



WELLS FARGO CAPITOL CENTER
150 FAYETTEVILLE STREET, SUITE 1700
RALEIGH, NC 27601

T 919.839.0300
F 919.839.0304
WWW.BROOKSPIERCE.COM

December 8, 2020

By Electronic Mail

Jeff S. Jordan
Assistant General Counsel
Federal Election Commission
Office of Complaints Examination
& Legal Administration
1050 First Street, NE
Washington, DC 20463
E-mail: cela@fec.gov

Re: *Response to Complaint against WMTW-TV, Portland, Maine*
(MUR 7835)

Dear Mr. Jordan:

We are submitting this letter on behalf of WMTW-TV ("WMTW" or the "Station") in response to the Complaint filed with the Federal Election Commission by Lisa Savage and Max Linn ("Complainants"), two unsuccessful candidates for one of Maine's seats in the United States Senate. Complainants accuse the Station of failing to use pre-existing objective criteria to select the participants in a televised debate (the "Debate") that occurred on WMTW on October 28, 2020.

For the reasons set forth below, the Complaint should be dismissed without further action by the Commission.

BACKGROUND

WMTW has a long history of broadcasting political debates and public affairs programming. (Abel Decl. ¶ 3; Beveridge Decl. ¶ 4.) Such programming is an integral part of the Station's newsgathering activities as well as the Station's public interest obligations under the Communications Act of 1934, as amended, and the rules and regulations of the Federal Communications Commission.

In early August of 2020, WMTW began making plans to host a debate for candidates running for Maine's seat in the United States Senate. (Beveridge Decl. ¶ 5.) The Station's goal in

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hosting the debate was to present newsworthy content to its viewers. (Beveridge Decl. ¶ 6.) To accomplish that goal—and to comply with federal regulations—the Station identified seven objective criteria to be used to select the participants in the Debate. (Abel Decl. ¶¶ 4–6; Beveridge Decl. ¶¶ 5–8.)

The objective criteria was as follows:

- (1) Whether the candidate was currently holding elected office.
- (2) Whether the candidate had previously held an elected office.
- (3) Whether the candidate had previously run for an elected office.
- (4) The amount of political contributions the candidate received in his or her last race for an elected office.
- (5) The percentage of vote the candidate received in his or her last race for an elected office.
- (6) The candidate's fundraising for the current Senatorial race.
- (7) The candidate's performance in independent polls in the current Senatorial race.

(Abel Decl. ¶ 6; Beveridge Decl. ¶ 8.) Ms. Beveridge, the Station's News Director, was tasked with researching the criteria. (Abel Decl. ¶ 8; Beveridge Decl. ¶ 7.) She created a spreadsheet to capture the information. (Beveridge Decl., Ex. A.)

There were four candidates in the Senate race: Senator Susan Collins, Sara Gideon, Max Linn, and Lisa Savage. (Abel Decl. ¶ 8.) Ms. Beveridge attempted to complete her research on the candidates in early September, but Mr. Linn and Ms. Savage had raised meager funds and were not listed in most polls. (Beveridge Decl. ¶ 9.) Therefore, Ms. Beveridge decided to wait until mid-October to see if Mr. Linn and Ms. Savage would perform better under the pre-established criteria. (Beveridge Decl. ¶ 9.)

On October 19, 2020, Ms. Beveridge completed the spreadsheet and shared it with Mr. Abel. (Beveridge Decl. ¶ 10 & Ex. A.) Ms. Beveridge's research revealed the following objective facts about the four candidates:

- (1) Sen. Collins and Ms. Gideon were currently in an elected office; Ms. Savage and Mr. Linn were not.
- (2) Sen. Collins and Ms. Gideon had previously held elected office; Ms. Savage and Mr. Linn had not.

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- (3) While Sen. Collins and Ms. Gideon had successfully run for office before, Mr. Linn's prior campaigns had all failed. Ms. Savage had never run for office before.
- (4) Sen. Collins raised over \$6 million for her last campaign, Ms. Gideon raised \$4,300, and Mr. Linn raised only \$340. Ms. Savage had never run for office before.
- (5) Sen. Collins and Ms. Gideon had both collected a strong majority of the votes (over 66%) in their prior elections. Mr. Linn had been disqualified from the ballot. Ms. Savage had never run for office before.
- (6) Sen. Collins had raised over \$26 million and Ms. Gideon had collected over \$39 million. Mr. Linn had raised only \$460,000—and most of it was his personal loan to his campaign. Ms. Savage raised less than \$150,000.
- (7) Sen. Collins polled between 38% to 45%, and Ms. Gideon polled between 44% to 49%. Mr. Linn polled between 1% to 5%. Ms. Savage polled between 0% and 6%.

(Beveridge Decl., Ex. A.)

Relying on the pre-established objective criteria, Ms. Beveridge and Mr. Abel relied on their combined journalist experiences to determine that the lone newsworthy candidates were Sen. Collins and Ms. Gideon. (Abel Decl. ¶¶ 9–12; Beveridge Decl. ¶¶ 11–12.) Sen. Collins and Ms. Gideon had track records in public office, had enormous campaign budgets, and were the only two candidates with a chance at winning the Senate seat. (Abel Decl. ¶¶ 10–11; Beveridge Decl. ¶ 11.) In contrast, Ms. Savage and Mr. Linn had no track record in public office, had meager campaign funds, and no reasonable chance of prevailing in the election. (*Id.*) Sen. Collins and Ms. Gideon were the only legitimate contenders in the race for the U.S. Senate seat; Ms. Savage and Mr. Linn were immaterial to the election. Indeed, the final election results showed Sen. Collins collected 51% of votes cast in the U.S. Senate race and Ms. Gideon trailed with 42.2%; Ms. Savage and Mr. Linn received only 5% and 1.6%, respectively.¹

After applying the pre-established objective criteria, the Station contacted the campaigns of Sen. Collins and Ms. Gideon to invite them to the Debate and finalize the details. (Abel Decl. ¶ 12.) The Station did not contact Mr. Linn and Ms. Savage because they were not invited to participate in the Debate. (Abel Decl. ¶ 14.) The Station held the Debate at 8:00 p.m. on October 28, 2020, and incurred some costs as part of staging the debate. (Abel Decl. ¶ 15.)

¹ See Maine Bureau of Corporations, Elections, and Commissions, *November 3, 2020 General Election Results*, available at <https://www.maine.gov/sos/cec/elec/results/results20.html#novtab>.

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DISCUSSION

The Federal Elections Campaign Act (“FECA”) prohibits corporations from making any contribution or expenditure “in connection with” a federal election.² Contributions include “any gift, subscription, loan, advance, or deposit of money or anything of value,”³ and expenditures include “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value.”⁴ The terms “contribution” and “expenditure” do not, however, include activities that fall (1) within the station’s legitimate press function⁵ or (2) within the Commission’s regulations governing the staging of candidate debates.⁶

It is important to remember that Congress crafted these two exemptions to safeguard the First Amendment rights of freedom of the press and freedom of speech. Congress decided to protect the press’s freedom “by relying on broadcasters as public trustees” who would “use their discretion in ensuring the public’s access to conflicting ideas.”⁷ Moreover, when a broadcaster “exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity.”⁸

In light of these First Amendment concerns, the Supreme Court has recognized that “television broadcasters enjoy the *widest journalistic freedom* consistent with their public responsibilities.”⁹ Broadcasters “are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming.”¹⁰ This discretion, moreover, includes wide latitude in how to select participants in a debate hosted by a broadcaster. Candidates cannot enjoy “broad rights of access” to debates, for such entitlements “would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations.”¹¹

In addition to these two statutory exemptions, the press’s freedom is further safeguarded by Congressional limitations on investigations into the press. As courts have recognized, “freedom of the press is substantially eroded by investigation of the press, even if legal action is not taken following the investigation.”¹² “Those concerns are particularly acute where a governmental entity is investigating the press in connection with the dissemination of political matter. These factors support the interpretation of the statutory exemption as barring even investigation of press activities which fall within the exemption.”¹³

² 52 U.S.C. § 30118(a).

³ 52 U.S.C. § 30101(8)(A).

⁴ 52 U.S.C. § 30101(9)(A).

⁵ See 52 U.S.C. § 30101(9)(B)(i); 11 C.F.R. §§ 100.73, 100.132.

⁶ See 11 C.F.R. § 110.13; see also 11 C.F.R. §§ 100.92 (debates that comply with 11 C.F.R. § 110.13 are exempt from definition of “contribution”), 100.154 (same for “expenditure”).

⁷ *Johnson v. FCC*, 829 F.2d 157, 162 (D.C. Cir. 1987) (internal quotations omitted).

⁸ *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674 (1998).

⁹ *Id.* (internal quotations omitted) (emphasis added).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Reader’s Digest Ass’n, Inc. v. FEC*, 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981).

¹³ *Id.*

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The Debate staged by WMTW falls easily within both of these independent exemptions: the Station qualifies for the media exemption because it was functioning as a legitimate press entity when it hosted the Debate; and the Debate complied with the Commission's requirements for staging a debate. Because the Debate rests safely within the well-recognized sphere of protected press activity, the Commission should dismiss the Complaint without any further action.

A. The Debate Fell within the Media Exemption.

Although many media entities are corporations, the Commission's ability to regulate and investigate media activities is restricted by the so-called "media" (or "press") exemption found in 52 U.S.C. § 30101(9)(B)(i). The media exemption excludes the cost of any "news story, commentary, or editorial distributed through the facilities of any broadcasting station" from the definition of contribution or expenditure.¹⁴

The media exemption poses two questions to the Commission. First, it asks whether the entity engaging in the activity is a "press entity."¹⁵ Second, if the entity is a press entity, the exemption will apply so long as the entity is (1) not owned or controlled by a political party, political committee, or candidate and (2) acting within its "legitimate press function" in conducting the activity.¹⁶ When determining whether WMTW was functioning as a "legitimate press entity" at the time of the Debate, the Commission considers two factors: (1) whether the entity's materials are available to the general public and (2) whether they are comparable in form to those ordinarily issued by the entity.¹⁷

Here, Complainants do not dispute that WMTW is a press entity that is not owned or controlled by a political party, political committee, or candidate. In fact, the Complaint opens by alleging that WMTW is "a television station in Maine owned by Hearst Television, Inc."¹⁸ The Complaint later describes the Station as a "corporate news entity" and a "broadcasting entity," and it acknowledges that the Station has hosted debates in the past.¹⁹ The Station broadcasted the Debate and made it available to the general public, and the format of the Debate was comparable to past candidate debates hosted by WMTW. (Abel Decl. ¶ 15.) Moreover, a broadcaster's "presentation of a debate is a 'news story' within the meaning of this provision of the FECA."²⁰

¹⁴ See 52 U.S.C. § 30101(9)(B)(i); 11 C.F.R. §§ 100.73, 100.132.

¹⁵ Advisory Op. 2005-16 (Fired Up!) at 4 ("AO 2005-16"). 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 Opinion 2008-14 (Melothe) at 7 ("AO 2008-14").

¹⁶ *Reader's Digest*, 509 F. Supp. at 1214–15.

¹⁷ *Id.* at 1215.

¹⁸ Compl. at 1.

¹⁹ Compl. at 2, 3.

²⁰ Statement of Reasons (by Mason, Sandstrom, Smith, and Toner) at 2, MUR 5224 (Boston Globe, *at al.*).

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Because WMTW was functioning as a legitimate press entity when it staged and broadcasted the Debate, the Debate is exempt from the definitions of “contribution” and “expenditure” under the media exemption.

This result is consistent with the special rules and regulations governing television licensees established by the FCC. The FCC encourages television stations to present debates and other political and public affairs programming as part of its public interest stewardship. The FCC has its own political broadcasting rules that govern debates and other bona fide news programming, and the FCC allows stations to exempt qualifying debates and other news programming from the FCC’s “equal opportunities” requirement.²¹ In addition, it is well-settled that there is no private right of action under Section 315 of the Communications Act by a candidate who has been excluded from a debate broadcasted by a television station (whether public or private).²²

Most importantly, application of the media exemption to the Debate hosted by WMTW is fully consistent with a broadcaster’s exercise of journalistic discretion, as protected by the First Amendment.²³ The D.C. Circuit has recognized the “importance of preserving a large measure of journalistic discretion for broadcasters,” describing such discretion as “a serious First Amendment issue.”²⁴ This constitutional principle undergirds the Commission’s media exemption and serves to guard against governmental interference with a television station’s good-faith news judgments made in the course of sponsoring and broadcasting candidate debates.

For all of these reasons, the Station’s broadcast of the Debate was permitted by the FEC’s media exemption, the FCC’s political broadcasting regulations, and by the Station’s constitutionally protected exercise of journalistic discretion.

B. The Debate Fell within the Debate Exemption.

A debate is also exempt from the prohibition on corporate contributions or expenditures under a separate exemption: compliance with the Commission’s debate regulations under 11 C.F.R. § 110.13. When a press entity stages a debate, the press entity is exempt from the FECA if it complies with the same rules as other debate staging organizations.²⁵

²¹ Although Section 315(a) of the Communications Act requires that television licensees provide equal opportunities for all legally qualified candidates to use its broadcast facilities, debates are excluded from that rule as “bona fide news interviews” or “on-the-spot coverage of bona fide news events.” 47 U.S.C. § 315(a)(2), (4); *see In re Henry Geller*, 95 F.C.C.2d 1236, *aff’d sub nom. League of Women Voters v. FCC*, 731 F.2d 995 (D.C. Cir. 1984).

²² *See, e.g., McCarthy v. Nat’l Broad. Co.*, No. 96-7822, 1998 U.S. App. Lexis 2874, at *9 (2d Cir. Feb. 24, 1998) (unpublished); *Lechtner v. Brownyard*, 679 F.2d 322, 326–27 (3rd Cir. 1982); *Belluso v. Turner Commc’ns Corp.*, 633 F.2d 393, 397, 401 (5th Cir. 1980); *Daly v. Columbia Broad. Sys., Inc.*, 309 F.2d 83, 85 (7th Cir. 1962); *Palmer v. Fox Broad. Corp.*, No. CIV.A.02-0108, 2002 U.S. Dist. Lexis 20301, at *3–4 (E.D. La. Jan. 15, 2002); *Arons v. Donovan*, 882 F. Supp. 379, 385 (D.N.J. 1995); *Lamb v. Griffin Television, Inc.*, 804 F. Supp. 1430, 1431 (W.D. Okla. 1992).

²³ *See Forbes*, 523 U.S. at 683.

²⁴ *Johnson*, 829 F.2d at 163–64.

²⁵ 11 C.F.R. § 110.13(c).

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The Commission’s debate regulations leave the structure of a debate to the discretion of the staging organization, provided that the debate includes at least two candidates, and the organization does not structure the debate to promote or advance one candidate over another.²⁶ Commission regulations require debate staging organizations to use “pre-established objective criteria to determine which candidates may participate in the debate.”²⁷

The regulations do not define “objective criteria.” The courts have said the regulations do not “mandate[] a single set of objective criteria all staging organizations must follow, but rather [give] the individual organizations leeway to decide what specific criteria to use.”²⁸ “[S]taging organizations must be able to show that their objective criteria were used to pick the participants, and that the criteria were not designed to result in the selection of certain pre-chosen participants.”²⁹

In staging the Debate, the Station relied on pre-established objective criteria and the criteria were not designed to result in the selection of pre-chosen candidates. Because the Station fully complied with the Commission’s debate regulations, the expenses the Station incurred in staging the debate are not a “contribution” or “expenditure” under the FECA.

1. The Debate Criteria Were Pre-Established and Objective

As detailed in the Declarations of Amy Beveridge and David Abel, the Station developed—in advance of the Debate—written objective criteria for the selection of the debate participants and applied the criteria to determine which candidates were qualified for inclusion in the Debate. (Abel Decl. ¶¶ 4–12; Beveridge Decl. ¶¶ 5–12.)

Section 110.13(a) does not “mandat[e] a single set of ‘objective criteria’ all staging organizations must follow” but rather “[gives] the individual organizations leeway to decide what specific criteria to use.”³⁰ Were the regulations “to require, and so to define and approve, pre-established criteria for access [to a debate], it would risk” substituting the Commission’s preferences for “judgments that should be left to the exercise of journalistic discretion.”³¹ Thus, “[t]he Commission has accorded broad discretion to debate sponsors in determining the criteria for participation selections.”³² Debate sponsors have “wide leeway in deciding what specific criteria to use.”³³

²⁶ *Id.* § 110.13(b).

²⁷ *Id.* § 110.13(c).

²⁸ *Buchanan v. FEC*, 112 F. Supp. 2d 58, 73 (D.D.C. 2000).

²⁹ 60 Fed. Reg. 64260, 64262 (Dec. 14, 1995).

³⁰ *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996).

³¹ *Forbes*, 523 U.S. at 674.

³² 1st Gen. Counsel Rpt. at 16, MURs, 4987, 5004, 5021 (2000 Commission on Presidential Debates, *et al.*) (internal quotations omitted).

³³ *Id.*

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Although the regulations do “not spell out precisely what the phrase ‘objective criteria’ means,”³⁴ so long as the criteria “is sufficiently measurable and verifiable, it would appear to satisfy at least the common definition of an objective requirement.”³⁵ However, “[t]o qualify as objective, criteria need not be stripped of all subjectivity or be judged only in terms of tangible, arithmetical cut-offs. Rather, it appears that [the criteria] must be free of content bias, and not geared to the selection of certain pre-chosen participants.”³⁶

The use of objective criteria ensures that the debate sponsor does not “grant or deny access to a candidate debate on the basis of whether it agrees with a candidate’s views.”³⁷ The Commission and the courts, however, have repeatedly affirmed the use of objective criteria “to determine whether [a] candidate is viable” and worthy of inclusion in a debate.³⁸

Here, WMTW established in advance, and recorded, its criteria for assessing the potential debate participants. (Beveridge ¶¶ 5–12 & Ex. A.) The pre-established criteria were objective factors that the Station chose to ensure that the viewing public had a chance to hear from, and consider, participants who were actually viable candidates for Maine’s seat in the U.S. Senate. (Abel Decl. ¶ 12; Beveridge Decl. ¶¶ 6, 12.)

The chosen criteria—regarding public offices, prior campaigns, fundraising, and voter support—were objective. Each criterion could be measured and verified. After selecting the criteria, Ms. Beveridge investigated, measured, and recorded each of the four candidates’ metrics under the seven factors. (Beveridge Decl. ¶¶ 7, 9–11.) Ms. Beveridge cataloged the results in a spreadsheet. (Beveridge Decl., Ex. A.) She shared the results with Mr. Abel on October 19, 2020. (Beveridge Decl. ¶ 19.)

The results of the Station’s criteria show that Sen. Collins and Ms. Gideon were *objectively* and *overwhelmingly* the only viable candidates for the Senate seat. Sen. Collins and Ms. Gideon were experienced elected officials, had tens-of-millions of dollars in campaign donations, and consistently garnered strong support in the polls. In comparison, Mr. Linn and Ms. Savage had never held elected office and they, *combined*, had less than a million dollars in funds and single-digit polling numbers. Mr. Linn and Ms. Savage had no reasonable chance of becoming Maine’s next U.S. Senator. Based on the objective criteria, Complainants were not considered by WMTW’s news department to be newsworthy and, therefore, did not warrant an invitation to participate in the Debate.

³⁴ *Perot*, 97 F.3d at 560.

³⁵ *Buchanan*, 112 F. Supp. 2d at 74.

³⁶ 1st. Gen. Counsel Rpt. at 6, MUR 6952 (Fox News Network, LLC); *see* 1st Gen. Counsel Rpt. at 23, MURs 4956, 4962, 4963 (Union Leader Corp., *et al.*); F&LA at 5, MUR 6703 (WCVB).

³⁷ *Forbes*, 523 U.S. at 676.

³⁸ *Buchanan*, 112 F. Supp. 2d at 75; *see also, e.g., La Botz v. FEC*, 889 F. Supp. 2d 51, 63 (D.D.C. 2012) (polling may be used as “an objective measure of a candidate’s viability”); Statement of Reasons at 8, MURs 4451, 4473 (1996 Commission on Presidential Debates, *et al.*); 1st Gen. Counsel Rpt. at 16–17, MURs 4987, 5004, 5021 (2000 Commission on Presidential Debates, *et al.*).

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2. The Debate Criteria Were Not Targeted at Excluding Mr. Linn and Ms. Savage.

Mr. Linn and Ms. Savage do not (and cannot) claim that they were viable candidates for the Senate. Nevertheless, Complainants insist that they were entitled to participate in the Debate, and they accuse WMTW of choosing criteria with the goal of excluding them from the Debate. Complainants' accusations are devoid of any supporting evidence.

A staging organization is not permitted to select criteria that is “designed to result in the selection of certain pre-chosen participants.”³⁹ A staging organization can, however, select objective criteria “to determine whether [a] candidate is viable” and worthy of an invitation to a debate.⁴⁰ “[A]bsent specific evidence that a candidate assessment criterion was ‘fixed’ or arranged in some manner so as to guarantee a preordained result,” the Commission is “not prepared to look behind and investigate every application of a candidate assessment criterion.”⁴¹

As a threshold matter, Complainants target their accusations at an email from Mr. Mark Prak—the Station's counsel—rather than the actual objective criteria used by WMTW. On October 22, 2020, Mr. Prak sent an email to a representative of Ms. Savage's campaign in which Mr. Prak defended the Station's journalistic discretion in choosing debate participants and offered a list of objective criteria that staging organizations can use for selecting participants. Complainants have mistaken Mr. Prak's list, which was intended to be examples of permissible criteria, as being the list of criteria the Station actually employed for selecting participants.

As shown by the spreadsheet created by Ms. Beveridge, the Station used seven criteria to select the candidates for the Debate. (Beveridge Decl., Ex. A.) Complainants lodge four accusations at the Station's criteria. Each of these accusations miss their mark:

- The criteria were not pre-established. The Station established its objective criteria before it made the decision of which candidates should be invited to participate in the Debate. The Station identified the criteria in August of 2020. On October 19, 2020, Ms. Beveridge had completed her research (after affording more time for Mr. Linn and Ms. Savage) and shared the results with Mr. Abel. They reviewed the objective criteria and concluded that the only viable candidates were Sen. Collins and Ms. Gideon. The Station then notified Sen. Collins and Ms. Gideon that they were invited to the debate. Complainants object that the Station never disclosed the criteria to them before the Debate (*see* Compl. at 3); but “nothing in the Commission's regulations or guidance

³⁹ 60 Fed. Reg. 64260, 64262 (Dec. 14, 1995).

⁴⁰ *Buchanan*, 112 F. Supp. 2d at 75; *see also, e.g., La Botz*, 889 F. Supp. 2d at 63 (polling may be used as “an objective measure of a candidate's viability”); Statement of Reasons at 8, MURs 4451, 4473 (1996 Commission on Presidential Debates, *et al.*); 1st Gen. Counsel Rpt. at 16–17, MURs 4987, 5004, 5021 (2000 Commission on Presidential Debates, *et al.*).

⁴¹ 1st Gen. Counsel Rpt. at 16, MURs, 4987, 5004, 5021 (Commission on Presidential Debates, *et al.*) (internal quotations omitted).

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require[s] the debate-staging organization to provide the criteria in advance of the debate.”⁴²

- The criteria were subjective. The criteria chosen by WMTW were unquestionably objective. Each of the seven criterion were measurable and verifiable. Furthermore, the criteria allowed the Station to make an objective determination that there were only two viable Senatorial candidates: Sen. Collins and Ms. Gideon. Complaints had no successful history of running for public office, had raised meager funds, and had nominal support in all of the polls. The Commission and the courts have repeatedly approved debate criteria that ensures that voters hear only from viable candidates.⁴³
- The lone objective criteria was the candidate’s political party. This accusation was premised on Mr. Prak having listed party-registration numbers as a permissible objective criteria for selecting debate participants. The Station did not use party registration as one of its seven objective criteria.
- Ranked-choice voting requires more than two candidates in a debate. Complainants suggest that ranked-choice voting made them viable candidates, but they gloss over the actual mechanics of Maine’s ranked-choice-voting system. Under ranked-choice voting, the candidate with the lowest votes is eliminated and any votes for the eliminated candidate are transferred to the respective voters’ next-highest-ranked candidates; this process is repeated until only two candidates remain on the ballot.⁴⁴ Thus, ranked-choice voting simply meant that once Complainants were eliminated (which was inevitable based on Complainants’ consistent, single-digit polling results), the votes for Complainants would be transferred to either Sen. Collins or Ms. Gideon. Ranked-choice voting did not transform Complainants into viable candidates.

Finally, Complainants object to WMTW’s decision to include a certain candidate in a prior Senatorial debate from 2018. First, Complainants were not Senate candidates in 2018 and, therefore, have no standing to object to the Station’s decision to include certain candidates in that debate. Second, Maine’s Senate race in 2018 was different than the race in 2020. In 2018, Senator Angus King—a former Governor and the incumbent—was the lone viable candidate for

⁴² F&LA at 10–11, MURs 7484/7514 (Nexstar Broadcasting, Inc., *et al.*); *see* 60 Fed. Reg. 64260, 64262 (Dec. 14, 1995) (“Although the new rules do not require staging organizations to do so, those staging debates would be well advised to reduce their objective criteria to writing and to make the criteria available to all candidates before the debate.”).

⁴³ *See, e.g.,* Statement of Reasons at 8, MURs 4451, 4473 (1996 Commission on Presidential Debates, *et al.*); 1st Gen. Counsel Rpt. at 16–17, MURs 4987, 5004, 5021 (2000 Commission on Presidential Debates, *et al.*); *see also, e.g., La Botz*, 889 F. Supp. 2d at 63 (polling 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 *See Rules Governing the Administration of Elections Determined by Ranked-Choice Voting*, Maine Bureau of Corporations, Elections, and Commissions (Nov. 17, 2018), available at <https://www.maine.gov/sos/cec/elec/upcoming/pdf/250c535-2018-230-complete.pdf>.

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U.S. Senate. (Abel Decl. ¶ 16.) But in order to hold a debate, the Station needed to invite at least one other candidate; the Station, therefore, exercised its journalistic discretion and decided to invite both of the other candidates in the 2018 race. (*Id.*) In 2020, there were two viable contenders for the Senate, which allowed the Station to host a debate without inviting non-viable candidates. Furthermore, the Station's inclusion of Senator King—and independent candidate—in the 2018 debate further proves that the Station does not, as Complainants allege, seek to invite the Democratic and Republican candidates and “exclude all others.”

Contrary to Complainants' accusations, there is no evidence that the Station selected criteria that was specially designed to exclude them from participation in the Debate. The criteria were designed to identify the viable candidates, and the criteria showed—objectively and overwhelmingly—that Complainants were not viable candidates for the Senate seat.

CONCLUSION

Because WMTW's staging of the Debate (1) was a “news story” that was exempt from the definition of contribution or expenditure and (2) complied with the exemption for candidate debates in 11 C.F.R. § 110.13, there is no reason to believe that the Station violated the prohibition on contributions and expenditures in connection with a federal election under 52 U.S.C. § 30118(a) (or violated the Communications Act of 1934 or any other law in connection with the debate at issue). Accordingly, the Commission should take no action against WMTW.⁴⁵

If you have any questions or need any additional information, please do not hesitate to contact either of the undersigned at (919) 839-0300.

Respectfully submitted,



Mark J. Prak
Craig D. Schauer
Counsel to WMTW-TV

Attachments

⁴⁵ In the event the Commission determines that neither the media exemption nor the debate exemption are applicable here, WMTW respectfully reserves the opportunity to argue, among other things, that any such unintended “expenditure” is an independent expenditure permitted by *Citizens United* or is otherwise protected by the First Amendment. Ultimately, the First Amendment forbids the Government from sanctioning a station for broadcasting to its viewers what the station deems to be newsworthy material.

**Before the
Federal Election Commission
Washington D.C.**

In the Matter of:

WMTW-TV, Portland, Maine

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MUR 7835

DECLARATION OF DAVID ABEL

1. My name is David Abel. I am the President and General Manager of television station WMTW-TV, Portland, Maine (the “Station”). I am competent to testify to the matters set forth in this Declaration, which are within my personal knowledge.

2. I have been the President and General Manager for over 11 years. In my position, I oversee all operations of the Station.

3. Our Station sponsors and promotes candidate debates as part of its political and public affairs programming in order to educate and inform viewers about issues and candidates.

4. Sometime in August of 2020, the Station began discussing sponsoring a debate between the candidates for Maine’s United States Senate seat (the “Debate”). I spoke with Amy Beveridge, the Station’s News Director, Andrew Vrees, Vice President of News for Hearst Television, and Mark Prak, legal counsel for the Station, about the criteria for selecting participants in the Debate.

5. Based on this conversation, Amy Beveridge created a spreadsheet that listed the objective criteria that we agreed we would consider when selecting the

participants in the Debate. The objective criteria we selected were targeted at ensuring we invited only viable candidates to participate in the Debate.

6. The objective criteria consisted of the following: (1) whether the candidate was currently holding elected office; (2) whether the candidate had previously held an elected office; (3) whether the candidate had previously run for an elected office; (4) the amount of political contributions the candidate received in his or her last race for an elected office; (5) the percentage of votes the candidate received in his or her last race for an elected office; (6) the candidate's fundraising for the current Senatorial race; and (7) the candidate's performance in independent polls in the current Senatorial race.

7. Ms. Beveridge was responsible for researching the candidates and populating the criteria in the spreadsheet. A copy of this spreadsheet is attached as an exhibit to Ms. Beveridge's declaration.

8. As you can see from the spreadsheet prepared by Ms. Beveridge, we considered inviting all four candidates for the U.S. Senate seat: Senator Susan Collins, Sara Gideon, Max Linn, and Lisa Savage.

9. After Ms. Beveridge had collected the information for the spreadsheet, we reviewed the criteria and determined that, based on numerous objective facts, there were only two viable candidates in the Senatorial race: Senator Susan Collins and Sara Gideon. The results of the criteria were so overwhelming that there was no need to apply any thresholds to the criteria.

10. The results of the criteria were not surprising. The Senatorial race between Sen. Collins and Ms. Gideon garnered unprecedented attention at the state and national level. Both were staples of the political scene in Maine, with Sen. Collins seeking her

fifth term and Ms. Gideon having served the past four years as the Speaker of the Maine House of Representatives. The two candidates shattered campaign-fundraising records in Maine. They were near-permanent fixtures of advertising on local television, radio, print media, video-streaming services, and social media. Going into October, Sen. Collins and Ms. Gideon were in a close race, with each polling regularly in the 40s.

11. In contrast, Mr. Linn and Ms. Savage had never held public office, had never managed a successful campaign, raised meager amounts of campaign funds, and never rose above the single digits in the polls. Mr. Linn and Ms. Savage were not viable candidates.

12. Relying on the pre-established objective criteria, Ms. Beveridge and I used our journalistic and editorial experience to make the determination that Sen. Collins and Ms. Gideon were newsworthy candidates, but Mr. Linn and Ms. Savage were not.

13. We contacted the campaigns for Sen. Collins and Ms. Gideon to notify them that they would be invited to participate in the Debate. We worked with their campaigns to schedule a date and time that worked for both candidates.


14. We did not contact Mr. Linn or Ms. Savage about the Debate because we were not going to invite them to participate in the Debate.

15. The Debate was hosted at the Station's studio on October 28, 2020, at 8:00 p.m. WMTW formatted the Debate similar to other prime-time debates the Station held in the past. The Debate was broadcasted to the general public. The Station incurred some expenses for sponsoring the debate, such as the cost of renting set pieces and personnel expenses for producing the broadcast.

16. I have read the complaint filed by Mr. Linn and Ms. Savage, in which they note the Station's decision to include Jay Ringelstein in a debate in 2018. That was a different race and a different debate. In 2018, Senator Angus King—a former Governor and the incumbent—was the lone viable candidate for U.S. Senate; yet, we could not have a debate with Sen. King alone. Therefore, we decided to invite both of the other (non-viable) candidates in the field. We hosted that debate as part of our regularly scheduled news programming at noon; the 2018 debate was not a prime-time broadcast.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

This the 3RD day of December, 2020.

A handwritten signature in black ink, appearing to read 'David Abel', is written over a horizontal line.

David Abel

**Before the
Federal Election Commission
Washington D.C.**

In the Matter of:

WMTW-TV, Portland, Maine

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)
)
)
)

MUR 7835

DECLARATION OF AMY BEVERIDGE

1. My name is Amy Beveridge. I am the News Director for television station WMTW-TV, Portland, Maine (the "Station"). I am competent to testify to the matters set forth in this Declaration, which are within my personal knowledge.

2. WMTW is owned by Hearst Stations Inc., and it is not owned or controlled by a political party, political committee, or candidate.

3. I have been the News Director at the Station for the past nine years; before that, I served as the Assistant News Director for three years. As part of my duties as the News Director, I lead our newsgathering operations, which includes political and public affairs programming designed to educate and inform viewers about issues and candidates. I exercise final editorial and journalistic discretion on our news content.

4. Our Station has a long history of sponsoring candidate debates.

5. In August of 2020, I had a discussion with Dave Abel, the Station's President and General Manager, Andrew Vrees, Vice President of News for Hearst Television, and Mark Prak, legal counsel for the Station, about the criteria for selecting participants in the Debate.

6. It was important, from a newsgathering and public interest perspective, for our Station to focus its limited airtime on candidates who had a chance of winning the election. We sought to identify the candidates who were legitimate contenders for the Senate and generated meaningful interest and support among voters. We agreed upon criteria that would provide an objective benchmark for us to make that determination.

7. After the discussion, I was tasked with creating a spreadsheet that listed the objective criteria we had agreed to use. I worked with one of our anchors to compile the information listed in the criteria.

8. The objective criteria consisted of the following: (1) whether the candidate was currently holding elected office; (2) whether the candidate had previously held an elected office; (3) whether the candidate had previously run for an elected office; (4) the amount of political contributions the candidate received in his or her last race for an elected office; (5) the percentage of votes the candidate received in his or her last race for an elected office; (6) the candidate's fundraising for the current Senatorial race; and (7) the candidate's performance in independent polls in the current Senatorial race.

9. In early September, when we first started to compile the information for the spreadsheet, Mr. Linn and Ms. Savage were barely registering in certain criteria we had pre-selected. Mr. Linn and Ms. Savage were not listed in the vast majority of available polls; and their campaign-finance reports at the time showed neither had raised more than \$70,000 (whereas Sen. Collins and Ms. Gideon had both eclipsed \$15,000,000 already). Therefore, I decided to wait until October to complete the spreadsheet, to see if Mr. Linn and Ms. Savage would perform better in future campaign-finance reports and polls.

10. I completed the spreadsheet on October 19, 2020, after the latest round of campaign-finance reports were available. I emailed a copy of the spreadsheet to Mr. Abel and Mr. Prak. A true and accurate copy of the spreadsheet and transmittal email are attached as Exhibit A.¹

11. Mr. Abel and I concluded, with no difficulty, that the objective criteria made clear that the race for Senate was a two-person race: Sen. Collins and Ms. Gideon were the only viable candidates for the Senate seat. Sen. Collins and Ms. Gideon were well-known elected officials, had run successful campaigns in the past, had tens-of-millions of dollars in campaign donations, and consistently garnered strong support in the polls. In comparison, neither Mr. Linn nor Ms. Savage had ever held elected office, neither raised as much as a million dollars in funds, and neither polled outside of the single digits.

12. Relying on the pre-established objective criteria, Mr. Abel and I used our journalistic and editorial experience to make the determination that Sen. Collins and Ms. Gideon were newsworthy candidates, but Mr. Linn and Ms. Savage were not.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

This the 8th day of December, 2020.


Amy Beveridge

¹ Certain portions of the email have been redacted to protect attorney-client privileged communications.

EXHIBIT A

From: Beveridge, Amy <ABeveridge@hearst.com>
Sent: Monday, October 19, 2020 1:03 PM
To: Mark J. Prak
Cc: Abel, David
Subject: WMTW Debate Criteria
Attachments: WMTW Candidate Info Sheet _ Senate _ 10_15_2020.xlsx

[EXTERNAL]

Hi Mark,

Hope you are doing well. To review since last we talked, we are holding our U.S. Senate debate October 28. [REDACTED]

With the latest campaign finance reports filed on Thursday, I was able to finalize our Candidate Info spreadsheet for Maine's U.S. Senate race. Here are a few highlights to note:

- In the most recent polls that have included all four candidates Lisa Savage ranges 0%-6%, while Max Linn ranges 1%-6%; for Linn the 6% seems to be an outlier.
- You will notice that both Linn and Savage's finance numbers are quite low. It is worth noting that Max Linn personally donated all his campaign's money except for \$178 in contributions from elsewhere.

Something else to note about Max Linn. While he has not run for any previous races in Maine, we did learn through our research that he was somewhat of a perennial candidate in Florida, where he previously lived. This article from the Bangor Daily News outlines his past in Florida pretty well ahead of his attempt to run against Angus King in 2018: <https://bangordailynews.com/2018/01/24/politics/former-florida-political-gadfly-courts-trump-voters-in-bid-to-unseat-angus-king/> Also, in my anchor's research, he found this excerpt from a Florida newspaper regarding a television station debate during his 2006 gubernatorial bid down there:

The election results also contradicted Linn's wild claim that a poll, conducted by a group that does not do polls, showed him with nearly 8 percent support. The poll that he paid for allowed him to persuade a federal judge on Oct. 30 to rule that Linn could take place in a debate televised statewide. Expect debate sponsors in the future to require more substantive proof of support before allowing candidates in.

As for Lisa Savage, back in August I was contacted by her campaign manager making a case for her to be invited to our debates. He included a petition signed by 972 people to support his stance. I am forwarding that email to you separately for your reference. I have not heard from her campaign regarding debates since then.

[REDACTED]

On a separate, but related subject, we are holding our Maine CD2 debate this Wednesday, October 21. There are only two candidates in the race. [REDACTED]

Can we set up a call to talk all this through? [REDACTED]

[REDACTED] This week, we will also begin promoting the senate debate, which may elicit Savage and Linn to respond.

Dave is cc'ed here.

Looking forward to talking.

Amy Beveridge

News Director

WMTW

4 Ledgeview Drive

Westbrook, ME 04092

T 207.835.3808

abeveridge@hearst.com



CANDIDATE INFORMATION SHEET FOR PLANNING DEBATE
OR OTHER EXEMPT PROGRAMMING

Candidate Name	Party	Candidate Information	Picture	HQ Location	Currently Holding Elected Office?	Held Any Other Elected Office?	Ever Run for Office Before?	How Much Raised in Previous Race for Public Office?	Percentage of Vote in Previous Race?	Cash Spent to Date / Cash on Hand as of Sept. 30	Independent Polling Data
Collins, Susan	R	Seeking fifth term. First elected 1996. Former Deputy Treasurer of Massachusetts. Lives in Bangor.			Yes	No	Yes	\$6,128,631 (2014)	67% (2014)	\$20,112,703.59 spent / \$6,568,316.69 on hand (OCT QRTLY)	<ul style="list-style-type: none"> • 39.8% (Pan Atlantic / Oct 2-6) • 43% (BDN Critical Insights / Sep 25-Oct 4) • 41% (Data for Progress / Sep 23-28) • 41% (Colby / Sep 17-23) • 42% (Suffolk / Sep 17-20) • 40% (Sienna College / Sep 11-16) • 41% (Citizen Data / Sep 10-14) • 43% (Fabrizio Ward Hart Research / Aug 30-Sep 5) • 44% (PPP / Aug 13-14) • 38% (Critical Insights / Jul 28 - Aug 9) • 41% (RMG / Jul 27 - Aug 2) • 43% (Quinnipiac / Jul 30 - Aug 3) • 45% (Data for Progress / Jul 24 - Aug 2) • 39% (Colby College / Jul 18 - 24) • 42% (PPP / Jul 22 - 23) • 42% (PPP / Jul 2 - 3) • 45% (Moore Information / Jun 20 - 24)
Gideon, Sara	D	Speaker of Maine House of Representatives. Former member of town council. Lives in Freeport.			Yes	Yes	Yes	\$4,314 (2018)	73.5% (2018)	\$17,148,338.89 spent / \$22,732,633.39 on hand (OCT QRTLY)	<ul style="list-style-type: none"> • 46.9% (Pan Atlantic / Oct 2-6) • 44% (BDN Critical Insights / Sep 25-Oct 4) • 46% (Data for Progress / Sep 23-28) • 45% (Colby / Sep 17-23) • 49% (Suffolk / Sep 17-20) • 44% (Sienna College / Sep 11-16) • 54% (Quinnipiac / Sep 10-14) • 49% (Citizen Data / Sep 10-14) • 44% (Fabrizio Ward Hart Research / Aug 30-Sep 5) • 49% (PPP / Aug 13-14) • 43% (Critical Insights / Jul 28 - Aug 9) • 48% (RMG / Jul 27 - Aug 2) • 47% (Quinnipiac / Jul 30 - Aug 3) • 48% (Data for Progress / Jul 24 - Aug 2) • 44% (Colby College / Jul 18 - 24) • 47% (PPP / Jul 22 - 23) • 46% (PPP / Jul 2 - 3) • 37% (Moore Information / Jun 20 - 24)
Linn, Max	I	Financial professional. Conservative activist. Lives in Bar Harbor.			No	No	Yes	\$340 (2018)	Disqualified from ballot	\$464,938.15 spent / \$10,280.04 on hand (OCT QRTLY)	<ul style="list-style-type: none"> • 2% (Pan Atlantic / Oct 2-6) • 1% (BDN Critical Insights / Sep 25-Oct 4) • 1% (Data for Progress / Sep 23-28) • 5% (Colby / Sep 17-23) • 1% (Suffolk / Sep 17-20) • 2% (Sienna College / Sep 11-16) • 0% (Citizen Data / Sep 10-14) • 1% (Moore Information / June 20 - 24)
Savage, Lisa	I	Public school teacher. Community Organizer. Lives in Solon.			No	No	No	n/a	n/a	\$115,067.02 spent / \$42,035.50 on hand (OCT QRTLY)	<ul style="list-style-type: none"> • 4.9% (Pan Atlantic / Oct 2-6) • 2% (BDN Critical Insights / Sep 25-Oct 4) • 3% (Data for Progress / Sep 23-28) • 3% (Colby / Sep 17-23) • 0% (Suffolk / Sep 17-20) • 2% (Sienna College / Sep 11-16) • 1% (Citizen Data / Sep 10-14) • 6% (Fabrizio Ward Hart Research / Aug 30-Sep 5) • 5% (Critical Insights / Jul 28 - Aug 9) • 3% (Moore Information / Jun 20 - 24)