



FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 10, 2020

Via Electronic Mail Only

E-Mail: nory@lermansenter.com

Nancy A. Ory
Lerman Senter PLLC
2001 L Street, NW
Suite 400
Washington, DC 20036

RE: MUR 7484
Sarkes Tarzian, Inc.

Dear Ms. Ory:

On August 27, 2018, the Federal Election Commission notified your client, Sarkes Tarzian, Inc., of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On June 25, 2020, the Commission found, on the basis of the information in the complaint and information provided by your client, that there is no reason to believe that Sarkes Tarzian, Inc. violated 52 U.S.C. § 30118(a) in connection with the November 2018 debate. 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 Disclosure of Certain Documents in Enforcement and Other Matters*, 81 Fed. Reg. 50,702 (Aug. 2, 2016). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Lynn Tran".

Lynn Y. Tran
Assistant General Counsel

Enclosure:

Factual and Legal Analysis

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FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Nexstar Broadcasting, Inc. MURs 7484 and 7514

Sarkes Tarzian, Inc. MUR 7484

WQLN Public Media MUR 7514

Manufacturers & Business Association

Mercyhurst University

Mike Kelly for Congress and Ann Coleman in her official capacity as treasurer

DiNicola for Congress and Christine A. Mitchell in her official capacity as treasurer

I. INTRODUCTION

The Complaints allege that Nexstar Broadcasting, Inc. (dba KLAS TV 8 and WJET)

(“Nexstar”) and its broadcast partners, Sarkes Tarzian, Inc., (licensee of KTVN(TV), Reno,

19 Nevada) (“Sarkes”), WQLN Public Media (“WQLN”), Manufacturers & Business Association

20 (“MBA”), and Mercyhurst University (“Mercyhurst”) failed to use pre-established objective

21 criteria in selecting debate participants for two different debates that they staged as required by

22 Commission regulations, resulting in the exclusion of Complainants from the respective debates

23 and prohibited corporate contributions from the debate sponsors to the participating candidates.

24 Both Complaints primarily argue that Nexstar's requirement that a candidate raise \$50,000 in

25 monetary contributions in order to participate in the debates was not an objective criterion. The
26 debates in question took place in Nevada and Pennsylvania.

27 For the reasons set forth below, the Commission finds no reason to believe that Nexstar,

²⁸ Sarkes, WQLN, MBA or Mercyhurst violated 52 U.S.C. § 30118(a) in connection with

29 sponsoring and broadcasting the debates. The Commission further finds no reason to believe

30 that the candidate committees that participated in the debates, Mike Kelly for Congress and Ann

³¹ Coleman in her official capacity as treasurer (“Kelly Committee”) and DiNicola for Congress

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1 and Christine A. Mitchell in her official capacity as treasurer (“DiNicola Committee”), violated
 2 52 U.S.C. § 30118(a) by accepting prohibited corporate contributions from the debate sponsors.

3 **II. FACTUAL BACKGROUND**

4 **A. The 2018 Nevada Senate Debate**

5 Barry Michaels was an independent candidate for U.S. Senate for Nevada in 2018.¹ On
 6 October 19, 2018, Nexstar sponsored a debate, which was broadcast by both Nexstar and Sarkes
 7 in Nevada. Nexstar is a privately owned Delaware corporation that owns and operates 133
 8 television stations in 99 markets around the country.² Sarkes is an Indiana corporation that owns
 9 two television stations and four radio stations.³ The October debate included the Democratic and
 10 Republican candidates, but no third party candidates, including Michaels, were allowed to
 11 participate.

12 On July 30, 2018, Michaels received a letter from Nexstar detailing the criteria that he
 13 would need to satisfy in order to participate in the debate.⁴ While Michaels satisfied many of the
 14 requirements set forth in the letter, including among others, having a campaign headquarters,
 15 campaign literature, and press coverage, he had not raised at least \$50,000 in monetary campaign
 16 contributions.⁵ The Complaint in MUR 7484 argues that the fundraising criterion is “arbitrarily

¹ Michaels did not file a statement of candidacy or register a principal campaign committee with the Commission; however, it is unclear whether Michaels surpassed \$1,000 in contributions or expenditures, requiring him to register. The record before the Commission indicates that Michaels spent \$500 to register Barry Michaels for U.S. Senate 2018 with the Nevada Secretary of State and he spent \$400 to file a federal court complaint as discussed below. *See Compl. ¶ 5, MUR 7484 (Aug. 20, 2018), Michaels v. Nexstar Media Group, Case No. 2:18-cv-1620-JAD-GWF, Doc. No. 1 (D. Nev. Oct. 3, 2018).*

² Nexstar Resp. (Sept. 13, 2018), Howfield Decl. ¶ 2.

³ Sarkes Resp. (Sept. 18, 2018), Fox Decl. ¶¶ 5-6.

⁴ Compl. ¶ 2, Ex. A, MUR 7484.

⁵ *Id.* ¶¶ 3-4, Ex. A.

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1 and capriciously chosen without objectivity" and that the criteria could "only be met by the
 2 Democrat and Republican candidates."⁶

3 In response to the Complaint, Nexstar attests through its General Manager, Lisa
 4 Howfield, that beginning in 2014, Nexstar made a concerted effort to host more debates across
 5 its 133 television stations and adopted "a set of objective criteria" that applied across all markets
 6 in an effort to invite only "serious candidates for the position."⁷ Nexstar argues that the \$50,000
 7 fundraising criterion was a pre-established, objective, and viewpoint-neutral criterion.⁸

8 In its Response, Sarkes asserts that Nexstar sponsored the debate and had sole
 9 responsibility for developing and implementing the criteria used to select participants.⁹ Sarkes
 10 states that it was only responsible for broadcasting the debate in northern Nevada.¹⁰

11 **B. The 2018 Pennsylvania Congressional Debate**

12 Ebert Beeman was the Libertarian candidate for Pennsylvania's 16th Congressional
 13 District in 2018. Complainant Beeman for Congress and Brandon M. Magoon in his official
 14 capacity as treasurer ("Beeman Committee") was Beeman's principal campaign committee. On
 15 October 8, 2018, Nexstar and its partners staged a debate for candidates for Pennsylvania's 16th

⁶ *Id.* ¶¶ 13, 15. On August 28, 2018, Michaels filed a Complaint in Nevada District Court seeking an injunction against Nexstar and Sarkes from enforcing the \$50,000 criterion. On October 3, 2018, the court dismissed the action for lack of jurisdiction holding that Complainant did not have a private right of action under FECA. *See Michaels v. Nexstar Media Group*, Case No. 2:18-cv-1620-JAD-GWF, Doc. No. 24 (D. Nev. Oct. 3, 2018).

⁷ Nexstar Resp. at 1-2, MUR 7484 (Sept. 13, 2018), Howfield Aff. ¶¶ 3-5.

⁸ Nexstar Resp. at 1-2, MUR 7484. Both major party candidates had clearly surpassed the \$50,000 threshold. *See Heller for Senate, Receipts 2017-2018*, <https://www.fec.gov/data/committee/C00494229/?cycle=2018&tab=raising>; *Rosen for Nevada, Receipts 2017-2018*, <https://www.fec.gov/data/committee/C00606939/?tab=raising&cycle=2018>.

⁹ Sarkes Resp. at 2 (Sept. 24, 2018).

¹⁰ *Id.*

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1 Congressional District. According to Respondents, Nexstar was “the editorial lead partner” with
 2 responsibility for providing the host and the participation criteria.¹¹ WQLN provided production
 3 equipment for the debate, including cameras and camera operators.¹² MBA planned the debate
 4 and implemented the Nexstar participant selection criteria.¹³ Mercyhurst provided the venue and
 5 two panelists for the debate.¹⁴

6 The debate included the Democratic and Republican party candidates, but Beeman was
 7 not allowed to participate.¹⁵ The Complaint argues that Nexstar’s requirement of raising
 8 \$50,000 in monetary contributions was not an objective criterion and the criteria were not pre-
 9 established. The Complaint further argues that exclusion criteria were unnecessary because the
 10 race had only three candidates.

11 The Nexstar participation criteria for the Pennsylvania debate were nearly identical to the
 12 Nevada participation criteria, requiring among other things, that a candidate raise \$50,000 in

¹¹ Nexstar Resp. at 2, MUR 7514 (Nov. 13, 2018); WQLN Email Resp. at 1 (Oct. 29, 2018); Mercyhurst Resp., Bollheimer Decl. ¶ 2 (Dec. 12, 2018).

¹² Nexstar Resp. at 2, MUR 7514; WQLN Email Resp. at 1. WQLN is a non-profit Pennsylvania corporation that files as a tax exempt 501(c)(3) entity with the IRS. *See* WQLN 990 (May 11, 2018), available at https://www.wqln.org/Portals/0/Files/WQLN_FY17_Form_990.pdf.

¹³ Nexstar Resp. at 2, MUR 7514; WQLN Email Resp. at 1. MBA is a Pennsylvania non-profit professional employers association that files as a tax exempt 501(c)(6) with the IRS. *See* MBA Resp. at 1 (Nov. 9, 2018); MBA 2017 IRS Form 990, available at https://apps.irs.gov/pub/epostcard/cor/250637030_201803_990O_2018092815740011.pdf.

¹⁴ Nexstar Resp. at 2, MUR 7514; WQLN Email Resp. at 1. Mercyhurst is a Pennsylvania non-profit entity that files as a tax exempt 501(c)(3) with the IRS. *See* Mercyhurst 2016 IRS Form 990, available at https://apps.irs.gov/pub/epostcard/cor/250965430_201705_990_2018050415288567.pdf.

¹⁵ Compl. at 1, MUR 7514.

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1 monetary contributions.¹⁶ Beeman raised only \$28,930 during the 2018 election cycle, \$24,100
 2 of which were contributed by Beeman himself.¹⁷

3 In its Response, Nexstar attaches the Declaration of Lou Baxter, a News Director for
 4 WJET, who attests that the criteria have been in place since approximately 2015, although the
 5 criteria were marked “July 2018,” evidently corresponding to a meeting among the debate
 6 organizers at which they agreed to use the criteria.¹⁸ Although it is unclear who implemented the
 7 criteria, it is undisputed that Beeman was not invited to attend the debate because he had not
 8 raised \$50,000 in monetary contributions.¹⁹

9 The Kelly and DiNicola Committees both assert that they played no role in creating the
 10 criteria and no action should be taken against them.²⁰ The DeNicola Committee further attaches
 11 an email to the debate sponsors dated September 28, 2018, stating that it had “no opposition to
 12 the inclusion of Ebert Beeman in the debate.”²¹

¹⁶ Nexstar Resp., Baxter Decl., Attach.

¹⁷ Beeman for Congress, Receipts 2017-2018, <https://www.fec.gov/data/committee/C00689802/?tab=summary>. Both major party candidates clearly surpassed the \$50,000 threshold. *See* Mike Kelly for Congress, Receipts 2017-2018, <https://www.fec.gov/data/committee/C00474189/?cycle=2018&tab=raising>; DiNicola for Congress, Receipts 2017-2018, <https://www.fec.gov/data/committee/C00673350/?cycle=2018>.

¹⁸ Nexstar Resp., Baxter Decl. ¶¶ 3-4, 11.

¹⁹ *Id.* ¶ 19; Mercyhurst Resp., Bollheimer Decl. ¶ 3.

²⁰ Kelly Committee Resp. at 1 (Nov. 3, 2018); DiNicola Committee Resp. at 1 (Nov. 10, 2018). The Complaint specifically alleges that the candidate committees received prohibited in-kind contributions from the sponsors of the debates. *See* Compl. at 1, MUR 7514.

²¹ DiNicola Committee Resp., Attach. 1.

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1 III. LEGAL ANALYSIS

2 The Federal Election Campaign Act of 1971, as amended (the “Act”), prohibits any

4 corporation from making contributions or expenditures in connection with a federal election.²²

5 The Act also bars political committees from knowingly accepting corporate contributions.²³

6 “Contribution” includes “any gift, subscription, loan, advance, or deposit of money or anything

7 of value,”²⁴ and “expenditure” includes “any purchase, payment, distribution, loan, advance,

8 deposit, or gift of money or anything of value,”²⁵ but exempts “nonpartisan activity designed to

9 encourage individuals to vote or register to vote.”

10 Pursuant to that exemption, the Commission has promulgated rules permitting

11 “[n]onprofit organizations described in 26 U.S.C. § 501(c)(3) or 501(c)(4) and which do not

12 endorse, support, or oppose political candidates or political parties” to stage candidate debates in

13 accordance with 11 C.F.R. §§ 110.13 and 114.4(f).²⁶ The purpose of this rule was to “provide a

14 specific exception so that certain nonprofit organizations and the news media may stage debates,

15 without being deemed to have made prohibited corporate contributions to the candidates taking

16 part in the debate.”²⁷

17 The debate regulations leave the structure of the debate to the discretion of the staging

18 organization, provided that the debate includes at least two candidates, and the organization does

²² 52 U.S.C. § 30118(a).

²³ *Id.* §§ 30116(f); 30118(a).

²⁴ *Id.* § 30101(8)(1).

²⁵ *Id.* § 30101(9)(A)(i).

²⁶ 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”).

²⁷ *Corporate and Labor Organization and Express Advocacy and Coordination with Candidates*, 60 Fed. Reg. 64,260 (Dec. 14, 1995) (“1995 E&J”).

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1 not structure the debates to promote or advance one candidate over another.²⁸ Commission
 2 regulations require debate staging organizations to use “pre-established objective criteria to
 3 determine which candidates may participate in the debate.”²⁹ The regulation does not define
 4 “objective criteria,” however, the courts have said it does not “mandate[] a single set of objective
 5 criteria all staging organizations must follow, but rather [gives] the individual organizations
 6 leeway to decide what specific criteria to use.”³⁰ As the Commission noted in promulgating
 7 section 110.13(c), to establish that the criteria were set in advance of selecting the debate
 8 participants, “staging organizations must be able to show that their objective criteria were used to
 9 pick the participants, and that the criteria were not designed to result in the selection of certain
 10 pre-chosen participants.”³¹

11 The Act also exempts from the definition of “contribution” and “expenditure” “[a]ny cost
 12 incurred in covering or carrying a news story, commentary, or editorial by any broadcasting
 13 station . . . unless the facility is owned or controlled by any political party, political committee,
 14 or candidate.”³² This exemption is called the “press exemption” or “media exemption.”³³ A
 15 communication subject to this exemption is also exempt from the Act’s disclosure, disclaimer,
 16 and reporting requirements.”³⁴

²⁸ 11 C.F.R. § 110.13(b).

²⁹ *Id.* § 110.13(c).

³⁰ *Buchanan v. Fed. Election Comm'n*, 112 F. Supp. 2d 58, 73 (D.D.C. 2000); *see also* Factual and Legal Analysis (“F&LA”) at 22, MURs 6869 & 6942E (Commission on Presidential Debates).

³¹ 1995 E&J, 60 Fed. Reg. at 64,262.

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

³³ Advisory Op. 2008-14 (Melothé) at 3 (“AO 2008-14”).

³⁴ *Id.* at 7.

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1 To assess whether the press exemption applies to a communication, the Commission uses
 2 a two-part test.³⁵ First, it asks whether the entity engaging in the activity is a “press entity” as
 3 described by the Act and regulations.³⁶ Second, if the entity is a press entity, the exemption will
 4 apply so long as it (1) is not owned or controlled by a political party, political committee, or
 5 candidate, and (2) is acting within its “legitimate press function” in conducting the activity.³⁷

6 **A. 2018 Nevada Senate Debate**

7 Neither of the respondents that staged the 2018 Nevada Senate debate have violated the
 8 Act. Sarkes does not appear to have sponsored the debate, selected the participants or designed
 9 the selection criteria. Its role was to broadcast the debate and it appears to have performed that
 10 function as a *bona fide* media entity. There is no information in the record that Sarkes is owned
 11 or controlled by a political party, political committee, or candidate. Further, broadcasting a
 12 debate is a legitimate press function.³⁸ Therefore, any costs associated with Sarkes’s broadcast
 13 of the debate are exempt from the definitions of contribution and expenditure under the Act.

15 Additionally, Nexstar appears to have complied with the debate regulations. Nexstar is a
 16 media entity and there is no information in the available record to suggest that Nexstar endorsed,
 17 supported, or opposed any candidate. Therefore, the only issue is whether Nexstar used pre-
 18 established objective criteria to select the debate participants. Both the courts and the
 19 Commission have previously approved the use of fundraising thresholds as an objective

³⁵ Advisory Op. 2005-16 (Fired Up) at 4 (“AO 2005-16”).

³⁶ *Id.* 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.” Advisory Op. 2010-08 (Citizens United) at 7.

³⁷ *Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

³⁸ 11 C.F.R. § 110.13(a)(2); Factual and Legal Analysis (“F&LA”) at 12-13, MUR 7412 (Denver Metro Chamber Leadership Foundation).

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1 criterion.³⁹ In MUR 6703 (WCVB-TV), the Commission found no reason to believe a debate
 2 sponsor had made a contribution when staging a debate because the debate criteria it used,
 3 including a \$50,000 fundraising threshold, were objective and not designed to exclude any
 4 particular candidate.⁴⁰ In this matter, the Nexstar criteria, including the \$50,000 fundraising
 5 threshold, were established in advance of the debate and made available to Michaels several
 6 months before the debate was held. The record also indicates that Nexstar used the same criteria
 7 in multiple debates over several election cycles, which indicates that the criteria were not
 8 specifically designed to exclude any particular candidate. Accordingly, the Commission finds no
 9 reason to believe that Nexstar and Sarkes violated 52 U.S.C. § 30118(a) in connection with the
 10 2018 Nevada Senate debate.

11 **B. 2018 Pennsylvania Congressional Debate**

12 Nexstar, WQLN, MBA, and Mercyhurst are all sponsors of the 2018 debate for
 13 candidates for Pennsylvania's 16th Congressional District, having spent money in the production
 14 of the debates, as opposed to merely covering or carrying the debate. As a threshold matter,
 15 although MBA is a 501(c)(6) and not a 501(c)(3) or (c)(4) entity, the Commission has previously
 16 applied by analogy the debate regulations to a 501(c)(6) chamber of commerce and a tax-exempt
 17 state university.⁴¹ All other Respondents are either media companies or 501(c)(3) or (c)(4) non-

³⁹ See *La Botz v. Fed. Election Comm'n*, 889 F. Supp. 2d 51, 63 (D.D.C. 2012) (citing *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998); First Gen. Counsel's Rpt. ("FGCR") at 7, MUR 5395 (Dow Jones) (recommending finding no reason to believe because the criteria used to invite candidates were objective, including a fundraising threshold); Certification at 1, MUR 5395 (Dow Jones) (finding no reason to believe)).

⁴⁰ F&LA at 3, 6, MUR 6703 (WCVB-TV) (citing *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998)).

⁴¹ See F&LA at 4-5, MUR 6072 (Northland Regional Chamber of Commerce) (extending the debate regulations to the chamber of congress despite being incorporated as a (c)(6)); FGCR at 7, MUR 5650 (University of Arizona) (recommending dismissal for the University of Arizona despite being a tax exempt entity under 26 U.S.C. § 115 as an "integral part of a government agency."); Certification at 1, MUR 5650 (Feb. 4, 2006) (dismissing matter).

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1 profit entities. There is no information in the available record to suggest that any Respondent
 2 endorsed, supported, or opposed any candidate.

3 The Complaint in MUR 7514 challenges the debate selection criteria on three grounds.

4 First, the Complaint argues that the use of the \$50,000 threshold violates the debate regulations.
 5 For the reasons stated above, the argument fails because the use of a fundraising threshold has
 6 previously been found to be an objective criterion, and there is no indication that Nexstar used
 7 the \$50,000 threshold to exclude particular candidates.⁴² Second, the Complaint argues that
 8 inclusion criteria were not necessary because only three candidates were on the ballot. However,
 9 courts have approved debate criteria not only when debate sponsors wish to narrow large fields
 10 of candidates but also to ensure that voters hear only from viable candidates.⁴³

11 Finally, the Complaint challenges whether the criteria were pre-established. Although
 12 the debate participation criteria are marked “July 2018,” Nexstar asserts that the criteria were
 13 developed in 2015 and have not “substantively” changed since that time.⁴⁴ Nevertheless, even if
 14 the criteria were created in July 2018, they were still pre-established because they predate the
 15 October 8, 2018 debate by three months.⁴⁵

16 The Complaint further argues that Beeman was not apprised of the debate criteria until
 17 October 6, 2018, two days before the debate. However, nothing in the Commission’s regulations

⁴² See *supra*, Part III.A.

⁴³ See, e.g., *La Botz*, 889 F. Supp. 2d at 63 (polling thresholds may be used as “an objective measure of a candidate’s viability.”); *Buchanan*, 112 F. Supp. 2d at 75 (“It is difficult to understand why it would be unreasonable or subjective to consider the extent of a candidate’s electoral support prior to the debate to determine whether the candidate is viable enough to be included.”).

⁴⁴ Nexstar Resp., Baxter Decl., Attach.

⁴⁵ F&LA at 6, MUR 6703 (WCVB-TV) (finding that providing the criteria to a potential debate candidate two weeks before the debate satisfied the pre-established requirement).

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1 or guidance requires a debate-staging organization to provide the criteria to candidates in
2 advance of the debate. “Although the new rules do not require staging organizations to do so,
3 those staging debates would be well advised to reduce their objective criteria to writing and to
4 make the criteria available to all candidates before the debate.”⁴⁶

5 Because the debate criteria complied with Commission regulations, the Commission
6 finds no reason to believe that Nexstar, WQLN, Mercyhurst, or MBA made, or that the Kelly or
7 DiNicola Committees accepted, prohibited contributions in violation of 52 U.S.C. § 30118(a) in
8 connection with the 2018 Pennsylvania Congressional debate.

⁴⁶ 1995 E&J, 60 Fed. Reg. at 64,262.