

MARCUS | CLEGG
ATTORNEYS & COUNSELORS

MUR 7835

October 23, 2020

By Electronic Mail and Overnight Delivery

Office of General Counsel
Federal Election Commission
1050 First Street, NW
Washington, DC 20463
EnfComplaint@fec.gov

**Re: Complaint Against WMTW-TV, Portland, Maine
Request for Expedited Action**

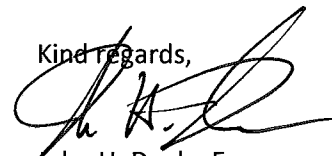
Dear General Counsel:

This firm, Marcus | Clegg ("MC"), represents the Max Linn for Senate 2020 campaign (the "Linn Campaign"). Please find enclosed for filing with the Federal Election Commission (the "Commission") a complaint (the "Complaint") against WMTW-TV Portland, Maine ("WMTW"), regarding an upcoming debate WMTW proposes to stage (the "Debate"), and from which it has excluded the Linn Campaign, as well as the campaign of a fourth candidate, Lisa Savage, whom MC does not represent. On information and belief, the exclusion of these candidates is in violation of 52 U.S.C. § 30118(a), and 11 C.F.R. § 110.13, as WMTW's decision to exclude candidates was not based upon pre-determined and legitimately objective criteria.

As the Debate is scheduled to take place next Wednesday, October 28th, and enforcement by the Commission should be prioritized as set forth in the Complaint, we kindly request the Commission attend to this matter at its earliest opportunity.

Please copy me on any correspondence from the Commission to the Linn campaign, and do not hesitate to contact me.

Kind regards,


John H. Doyle, Esq.
jhd@marcusclegg.com

GEORGE J. MARCUS
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Enclosures: Complaint; Exhibit A; Counsel Designation



FEDERAL ELECTION COMMISSION
Washington, DC 20463

Statement of Designation of Counsel

Provide one form for each Respondent/Witness
 Note: You May E-Mail Form to: CELA@fec.gov

CASE: 7835

Name of Counsel: John H. Doyle, Esq.

Firm: Marcus Clegg

Address: 16 Middle Street, 5th Floor
Portland, ME 04101

Telephone: (207) 828-8000 Fax: (207) 773-3210

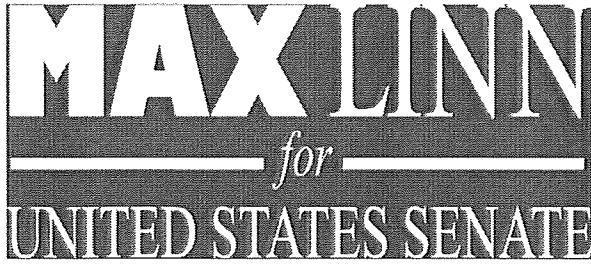
The above named individual and/or firm is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

Date	Signature	Title
Complainant RESPONDENT:	<u>Max Linn For Senate 2020</u>	
	(Committee Name/Company Name/Individual Named In Notification Letter)	

MAILING ADDRESS: 61 Cottage Street #125
Bar Harbor, ME 04609

Telephone:(H): _____ (W): (207) 380-4718

This form relates to a Federal Election Commission matter that is subject to the confidentiality provisions of 52 U.S.C. § 30109(a)(12)(A). This section prohibits making public any notification or investigation conducted by the Federal Election Commission without the express written consent of the person receiving the notification or the person with respect to whom the investigation is made.



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October 23, 2020

By Electronic Mail and Overnight Delivery

Office of General Counsel
 Federal Election Commission
 1050 First Street, NW
 Washington, DC 20463
EnfComplaint@fec.gov

Re: Complaint and Request for Expedited Proceedings

Ladies and Gentlemen:

WMTW TV, a television station in Maine owned by Hearst Television Inc. (“WMTW”), proposes to stage a debate of candidates for the office of United States Senator from Maine on Wednesday, October 28, 2020 (the “Debate”), but proposes to exclude from the Debate all candidates except the Republican incumbent and the Democrat challenger. As set forth below, the selection process for candidates to participate in the Debate does not comply with 11 C.F.R. § 110.13, and holding the Debate, as proposed, would violate the prohibition on corporate contributions or expenditures in connection with a federal election pursuant to 52 U.S.C. § 30118(a).

Facts

The 2020 race for the office of United States Senator for the State of Maine will be one of the most expensive legislative races in history, with well over one hundred million dollars spent on behalf of the Republican incumbent and Democrat challenger to persuade voters. Mainers cannot turn on their televisions or radios, or visit their mailboxes, without being bombarded with paid advertisements on behalf of the Republican or Democrat candidates. Yet, there are two other candidates in the race who have qualified to appear on November’s ballot: independent, Max Linn (“Linn”); and independent Green, Lisa Savage (“Savage”).

The candidates have participated in four debates to date, televised on networks other than WMTW. On or about October 21, 2020, candidates Linn and Savage became aware through reports from third parties and posts on Twitter that WMTW planned to host the Debate. Neither Linn, nor Savage, had been contacted by WMTW regarding the Debate, nor were they at any time apprised of any criteria for participation WMTW may have devised for the Debate.

Upon reaching out to WMTW to inquire about the Debate, a representative of the Savage campaign was immediately referred to legal counsel for WMTW, Mark J. Prak, of the law firm Brooks Pierce. Upon contacting Mr. Prak by telephone, that Savage representative, a staff member, was verbally threatened by Mr. Prak with legal consequences if the Savage campaign attempted to challenge WMTW's decision. Immediately thereafter, the Savage staff member received the email from Mr. Prak attached hereto as Exhibit A.

In his email, Mr. Prak, on behalf of WMTW, relayed the purported rationale for exclusion from the Debate of candidates Linn and Savage; a rationale not previously disclosed, and which rationale contradicts WMTW's own historic practices regarding debate participation by candidates. As set forth below, the rationale relayed by Mr. Prak is specious at best, and appears to be a post hoc attempt to legitimize a decision to exclude Linn and Savage to benefit the Republican and Democrat candidates.

The Actions of WMTW Violate the Act

The Federal Campaign Finance Act of 1971, as amended (the "Act"), prohibits any corporation from making contributions or expenditures in connection with a federal election.¹ WMTW is a corporate news entity. Conduct of an event such as the Debate constitutes a contribution or expenditure, unless it falls within prescribed exemptions or complies with applicable regulations for debates. With respect to the Debate, WMTW fails to qualify for an exemption and fails to comply with applicable regulations.

The Debate Does Not Fall Within the Media Exemption

The Act exempts from the definition of "contribution" and "expenditure" "[a]ny cost incurred in covering or carrying a new story, commentary, or editorial by any broadcasting station... unless the facility is owned or controlled by any political party, political committee, or candidate."² Such exemption is commonly called the "media exemption." However, when an entity such as WMTW stages a debate, the regulations of the Federal Election Commission (the "Commission") require the staging organization to comply with the same rules as any other debate staging organization.³

Mr. Prak's email makes clear that WMTW is not merely covering or broadcasting a debate or other news story occurring independently of WMTW's other actions. Rather, in Mr. Prak's words, WMTW is "conducting" the Debate. Accordingly, WMTW is staging the Debate.

¹ 52 U.S.C. § 30118(a)

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

³ 11 C.F.R. § 110.13(c)

WMTW Fails to Comply With Applicable Regulations

A broadcasting entity staging a debate: “must use pre-established objective criteria to determine which candidates may participate in a debate.” ... and “shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate.”⁴

Review of Mr. Prak’s email and knowledge of WMTW’s prior activities reveals that WMTW’s criteria are specious, were not pre-established, and effectively leave political party as the sole objective criterion to qualify for participation in the Debate.

Pre-Establishment

To be valid, WMTW’s criteria for debate participation must be pre-established. Yet, neither Linn, nor Savage, was ever apprised of WMTW’s debate criteria prior to receipt of Mr. Prak’s email. Indeed, they were not, and *still* have not been, contacted by WMTW to be told the Debate will even take place and that they are not invited, though WMTW is now publicly promoting the Debate, to include only the Republican and Democrat. When inquiring of WMTW about the debate, WMTW did not reference any participation criteria, but immediately referred inquiry to WMTW’s legal counsel. Only after contacting that legal counsel, Mr. Prak, less than a week before the Debate is to take place, were Savage and Linn provided the vague recitation of criteria WMTW purportedly used to determine participation, as outlined in Mr. Prak’s email.

Objectivity

To be valid, WMTW’s criteria for debate participation must be objective. Mr. Prak’s email is completely devoid of any quantifiable metrics or objectivity. Instead, it summarizes WMTW’s participation decision generally as follows: “the station simply did not believe that your candidate was qualified as newsworthy under our criteria.” That is an interesting statement, given that WMTW continues to report on the campaigns of Linn and Savage, as do the other major media outlets in Maine and even national media sources, as further discussed below.

Before offering this blanket statement of newsworthiness, Mr. Prak’s email did enumerate certain decision-making criteria WMTW allegedly pre-established and used to determine participation in the Debate. Those criteria are:

- “(1) fundraising support,
- (2) primary voting numbers,
- (3) past electoral performance,
- (4) previous offices held,
- (5) party voting registration numbers, and

⁴ 11 C.F.R. § 110.13(c)

(6) assessment of the campaign's viability (including campaign organization and outreach, coverage by major media, and support in public opinion polls)."

Each of these criteria is discussed below.

1. Fundraising Support

WMTW has revealed no objective measure of fundraising necessary for qualification for the Debate. As noted above, the Maine Senate race has seen more spending than any in the history of the State and is on track to be one of the most expensive in the history of the country. Relative to the Republican and Democrat candidates, Linn and Savage have raised very little. Linn, who has chosen to self-finance his campaign, reports \$465,000 lent to his campaign, while Savage reports \$150,000 in contributions.

Of note, the Linn and Savage campaigns are both better funded at this point in the race than was candidate Zak Ringelstein, a Democrat, in 2018, who at this point in the race reported only \$127,000, and a spending deficit that put his campaign nearly \$400,000 in the red. Yet, Ringelstein, the Democrat, was allowed to participate in WMTW's debate, mere days before the 2018 election, while Linn and Savage are being excluded with no meaningful differentiation from Linn and Savage and no explanation.

2. Primary Voting Numbers.

It is unclear how primary voting numbers are at all applicable to the Debate. Neither Linn, Savage, nor the Republican candidate faced a primary opponent. On a percentage basis, then, the Democrat candidate fared the worst in the primary because she was met with the most opposition. WMTW has not elaborated on what objective metrics and benchmarks regarding primary voting were used, likely because there were none, and how they are relevant to participation decisions.

3. Past Electoral Performance.

It is unclear how past electoral performance of a candidate could ever be an objective criterion or grounds for inclusion or exclusion of a candidate from the debate stage. By its nature, any such a criterion would always exclude newcomers to elected office, and would strongly disfavor candidates who are not members of the Republican and Democrat parties. WMTW has not elaborated on how this criteria is objectively implemented.

4. Previous Offices Held.

Once again, it is unclear how previous offices held would be an objective criterion. It appears to be a very subjective criterion, or one that functions to completely bar newcomers. However, WMTW allowed Democrat candidate Zak Ringelstein, who had never previously held elected office, to participate in WMTW's 2018 debate in the race for United States Senator mere days before the election. WMTW has not elaborated on how this criterion is objectively implemented, particularly in light of its past debate participation decisions.

5. Party Voting Registration Numbers.

This criterion is easily quantified and objective. However, by its nature, this criterion too would always function to the detriment of candidates not affiliated with the Republican or Democrat parties. Those who receive a nomination from those “particular political parties” would always have an advantage. Where this is the “sole objective criterion” for debate participation decisions, WMTW would appear to be in direct violation of prohibitions in § 110.13.

6. *Assessment of the Campaign’s Viability (Including Campaign Organization and Outreach, Coverage by Major Media, and Support in Public Opinion Polls).*

- a. Campaign Organization and Outreach. This appears to be a very subjective criterion. It is unclear how WMTW would objectively measure the organization of a campaign. Campaigns may guard closely their metrics on staff headcount, voter outreach, doors knocked, and voters called. Measures of “organization and outreach” would likely also always favor Republican and Democrat candidates, as the party apparatus for each delivers candidates pre-packaged organization and outreach support.
- b. Coverage by Major Media. Unless WMTW is counting airtime and word counts, and handicapping media outlets’ worth based on publication or reach, this also appears to be a wholly subjective criterion. Linn and Savage continue to be covered by major media within the State of Maine. Both have participated in four televised debates between the candidates in the past two months. In recent weeks, both have conducted lengthy, live-broadcast interviews with outlets such as the Maine Public Broadcasting Network. Both have recently been featured in lengthy articles in the State’s largest newspaper, the Portland Press Herald. Linn was recently featured in Forbes Magazine.
- c. Support in Public Opinion Polls. Polling data is an objective criterion. Mr. Prak in his email points out that debate selection criteria that exclude candidates polling under 15% have been upheld in court. However, Mr. Prak does not state what specific pre-determined polling threshold, if any, WMTW may have actually considered. In 2018, WMTW must not have used a 15% threshold, as it chose to allow Zak Ringelstein, the Democrat, to participate in its debate mere days before the election while Mr. Ringelstein polled at only 6%. Recent polling in this race shows 13% of Maine voters choosing Linn or Savage, yet WMTW chooses to prohibit them from the stage in the final debate before the election, despite outperforming Ringelstein.

In addition, Maine’s ranked-choice voting system changes the analysis of polling criterion significantly. It demands that WMTW take ranked-choice voting into account when a polling criterion is used. For example, if, as is the current likely outcome, neither of the party candidates have a clear majority, ranked-choice voting becomes extremely important. When considering second-round balloting preferences, both Linn and Savage climb further in the polls.

In summary, WMTW's professed "pre-established, objective criteria" appear to be anything but. WMTW never revealed these criteria previously and by certain, potentially quantifiable criteria, it allowed a candidate who had not performed as well as Linn and Savage to participate in prior debates. That candidate had one distinct advantage in that he was the nominee of one of the major parties, the Democrat Party, demonstrating further the inherent bias in the criteria described in Mr. Prak's email. In reality, that email appears to be a haphazard attempt to paper over the fact that WMTW had no pre-established criteria and/or used no objectivity in determining debate participation. Rather, WMTW chose to allow candidates of certain parties, the Republicans and Democrats, to participate and excluded all others.

Even taking at face value that the criteria set forth in Mr. Prak's email were those used by WMTW to determine participation in the Debate, and that WMTW had established those criteria before the Savage campaign's inquiry, some of the criteria appear fundamentally inapplicable or to lack any semblance of objectivity. And, those criteria that can be measured objectively show that there appear to be different standards for major party candidates such as Democrat, Ringelstein, and for independent candidates, such as Linn and Savage. Put another way, even the "objective" criteria are applied subjectively and are therefore not objective. Because the potentially objective criteria of campaign finance and polling appear to be unobjectively applied, the "sole objective criterion" remaining is voter registration. While objective, voter registration can only be implemented to promote Republican and Democrat candidates over independents. Because voter registration directly equates to nomination by a particular party, WMTW's "sole objective criterion" is the nomination of a candidate by a particular political party. That is prohibited.

Enforcement Should Be Priority

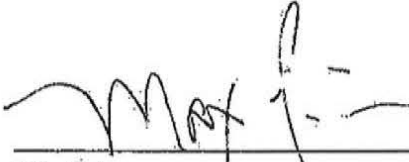
The Commission has established an enforcement priority system using formal, pre-determined scoring criteria to allocate agency resources and assess whether particular matters warrant further enforcement proceedings. The criteria include (1) the gravity of the alleged violation; (2) the apparent impact the alleged violation may have on the electoral process; (3) the complexity of the legal issues raised; and (4) recent trends in potential violations and other developments in law.

Maine is the first State in the nation to use ranked-choice voting for election of its United States Senators. This system allows voters to cast ballots for their first, second, third, and fourth choice candidates in this race. As such, normal polling is not necessarily indicative of the ultimate victor. Consider for example the victory of Jared Golden over Bruce Poliquin in Maine's 2nd Congressional District in 2018, which occurred only as a result of the modified method of vote tabulation provided by ranked-choice voting. Ranked-choice voting makes a significant change to federal elections in Maine, and MWTW's criteria appear to ignore it. In effect, WMTW appears to have flagrantly determined participation in the Debate based on impermissible criteria or no criteria at all. Such a decision has a very real possibility of impacting the outcome of the election,

particularly under the State's ranked-choice voting system. Further investigation and enforcement should be prioritized in this circumstance.

We thank you for your prompt and thorough attention to this matter of significant importance.

Respectfully submitted,

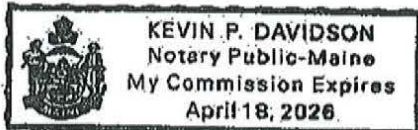

 Max Linn
 61 Cottage St. #125
 Bar Harbor, ME 04609
 Enclosure: Exhibit A

 Lisa Savage

Subscribed and sworn to before me by Max Linn this 23 day of October, 2020


 Notary Public/Attorney At Law

My Commission Expires: 4/18/2026



Subscribed and sworn to before me by Lisa Savage this ____ day of October, 2020

 Notary Public/Attorney At Law

My Commission Expires: _____

particularly under the State's ranked-choice voting system. Further investigation and enforcement should be prioritized in this circumstance.

We thank you for your prompt and thorough attention to this matter of significant importance.

Respectfully submitted,

Max Linn

Lisa Savage
Lisa Savage

30 Hole in the Wall Rd.
Solon, ME 04979

Enclosure: Exhibit A

Subscribed and sworn to before me by Max Linn this ____ day of October, 2020

Notary Public/Attorney At Law

My Commission Expires: _____

Subscribed and sworn to before me by Lisa Savage this 23rd day of October, 2020

Linda L. Orr
Notary Public/Attorney At Law

My Commission Expires: 05/06/2023

Linda L. Orr
Notary Public, Maine
My Commission Expires, May 6, 2023

WMTW's Upcoming Debate



From Mark J Prak MPRAK@brookspierce.com
To sam@lisaformaine.org <sam@lisaformaine.org>
Date 2020-10-22 13:37

Dear Mr. Pfeifle:

This firm is legal counsel to Television Station WMTW TV, Portland, Maine

Your recent communications with the Station's News Director, Ms. Any Beveridge, have been referred to me for response.

WMTW is conducting a debate for the U S Senate seat between incumbent Senator Susan Collins and her principal challenger, Sara Gideon. While there are other candidates in the race, WMTW's news department has determined, in the exercise of its good faith journalistic judgment, that Ms. Collins and Ms. Gideon are the only newsworthy candidates.

WMTW's exercise of its editorial discretion is protected by the First Amendment and is consistent with federal law. In particular, Section 315 (a)(4) of the Communications Act, as amended, provides television stations with an exemption to the equal opportunities requirement for "on the spot coverage of bona fide news events." See also 47 CFR Section 73.1941 (a)(4). The FCC has held debates to be covered by the bona fide news event exemption. *Henry Geller*, 95 FCC 2d 1236 (1983), *aff'd sub nom., League of Women Voters v. FCC*, 731 F.2d 955 (D.C. Cir. 1983).

WMTW made its news judgment about whom to include in its debate based on predetermined objective criteria. Those criteria included the following: (1) fundraising support, (2) primary voting numbers, (3) past electoral performance, (4) previous offices held, (5) party voting registration numbers, and (6) assessment of the campaign's viability (including campaign organization and outreach, coverage by major media, and support in public opinion polls).

We have litigated claims to decision by the FEC and our debate criteria have been upheld by that body. See *WCVB-TV*, MUR6703, (12/19/13). You should also note that the federal debate criteria have been interpreted to permit exclusion of candidates that do not meet a 15 percent polling threshold. See *Buchanan v. FEC*, 112 F. Supp. 2d 58, 73-75 (D.D.C. 2000) (finding that the use of 15% showing of support in independent poll was objective and reasonable); see also Federal Election Commission, Candidate Debates, Supplemental Notice of Disposition, 82 Fed. Reg. 15468 (March 29, 2017) (declining "to commence a rulemaking that would amend the criteria for staging candidate debates in 11 CFR 110.13(c) to prohibit the use of a polling threshold to determine participation in presidential general election debates").

At the end of the day, we are sorry to disappoint you and your candidate. That said, the station simply did not believe that your candidate was qualified as newsworthy under our criteria.

If you or your campaign's legal counsel wish to discuss the matter further, please feel free to let me know.

Very truly yours,

Mark J. Prak
Counsel to Television Station WMTW

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