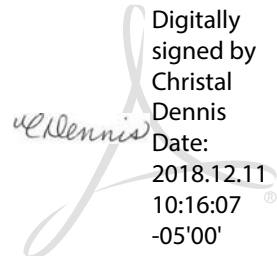




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December 10, 2018

Jeff S. Jordan  
Federal Election Commission  
Office of Complaints Examination and Legal Administration  
Attn: Christal Dennis, Paralegal  
1050 First Street, NE  
Washington, D.C. 20463

**Re: Matter Under Review 7515**

Dear Mr. Jordan:

The Federal Election Commission (“FEC” or “Commission”) notified our client, the Cable News Network (“CNN”), of a complaint filed against it by Neal Dikeman for Senate, the campaign committee of a libertarian candidate who recently ran to represent Texas in the United States Senate. The Commission extended the deadline for responding to the complaint, as well as supplemental addendum filed thereto, until today.

The complaint’s central allegation is that CNN violated the Federal Election Campaign Act of 1971, as amended (“FECA”), and accompanying regulations by promoting, producing and airing an hour-long town hall featuring U.S. Senate candidate Beto O’Rourke. However, a media organization’s interview of a candidate, in any format, is wholly exempt from regulation under the “Press Exemption” of the FECA, Commission regulations, and the First Amendment. And even if, as asserted in the complaint, the Commission’s debate regulations were applicable to the O’Rourke interview because the interview arose from an invitation to a debate that never materialized, CNN’s activities are still exempt from regulation as press coverage of a newsworthy event and, moreover, the specific terms of the debate regulation itself. Accordingly, the Commission should find no reason to believe that CNN violated the FECA and dismiss this matter.

### **FACTUAL BACKGROUND**

CNN is a 24-hour news channel carried on cable and satellite. CNN was founded in 1980, is headquartered in Atlanta, Georgia, and is owned by Turner Broadcasting System, Inc. The company is not owned or operated by any federal candidate or political party.

Over the last four decades, CNN has interviewed thousands of candidates for public office in a wide variety of formats, including in-studio interviews, field and on-site interviews, special news events, town halls and other formats. Some recent examples include CNN’s Town Hall with Libertarian Party presidential and vice presidential candidates Gary Johnson and William Weld on June 23, 2016; CNN’s Town Hall with presidential candidate Ted Cruz and his

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family on April 14, 2016; CNN’s Town Hall with presidential candidate Donald Trump and his family on April 13, 2016; CNN’s Town Hall with presidential candidate John Kasich and his family on April 12, 2016; CNN’s One-On-One with presidential candidate Bernie Sanders on March 22, 2016; CNN’s One-On-One with presidential candidate Donald Trump on March 22, 2016; and CNN’s One-On-One with presidential candidate Hillary Clinton, also on March 22, 2016.<sup>1</sup> CNN also has interviewed hundreds of candidates in joint appearances and debate formats as part of its regular news gathering and news dissemination function, as well as in a wide range of other formats and contexts.

In the fall of 2018, CNN’s news department planned to host debates in what it deemed several of the most consequential elections in November. As part of that plan, CNN contemplated interviewing Texas U.S. Senate candidates Ted Cruz and Beto O’Rourke in a joint debate format. CNN chose Cruz and O’Rourke because they were the only two candidates who were registering in the polls recognized as reliable by CNN’s news department. As CNN explained in an October 17, 2018 letter to Neal Dikeman (attached to the complainant’s supplemental addendum), Mr. Dikeman was not invited to participate because he had not “registered in any poll conducted that is recognized by CNN.”

Senator Cruz decided not to participate in the contemplated debate, which meant that CNN did not end up producing such a news event. Instead, CNN editorial leadership decided to interview O’Rourke in a one-hour, town hall format moderated by journalist Dana Bash on October 18, 2018. CNN also extended an invitation to Cruz to be interviewed individually in a one-hour town hall format, but he declined to participate.

### **THE LAW**

The Federal Election Campaign Act of 1971, as amended (“the Act”), exempts from regulation all costs “incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.”<sup>2</sup> The Commission has clarified in its regulations that the exemption applies to “a cable television operator, programmer or producer.”<sup>3</sup> The exemption is known as the “Press Exemption” or “Media Exemption.”

Congress explained the intent of the Press Exemption is to protect and respect broad freedom of the press:

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<sup>1</sup> See CNN’s Town Halls & Debates, at <https://open.spotify.com/show/2EAzcHeDN2JSWvbAhzKoct>.

<sup>2</sup> 52 U.S.C. § 30101(9)(B)(i).

<sup>3</sup> 11 C.F.R. §§ 100.73, 100.132.

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[I]t is not the intent of the Congress in the present legislation to limit or burden in any way the first amendment freedoms of the press and of association. Thus the exclusion assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.<sup>4</sup>

The Press Exemption applies to press activity under a two-part test. First, the organization must be a “press entity.” Second, the press activity at issue must represent a “legitimate press function.”<sup>5</sup>

Finally, although not relevant to a resolution of this matter, the Commission also has adopted regulations for press-sponsored debates, which the Commission has indicated establish a “safe harbor” for “legitimate press functions” under the Press Exemption.<sup>6</sup> To fit within the safe harbor, the Commission’s regulations require the staging organization to use “pre-established objective criteria to determine which candidates may participate in a debate.”<sup>7</sup>

### ANALYSIS

CNN qualifies for the first prong of the Press Exemption because it is a press entity.<sup>8</sup> As to the second prong, the CNN town hall interview of O’Rourke is unquestionably a “legitimate press function.” The Commission has concluded that a television station’s interview of a single candidate, after another candidate has declined to join a debate format, is exempt from regulation under the Press Exemption. In one prior matter the Commission reasoned that where “no debate occurred, Respondent [television station] was not subject to the Commission’s debate staging regulations. Instead, Public Television’s October 10, 2008, interview of candidate Kay Barnes represented activity that falls within the ‘press exemption.’”<sup>9</sup> Here, after Cruz declined to debate

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<sup>4</sup> H.R. Report No. 93-1239, 93d Congress, 2d Sess. at 4 (1974).

<sup>5</sup> *See Reader’s Digest Association v. FEC*, 509 F.Supp. 1210, 1215 (S.D.N.Y. 1981); *FEC v. Phillips Publishing, Inc.*, 517 F.Supp. 1308, 1312-13 (D.D.C. 1981).

<sup>6</sup> 11 C.F.R. § 110.13; *Candidate Debates and News Stories*, 61 Fed. Reg. 18049, 18050 (explaining that press organizations “fall broadly within the press entity’s legitimate press function” when they comport debates to the debate regulation); MUR 6131 (Public Television 19, Inc.), Factual and Legal Analysis, at 7 (referring to debate regulation as setting a “safe harbor” for press-sponsored debates).

<sup>7</sup> *See* 11 C.F.R. § 110.13.

<sup>8</sup> *See, e.g.*, MUR 7231 (CNN), Factual & Legal Analysis, at 3 n.5 (identifying CNN as an “independent press entit[y]”).

<sup>9</sup> MUR 6131 (Public Television 19, Inc.), Factual & Legal Analysis, at 7.

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O'Rourke, CNN interviewed only O'Rourke in a town hall format similar to many other interviews conducted over the decades of politicians and candidates for public office. Accordingly, CNN's interview of O'Rourke is not regulated by the FECA under the Press Exemption.<sup>10</sup>

Even had CNN produced the contemplated debate, its production and dissemination of the debate would have been exempt from regulation under the Press Exemption. As a majority of the Commission recognized in dismissing a complaint over a debate sponsored by the Boston Globe and WBZ-TV, "a news organization's presentation of a debate is a 'news story' within the meaning of this provision of the FECA [the Press Exemption]."<sup>11</sup> A controlling group of the Commission also applied the Press Exemption to dismiss a complaint against Fox News, concluding that "Fox News's sponsorship of these debates was squarely within its press function and [was] thus protected from the Commission's regulation under the press exemption and the free press clause of the First Amendment."<sup>12</sup> Accordingly, even had CNN produced the contemplated debate between Cruz and O'Rourke, its production and dissemination costs were exempt from regulation.

Finally, the present complaint does not accurately invoke the Commission's debate regulation because, by its own provisions, two or more candidates must participate for a news interview to be considered a "debate."<sup>13</sup> In any event, even were the Commission to review CNN's Town Hall interview of O'Rourke under the debate regulation, the CNN's editorial

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<sup>10</sup> See also MUR 7231, Factual & Legal Analysis, at 4 (concluding that CNN, and other media entities, did not violate the FECA through their coverage of Senator Ted Cruz's presidential campaign in a way that supported his campaign to the detriment of lesser-known candidates in the race). The supplemental addendum further suggests (at 2) that "news stories, commentary or editorial by the media [must] be part of a general pattern of campaign related news accounts that give reasonably equal coverage to all opposing candidates" to qualify for the Press Exemption. That requirement only applies, however, where the media entity is under the control of a candidate or party. See 11 C.F.R. § 100.73; MUR 7206 (Bonnevill Int'l Corp.), Factual & Legal Analysis, at 7.

<sup>11</sup> MUR 5224 (Boston Globe & WBZ-TV), Statement of Reasons of Chairman David Mason, Vice Chairman Karl Sandstrom, Commissioner Bradley Smith, Commissioner Michael Toner, Sept. 3, 2002, at 2. The Commission majority's treatment of WBZ-TV's debate as "news coverage" is consistent with the Federal Communication Commission's treatment of debates sponsored by broadcast stations as "news coverage." See Regarding Petitions of Henry Geller and the National Association of Broadcasters and the Radio-Television News Directors Association to Change Commission Interpretations of Certain Subsections of the Communications Act, 48 Fed. Reg. 53166-53171 (Nov. 25, 1983).

<sup>12</sup> MUR 6952 (Fox News Network LLC), Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, June 28, 2018, at 3; see also, MUR 6703 (WCVB-TV), Statement of Reasons of Vice Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, Dec. 19, 2013; Concurring Statement of Commissioner Lee E. Goodman on Notice of Disposition of Petition for Rulemaking on Candidate Debates, Nov. 9, 2015.

<sup>13</sup> 11 C.F.R. § 110.13(b)(1) ("debates include at least two candidates").

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criteria complied with the safe harbor for “objective criteria.”<sup>14</sup> The news department invited Cruz and O’Rourke to participate in a town hall debate because they were the only candidates who “registered in any poll conducted that is recognized by CNN.” This is consistent with past Commission practice permitting the media to rely upon “names [that] were consistently offered to respondent in major national polls (as recognized by [the media outlet])” when determining which candidates to include or exclude from a debate.<sup>15</sup>

### **CONCLUSION**

The Commission has no subject matter jurisdiction to regulate a press organization’s interview of a candidate in the exercise of its newsgathering and news coverage functions. Moreover, even where the interview could otherwise be considered a debate – and it should not be here – CNN’s production and coverage of such a news event would not violate the FECA. Accordingly, the complaint should be dismissed.

Please feel free to contact me if you have any questions.

Best regards,



Andrew G. Woodson

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<sup>14</sup> 11 C.F.R. § 110.13(c).

<sup>15</sup> MUR 6952 (Fox News Network LLC), Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, at 14-15.