIONS: June 15, 2018
8 Oct. 2, 2018

9 DATE OF LAST RESPONSE: Nov. 15, 2018

10 DATE ACTIVATED: Nov. 9, 2018

11
12 EXPIRATION OF SOL: Sept. 7, 2021 (earliest)/
13 Feb. 19, 2023 (latest)

14 ELECTION CYCLES: 2016, 2018

15
16 **COMPLAINANT:**

Libertarian National Committee

17
18 **RESPONDENTS:**

Denver Metro Chamber Leadership Foundation

WTTW, Public Television Chicago

KDKA-TV, Pittsburgh, PA

NBCUniversal Media LLC

Iraq and Afghanistan Veterans of America

23
24 **RELEVANT STATUTES**
25 **AND REGULATIONS:**

52 U.S.C. § 30116

52 U.S.C. § 30118(a)

11 C.F.R. § 100.92

11 C.F.R. § 110.13

11 C.F.R. § 114.4(f)

29
30 **INTERNAL REPORTS CHECKED:** None

31
32 **FEDERAL AGENCIES CHECKED:** None

33
34 **I. INTRODUCTION**
35

36 The Complaint alleges that the Denver Metro Chamber Leadership Foundation¹ (the
37 "Leadership Foundation"); WTTW, Public Television Chicago ("WTTW"); KDKA-TV,

¹ The Leadership Foundation was incorrectly identified in the Complaint as the Denver Metro Chamber of Commerce ("DMCC"), a related entity. Initially, on June 15, 2018, only DMCC was notified; however, on July 3, 2018, CELA received a response on behalf of both DMCC and the Leadership Foundation. CELA subsequently notified the Leadership Foundation on August 10, 2018, and it responded by relying on the arguments made in its July 3, 2018 response.

1 Pittsburgh, PA (“KDKA”);² NBCUniversal Media LLC (“NBC”);³ and Iraq and Afghanistan
2 Veterans of America (“IAVA”) failed to use pre-established objective criteria in selecting debate
3 participants, as required by Commission regulations, resulting in the exclusion of Libertarian
4 candidates from the debates and prohibited corporate contributions from the debate sponsors to
5 the participating candidates.

6 For the reasons set forth below, we recommend that the Commission find no reason to
7 believe that the Leadership Foundation, NBC, and IAVA violated 52 U.S.C. § 30118(a) by
8 failing to comply with the requirements for staging debates. We further recommend that the
9 Commission dismiss the allegations against WTTW and KDKA pursuant to *Heckler v. Chaney*.⁴

10 **II. FACTUAL BACKGROUND**

11
12 **A. Leadership Foundation—Colorado Senatorial Debate**

13 On October 12, 2016, the Libertarian National Committee contacted the Leadership
14 Foundation and requested that it invite the Libertarian candidate to participate in a debate for
15 candidates for U.S. Senate for Colorado on October 17, 2016.⁵ The Leadership Foundation
16 informed the Libertarian National Committee that it had “a long-standing policy on participation
17 in candidate forums and debates,” pursuant to which “nominees of any party whose candidate
18 received at least ten percent of the total gubernatorial votes cast in Colorado’s last gubernatorial

² CBS is the owner and operator of KDKA, and submitted a response on behalf of KDKA.

³ According to its response, NBC News and MSNBC – the entities responsible for airing the event – are divisions of NBCUniversal Media LLC. One response was submitted on behalf of all three entities, which will be referred to collectively as “NBC.” *See* NBC Resp. at 1 (Nov. 15, 2018).

⁴ 470 U.S. 821 (1985).

⁵ Compl. ¶¶ 25, 27 (Jun. 18, 2018).

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1 election are eligible to participate,” and the Libertarian candidate did not meet this criteria.⁶ The
2 Leadership Foundation sent a copy of its written policy to the Libertarian National Committee on
3 October 13, 2016, and held the debate on October 17, 2016, with only the Democratic and
4 Republican candidates.⁷ The Complaint argues that the Leadership Foundation’s criteria is
5 impermissible because it poses an absolute bar to a candidate from a party that did not exist
6 before the last gubernatorial election.⁸

7 In response, the Leadership Foundation argues that it used pre-established objective
8 criteria to select debate candidates and provided a copy of the written criteria to Complainant
9 before the debate.⁹ The Leadership Foundation further contends that because a federal court,
10 albeit in *dicta*, stated that the criterion for being eligible to receive federal matching funds by
11 acquiring 5% support in the previous general election would “probably” be an objective
12 criterion,¹⁰ thus, its 10% threshold should likewise be deemed objective.¹¹

13 **B. NBC/IAVA—Commander in Chief Forum**

14 The Complaint alleges that IAVA and NBC did not invite any minor party candidates to
15 participate in a debate for Presidential candidates billed as the “Commander in Chief Forum,”

⁶ *Id.* ¶ 27, Ex. C. Complainant initially asked DMCC for debate participant selection criteria, who erroneously responded that there were no criteria; however, a Leadership Foundation representative later corrected the record. *Id.* The Leadership Foundation’s policy purportedly mirrors the definition of “major political party” as defined by the Colorado Secretary of State. *See* Leadership Foundation Resp. at 3 (July 3, 2018).

⁷ Compl. ¶ 28.

⁸ *Id.* ¶ 29. Complainant does not argue that its candidate would be absolutely barred by this criterion.

⁹ Leadership Foundation Resp. at 1-2. The Leadership Foundation also argues that the Complaint should be dismissed because Complainant named the wrong respondent, DMCC.

¹⁰ *Buchanan v. Fed. Election Comm’n*, 112 F. Supp. 2d 58, 73 (D.D.C. 2000). In *Buchanan*, the Court held that a 15% polling threshold from polling from the *current* election was an objective criterion.

¹¹ Leadership Foundation Resp. at 4.

1 which was held on September 7, 2016.¹² IAVA is a corporation organized under section
2 501(c)(3) of the Internal Revenue Code “with a mission to connect, unite, and empower post-
3 9/11 veterans.”¹³ IAVA and NBC were billed as co-hosts of the event, which consisted of
4 separate interviews of the two major party candidates that NBC aired back-to-back.¹⁴

5 On August 29, 2016, the Libertarian National Committee wrote an “open letter to IAVA”
6 requesting either an invitation to the event or the criteria used for selecting candidates.¹⁵ IAVA
7 did not respond directly to the open letter; however, on September 2, 2016, IAVA invited the
8 Libertarian nominee, Gary Johnson, and Green Party candidate, Jill Stein, to a separate “event,”
9 which ultimately never took place.¹⁶ That same day, the Libertarian National Committee sent a
10 letter to IAVA informing IAVA of its obligation to use pre-established objective criteria in
11 selecting candidates to the debate, and requested an invitation to the Commander in Chief Forum
12 for Gary Johnson, the Libertarian candidate for President.¹⁷ There is no indication that
13 Complainant also asked NBC for the criteria used to select participants for the forum.

14 NBC responds that the event is covered under the press exemption and that, following
15 “inquiries seeking clarification as to the process for selecting the candidates,” NBC used the

¹² Compl. ¶ 31.

¹³ IAVA Resp. at 1 (Aug. 3, 2018), Paul Rieckhoff Decl. ¶ 2.

¹⁴ Commander in Chief Forum, NBC NEWS (Sept. 7, 2016), <https://www.nbcnews.com/storyline/commander-in-chief-forum>.

¹⁵ Compl. ¶ 32.

¹⁶ *Id.* ¶¶ 33, 35; IAVA Resp. at 2, Exs. A-B.

¹⁷ Compl., Ex. D.

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1 same polling criteria as the Commission on Presidential Debates (“CPD”).¹⁸ According to NBC,
2 the Libertarian candidate did not satisfy the CPD criteria.

3 IAVA contends that NBC had sole responsibility for inviting participants, and NBC
4 confirms that it maintained “complete operational and editorial control over the Forum at all
5 times.”¹⁹ Therefore, IAVA argues, NBC had responsibility for complying with the debate
6 regulations and, in any event, all expenditures are covered under the press exemption.²⁰ IAVA
7 further asserts that in its limited role as an advisor to NBC on “veteran-focused subject matter,”
8 the only expenditures IAVA had were for staff time, which should be deemed *de minimis*.²¹

9 **C. WTTW—Illinois Senatorial Debate**

10 The Complaint alleges that WTTW did not invite the Libertarian candidate for U.S.
11 Senate for Illinois to participate in a debate that WTTW planned to hold on October 26, 2016.²²
12 WTTW invited only the two major party candidates to participate in an event billed as a
13 “Candidate Forum” held on October 26, 2016, but the Republican candidate declined, and the
14 Democratic candidate was ultimately interviewed alone.²³ In support of its argument, that
15 WTTW did not use established criteria to determine the participants in the event, the Complaint

¹⁸ NBC Resp., Weiner Aff. ¶ 4. According to CPD’s website, the criteria is as follows: “Under the 2016 Criteria, in addition to being Constitutionally eligible, candidates must appear on a sufficient number of state ballots to have a mathematical chance of winning a majority vote in the Electoral College, and have a level of support of at least 15 percent of the national electorate as determined by five selected national public opinion polling [sic] organization, using the average of those organizations’ most recently publicly-reported results at the time of the determination.” Commission on Presidential Debates, <https://www.debates.org/index.php?page=overview>.

¹⁹ IAVA Resp. at 1; NBC Resp. at 2.

²⁰ IAVA Resp. at 2.

²¹ *Id.* at 1.

²² Compl. ¶ 19.

²³ *Id.* ¶ 24.

1 includes an email allegedly memorializing a conversation between counsel for the Libertarian
2 National Committee and Mary Field, an executive producer of WTTW, which occurred the day
3 before the debate.²⁴ According to the email drafted by Libertarian National Committee's
4 counsel, "I asked about five times [for the criteria]. Finally, she [Mary Field] said we'd have to
5 be 'at about, I would say, 5 percent' in the polls. I asked when that criteria was established, and
6 she hung up on me."²⁵

7 WTTW argues that the alleged debate was in fact an "in-studio" interview hosted "on a
8 segment of the news program," *Chicago Tonight*, and was not subject to the debate regulations.²⁶
9 According to its website, *Chicago Tonight* has produced many "Candidate Forums" for a wide
10 variety of federal, state, and local races in Illinois.²⁷ WTTW asserts that the Republican and
11 Democratic candidates were invited for "interviews," the Republican candidate declined, and
12 therefore, only the Democratic candidate was interviewed.²⁸ WTTW does not argue that it had
13 pre-established objective criteria for selecting debate participants, but rather that the interview
14 was covered under the press exemption and not subject to the debate regulations.²⁹

²⁴ *Id.* ¶ 22, Ex. B.

²⁵ *Id.* ¶ 22, Ex. B. WTTW disputes whether the alleged communications with WTTW regarding Complainant's requests for the criteria as reflected in the Complaint's Exhibit B actually took place. First, WTTW correctly notes that WTTW never responded to Complainant's emails. Second, the emails in Exhibit B at least partially refer to a State Comptroller race, not the U.S. Senate race. Third, the Complaint contains a typographical error in that it refers to "Ms. Linaberger" at Paragraph 23. Ms. Linaberger is a representative of KDKA (*see* section II.D).

²⁶ WTTW Resp. 1-3 (July 30, 2018).

²⁷ *See, e.g.*, WTTW, 2018 Primary Election: Candidate Forums on 'Chicago Tonight,' <https://news.wttw.com/2018/03/06/2018-primary-election-candidate-forums-chicago-tonight>.

²⁸ WTTW Resp. 1-2.

²⁹ *Id.*

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1 **D. KDKA—Pennsylvania Congressional Debate**

2 Finally, the Complaint alleges that KDKA did not use objective criteria in connection
3 with a debate on February 19, 2018, between the Democratic and Republican candidates for the
4 special election in Pennsylvania's 18th Congressional District.³⁰ KDKA did not invite any minor
5 party candidates.³¹ It is unclear when KDKA invited the major party candidates to participate in
6 the debate, which was announced publicly on February 16, 2018, only three days before the
7 debate.³²

8 The Complaint alleges that the Libertarian National Committee contacted KDKA
9 multiple times in the days before the debate to ask what objective criteria the Libertarian
10 candidate, Drew Gray Miller, would need to satisfy to participate in the debate.³³ On the
11 morning of the debate, KDKA's News Director, Anne Linaberger, informed the Libertarian
12 National Committee by email that Mr. Miller did not meet the "minimum requirements" for
13 participation in the debate because "Mr. Miller did not appear in the Monmouth University poll,
14 the one major poll taken in this race. Nor has Mr. Miller done any significant campaigning to
15 date."³⁴ The Monmouth University poll is dated February 15, 2018, the day before KDKA

³⁰ Compl. ¶ 12.

³¹ *Id.*

³² Julian Routh, *Conor Lamb and Rick Saccone to debate on KDKA Monday night*, PITTSBURGH POST-GAZETTE, Feb. 16, 2018, <https://www.post-gazette.com/news/politics-local/2018/02/16/Conor-Lamb-Rick-Saccone-debate-KDKA-Monday-night/stories/201802160171>.

³³ Compl., Ex. A.

³⁴ *Id.* ¶ 17, Ex. A.

1 officially announced the debate, and revealed that third-party candidates received a combined
2 total of 1%, while the Democrat received 49% and the Republican received 46%.³⁵

3 KDKA responds that it staged the debate using pre-established objective criteria, and the
4 press exemption applies to its airing of the debate. KDKA asserts that it relied upon the results
5 of the Monmouth University poll, stating that the "failure of Miller to poll above one percent
6 clearly evidences the validity of KDKA-TV's decision..." not to invite him.³⁶

7 KDKA asserts that it also considered each candidate's relative "campaign activity" and
8 "press coverage" as evidenced by the receipt of press releases and other "campaign outreach."³⁷
9 Although KDKA does not assert that it had a pre-established threshold for evaluating these two
10 factors, KDKA states that it determined that the major party candidates had both more campaign
11 activity and press coverage.³⁸ Linaberger states in her Affidavit that KDKA applied all of these
12 factors and determined that Miller was not a viable candidate "at the time the debate was
13 conducted."³⁹

14 **III. LEGAL ANALYSIS**

15 The Federal Election Campaign Act of 1971, as amended (the "Act"), prohibits any
16 corporation from making contributions or expenditures in connection with a federal election.⁴⁰
17

³⁵ *Id.*, Ex. A.

³⁶ KDKA Resp. at 3.

³⁷ *Id.* at 4.

³⁸ *Id.*

³⁹ *Id.*, Ex. 2, Linaberger Aff. ¶ 6.

⁴⁰ 52 U.S.C. § 30118(a).

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1 The Act also bars political committees from knowingly accepting corporate contributions.⁴¹
2 "Contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything
3 of value"⁴² and "expenditure" includes "any purchase, payment, distribution, loan, advance,
4 deposit, or gift of money or anything of value,"⁴³ but exempts "nonpartisan activity designed to
5 encourage individuals to vote or register to vote."

6 Pursuant to that exemption, the Commission has promulgated rules permitting
7 "[n]onprofit organizations described in 26 U.S.C. § 501(c)(3) or 501(c)(4) and which do not
8 endorse, support, or oppose political candidates or political parties" to stage candidate debates in
9 accordance with 11 C.F.R. § 110.13 and 114.4(f).⁴⁴ The purpose of this rule was to "provide a
10 specific exception so that certain nonprofit organizations and the news media may stage debates,
11 without being deemed to have made prohibited corporate contributions to the candidates taking
12 part in the debate."⁴⁵

13 Although the term "debate" is not defined in the regulations, the Commission has
14 explained that a "face-to-face appearance or confrontation by the candidates is an inherent
15 element of a debate."⁴⁶ The debate regulations leave the structure of the debate to the discretion

⁴¹ *Id.* §§ 30116(f); 30118(a).

⁴² *Id.* § 30101(8)(1).

⁴³ *Id.* § 30101(9)(A)(i).

⁴⁴ 11 C.F.R. § 110.13(a); Explanation and Justification, Funding and Sponsorship of Federal Candidate Debates, 44 Fed. Reg. 76,734 (Dec. 27, 1979) ("1979 E&J").

⁴⁵ *Corporate and Labor Organization and Express Advocacy and Coordination with Candidates*, 60 Fed. Reg. 64,260 (Dec. 14, 1995) ("1995 E&J").

⁴⁶ 1995 E&J, 60 Fed. Reg. 64,260 (citing Advisory Op. 1986-37 (National Conservative Foundation)).

1 of the staging organization, provided that the debate includes at least two candidates, and the
2 organization does not structure the debates to promote or advance one candidate over another.⁴⁷

3 Commission regulations require debate staging organizations to use "pre-established
4 objective criteria to determine which candidates may participate in the debate."⁴⁸ The regulation
5 does not define "objective criteria," however, the courts have said it does not "mandate[] a single
6 set of objective criteria all staging organizations must follow, but rather [gives] the individual
7 organizations leeway to decide what specific criteria to use."⁴⁹ As the Commission noted in
8 promulgating section 110.13(c), to establish that the criteria were set in advance of selecting the
9 debate participants, "staging organizations must be able to show that their objective criteria were
10 used to pick the participants, and that the criteria were not designed to result in the selection of
11 certain pre-chosen participants."⁵⁰

12 The Act also exempts from the definition of "contribution" and "expenditure" "[a]ny cost
13 incurred in covering or carrying a news story, commentary, or editorial by any broadcasting
14 station . . . unless the facility is owned or controlled by any political party, political committee,
15 or candidate."⁵¹ This exemption is called the "press exemption" or "media exemption."⁵² A

⁴⁷ 11 C.F.R. § 110.13(b).

⁴⁸ 11 C.F.R. § 110.13(c).

⁴⁹ *Buchanan*, 112 F. Supp. 2d at 73; see also F&LA at 22, MURs 6869 & 6942E (Commission on Presidential Debates).

⁵⁰ 1995 E&J, 60 Fed. Reg. at 64,262.

⁵¹ 11 C.F.R. §§ 100.73, 100.132; see also 52 U.S.C. § 30101(9)(B)(i).

⁵² Advisory Op. 2010-08 (Citizens United) at 3 ("AO 2010-08").

1 communication subject to this exemption is also exempt from the Act's disclosure, disclaimer,
2 and reporting requirements."⁵³

3 To assess whether the press exemption applies to a communication, the Commission uses
4 a two-part test.⁵⁴ First, it asks whether the entity engaging in the activity is a "press entity" as
5 described by the Act and regulations.⁵⁵ Second, if the entity is a press entity, the exemption will
6 apply so long as it (1) is not owned or controlled by a political party, political committee, or
7 candidate, and (2) is acting within its "legitimate press function" in conducting the activity.⁵⁶

8 In the context of a debate, the Commission's regulations specifically note that media
9 entities may "cover or carry" debates "as press entities."⁵⁷ When a media entity *stages* a debate,
10 however, the Commission's regulations require the staging organization to comply with the same
11 rules as any other debate staging organization.⁵⁸

⁵³ *Id.* at 7.

⁵⁴ *Id.* at 4; Advisory Op. 2005-16 (Fired Up) at 4 ("AO 2005-16").

⁵⁵ AO 2010-08 at 4; AO 2005-16 at 4. The Commission has explained that to determine when the term "press entity" applies, it "has focused on whether the entity in question produces on a regular basis a program that disseminates news stories, commentary, and/or editorials." AO 2010-08 at 7.

⁵⁶ *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

⁵⁷ 11 C.F.R. § 110.13(a)(2).

⁵⁸ See *id.* § 110.13(c) (setting forth candidate-invitation rules "[f]or all debates" and "staging organization(s)" (emphasis added)); First Gen. Counsel's Rpt. at 5-7, 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); FGCR at 6-7, n.21, MUR 6952 (Fox News Network, LLC) (explaining that a press entity staging a debate must be analyzed under the debate staging regulations, and not the press exemption); Factual and Legal Analysis at 5-8, MUR 6703 (WCVB-TV, Channel 5) ("F&LA") (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); F&LA at 4-10, MUR 6493 (Fox News Channel) (analyzing media entity's challenged debate criteria under the Commission's debate regulations).

1 **A. There Is No Reason to Believe that the Leadership Foundation Made**
2 **Prohibited Corporate Contributions by Violating the Debate Regulations**

3
4 The Leadership Foundation used the pre-established objective criterion of having 10%
5 support in the previous gubernatorial election to determine the participants in the debate it hosted
6 for U.S. Senate candidates in Colorado, and provided this written criterion to the Libertarian
7 National Committee in advance of the debate. The Complaint does not argue that the Leadership
8 Foundation's threshold was too high (or for a different political position – *i.e.*, polling for
9 governor in a Senate race), but rather argues that taking into account the polling levels from a
10 previous election poses an absolute bar to a candidate from a new party and was therefore not
11 permissible.

12 The Complaint's argument is unpersuasive because the Libertarian Party was not a new
13 party and had the opportunity to satisfy the criteria established by the Leadership Forum.
14 Moreover, a federal court has already expressed approval for using a 5% threshold from a
15 previous election.⁵⁹ Accordingly, we recommend that the Commission find no reason to
16 believe that the Leadership Foundation made prohibited corporate contributions in violation of
17 52 U.S.C. § 30118(a).

18 **B. There Is No Reason to Believe that NBC or IAVA Made Prohibited Corporate**
19 **Contributions by Violating the Debate Regulations**

20
21 Although the Complaint alleges that IAVA and NBC hosted a debate, the Commander in
22 Chief Forum was not billed as a debate and does not appear to qualify as a debate under
23 Commission regulations and guidance. The host of the event interviewed each candidate alone,

⁵⁹ See *Buchanan*, 112 F. Supp. 2d at 73. The court also held that a 15% threshold from polling in the current election was an objective criterion. Recently, another district court, relying on *Buchanan*, held that a 15% threshold in the current election was not so high that only major party candidates would qualify. *Level the Playing Field v. FEC*, No. 15-cv-1397 (TSC), 2019 WL 1440883 at *18 (D.D.C. Mar. 31, 2019).

1 and the two interviews were aired back-to-back.⁶⁰ The candidates did not appear in a face-to-
2 face confrontation, which is an “inherent element of a debate.”⁶¹ The Commission confronted a
3 similar situation in Advisory Opinion 1996-41 (Belo) in which the Commission found that
4 separately taped interviews aired back-to-back did not constitute a debate.⁶² Therefore, neither
5 NBC nor IAVA were required to invite participants using pre-established objective criteria
6 pursuant to the debate regulations.

7 Moreover, the expenditures in connection with the Commander in Chief Forum are
8 covered by the press exemption. First, NBC is a nationally recognized broadcaster. Second,
9 there is no allegation, nor is there any information in the available record, that would suggest that
10 NBC is owned or controlled by any political party, political committee, or candidate. Finally,
11 NBC was acting as a press entity when it broadcasted interviews of two Presidential
12 candidates.⁶³ Therefore, any costs associated with the production of the Commander in Chief
13 Forum are covered by the press exemption.

14 Although IAVA was billed as a co-host of the event, IAVA's role is more analogous to a
15 vendor of NBC. According to IAVA's response, “NBC decided which candidates to invite to
16 participate in the Forum, negotiated terms with the participating candidates, paid for all of the

⁶⁰ NBC Resp., Weiner Aff. ¶ 3; Commander in Chief Forum, NBC NEWS (Sept. 7, 2016),
<https://www.nbcnews.com/storyline/commander-in-chief-forum>.

⁶¹ 1995 E&J, 60 Fed. Reg. at 64,262.

⁶² Advisory Op. 1996-41 (Belo) (holding that a press entity was entitled to the media exemption, and that the debate regulations did not apply, when it separately interviewed candidates and aired their responses back-to-back).

⁶³ *Id.*; see also General Counsel's Report at 5, MUR 7241(Comcast Corporation) (extending media exemption to NBC); Certification, MUR 7241 (July 13, 2017).

1 costs associated with the Forum, and determined the structure of the Forum.”⁶⁴ NBC asserts that
2 it maintained complete operational and editorial control over the event.⁶⁵ IAVA did not have any
3 expenditures for the event other than its own staff time.⁶⁶ To the extent IAVA’s staff time
4 constitute in-kind expenditures, they were for the benefit of NBC’s production and airing of the
5 “Commander in Chief Forum,” which as analyzed above, falls within the media exemption.⁶⁷

6 Accordingly, we recommend that the Commission find no reason to believe that NBC or
7 IAVA made prohibited corporate contributions in violation of 52 U.S.C. § 30118(a).

8 **C. The Commission Should Dismiss the Allegation that WTTW Made a**
9 **Prohibited Corporate Contribution**

10 Although the Complaint alleges that WTTW aired a debate, this particular episode of the
11 “Candidate Forum” did not have two candidates and, therefore, did not qualify as a debate.⁶⁸ A
12 “face-to-face appearance or confrontation by the candidates is an inherent element of a debate.”⁶⁹
13 Thus, the comments of WTTW’s employee to Complainant implying that it did not have pre-
14 established objective criteria to select candidates are ultimately irrelevant. WTTW was not
15 required to have such criteria because a debate was never held.
16

⁶⁴ IAVA Resp. at 1.

⁶⁵ NBC Resp. at 2.

⁶⁶ *Id.*

⁶⁷ See Advisory Op. 2003-34 (Showtime) at 3 n. 1 (“assuming” that a production company requestor was a press entity, and that even if it was not, “it is the type of production company that press entities typically employ for the purposes of creating [the show] and other informational content, especially where, as here, final editorial discretion rests with an entity that is a press entity.”); see also FGCR at 7, MUR 6936 (Charles) (recommending extending the press exemption to on-air personality as “agent” of the press entity entitled to the press exemption).

⁶⁸ 11 C.F.R. § 110.13(b)(1); 1995 E&J, 60 Fed. Reg. at 64,260.

⁶⁹ 1995 E&J, 60 Fed. Reg. at 64,260 (citing Advisory Op. 1986-37 (National Conservative Foundation)).

1 Because WTTW did not end up staging a debate, the expenditures WTTW incurred in
2 connection with this segment of the "Candidate Forum" are covered by the press exemption.
3 First, it is undisputed that WTTW is a legitimate press entity. Second, there is no allegation, nor
4 is there any information in the available record, that would suggest that WTTW is owned or
5 controlled by any political party, political committee, or candidate. Finally, WTTW was acting
6 as a press entity when it broadcasted an interview of the Democratic candidate for U.S. Senate
7 for Illinois. Therefore, any costs associated with the production of this segment of the Candidate
8 Forum are covered by the press exemption.

9 Accordingly, we recommend that the Commission dismiss the allegation that WTTW
10 made a prohibited corporate contribution in violation of 52 U.S.C. § 30118(a).⁷⁰

11 **D. The Commission Should Dismiss the Allegation that KDKA Made a**
12 **Prohibited Corporate Contribution**

13
14 KDKA asserts that it used pre-established objective criteria to select debate participants
15 and points to factors it used in its decision that the Commission has previously held to be
16 objective, such as independent polling, relative campaign activity and press coverage. Although
17 KDKA does not assert that it had a polling threshold above which a minor party candidate would
18 be invited, third party candidates received only one percent support in the Monmouth University
19 poll.⁷¹ Linaberger swears in her Affidavit that KDKA received little, if any, campaign outreach
20 from the Libertarian candidate, and the Libertarian candidate received little press coverage.⁷²

⁷⁰ See *Heckler*, 470 U.S. 821.

⁷¹ KDKA Resp., Ex. 1 at 1. Third party candidates are all grouped together. It is unclear how much is attributable to the Libertarian candidate.

⁷² *Id.*, Ex. 2 at ¶¶ 3, 5.

1 Linaberger further asserts that the criteria were pre-established because they were the same that
2 KDKA used in a prior debate held on October 17, 2016 for Pennsylvania's Senate election.⁷³

3 The KDKA debate for the special election was put together on a tight timeline.⁷⁴ On
4 February 15, 2018, the Monmouth University poll was released. KDKA announced that the two
5 major party candidates had agreed to participate in the debate on February 16, 2018, and the
6 debate was held on February 19, 2018. Despite the Libertarian National Committee's multiple
7 attempts to contact KDKA in the days before the debate, Linaberger did not respond until the
8 morning of the debate, and she justified KDKA's decision not to invite the Libertarian candidate
9 based on the Monmouth University poll and the fact that Miller did not do any "significant
10 campaigning."⁷⁵ Although Linaberger states that she determined that Miller was not a serious
11 candidate "at the time the February 19, 2018 debate was held,"⁷⁶ and not when she received the
12 poll and invited the participants, there is no information in the record that Miller would have
13 satisfied KDKA's purported objective criteria at any time prior to the debate.

14 The Complaint argues that KDKA "failed to disclose" the criteria, depriving Miller of the
15 opportunity to satisfy the criteria. However, nothing in the Commission's regulations or
16 guidance require a debate staging organization to provide the criteria to candidates in advance of
17 the debate. "Although the new rules do not require staging organizations to do so, those staging
18 debates would be well advised to reduce their objective criteria to writing and to make the

⁷³ *Id.*, Ex. 2 at ¶ 3.

⁷⁴ *Id.* at 3-4.

⁷⁵ Compl., Ex. A.

⁷⁶ KDKA Resp., Ex. 2 at ¶ 3.

1 criteria available to all candidates before the debate.”⁷⁷ Moreover, given the tight timeline in this
2 particular case, an extra three days advance notice would not likely have resulted in Miller
3 satisfying the criteria.

4 Given that the Monmouth University poll was released only four days before the debate
5 and one day before inviting the major party candidates, it is unclear whether KDKA used the poll
6 results to choose the debate participants, or whether it used the results to justify its decision to
7 exclude Miller *post hoc*. Nevertheless, it is not clear that Miller would have been included in the
8 debate under any pre-established objective criteria because the poll clearly reflects the lack of
9 support for Miller's candidacy during the short special election time frame, and the Commission
10 has previously dismissed violations of the debate regulations under similar circumstances,⁷⁸
11 Accordingly, we recommend that the Commission dismiss the allegation that KDKA made
12 prohibited corporate contributions in violation of 52 U.S.C. § 30118(a).⁷⁹

13 IV. RECOMMENDATIONS

- 14 1. Find no reason to believe that Denver Metro Chamber Leadership Fund violated
15 52 U.S.C. § 30118(a);
- 16 2. Find no reason to believe that NBCUniversal Media LLC violated 52 U.S.C.
17 § 30118(a);
- 18 3. Find no reason to believe that Iraq and Afghanistan Veterans of America violated
19 52 U.S.C. § 30118(a);
- 20 4. Dismiss the allegation that WTTW, Public Television Chicago violated 52 U.S.C.
21 § 30118(a);
- 22
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24

⁷⁷ 1995 E&J, 60 Fed. Reg. at 64,262.

⁷⁸ See F&LA at 10, MUR 6383R (Ohio News Organization) (dismissing as a matter of prosecutorial discretion because determining whether a debate staging organization used pre-established objective criteria in the absence of “contemporaneous written criteria” would not be “straightforward” and would require an extensive investigation of internal communications).

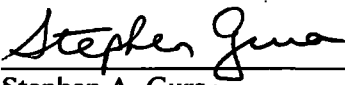
⁷⁹ See *Heckler*, 470 U.S. 821.

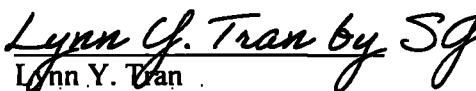
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- 2 5. Dismiss the allegation that KDKA-TV, Pittsburgh, PA violated 52 U.S.C. § 30118(a);
- 3
- 4 6. Approve the attached Factual and Legal Analysis;
- 5
- 6 7. Approve the appropriate letters;
- 7
- 8 8. Close the file.
- 9


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11 Lisa J. Stevenson
12 Acting General Counsel

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15 Charles Kitcher
16 Acting Associate General Counsel for
17 Enforcement

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