

TARRANT GILLIES & SHEMS

44 EAST STATE STREET
POST OFFICE BOX 1440
MONTPELIER, VT 05601-1440
(802) 223-1112
FAX: (802) 223-6225

GERALD R. TARRANT
PAUL S. GILLIES
RONALD A. SHEMS*
*Also Admitted in Maine

MICHAEL J. TARRANT II
NICHOLAS LOW
K. HEATHER DEVINE
ALEXANDRA J. SPRING

PARALEGAL
DOREEN M. PALMISANO

October 5, 2022

Roy Q. Lockett
Acting Asst. Gen. Counsel
Complaints Examination & Legal Administration
Federal Elections Commission
1050 First St. NE
Washington, D.C., 20463

via email to: cela@fec.gov

Re: VTDigger Response to FEC MUR 8065

Dear Attorney Lockett:

VTDigger responds to your letter dated September 20, 2022. I am designated to represent VTDigger in all Federal Election Commission (“FEC” or “Commission”) investigations and proceedings related to MUR 8065. Please direct all future communications about this matter to me.

VTDigger is a statewide news organization that publishes daily reports on state government, politics, public policy and local news. We also publish in-depth stories, investigative pieces, video, and audio, in addition to raw information in the form of press releases and government documents, and we host occasional public events to inform our readers. See: <https://vtdigger.org/> VTDigger is a project of [The Vermont Journalism Trust](#), a 501(c)(3) nonprofit organization. As detailed in the attached Declaration of Managing Editor Paul Heintz, VTDigger is a not-for-profit and 501(c)(3) organization with policies in place consistent with that status.

MUR 8065 pertains to a September 8, 2022, edition of the 2022 “Digger Debate Series” staged by the non-profit online news site known as VTDigger. The debate featured two candidates for one of Vermont’s U.S. Senate seats. The complaint appears to allege that a third candidate, independent Cris Ericson, was excluded from participation in the debate. Ms. Ericson states that debate participation must be based on criteria but does not specifically claim how VTDigger allegedly misapplied criteria to exclude her from that debate.

MUR 8065
October 5, 2022
Page 2

The debate in question was funded and staged consistently with applicable FEC regulations. No action should be taken against VTDigger or any other entity that is the subject of the debate-related complaint.

A. Regulatory Framework

FEC regulations leave the structure of the debate to the discretion of the staging organization, but set forth some mandatory compliance requirements, including for candidate selection. For general election debates such as the one at issue in MUR 8065, a:

staging organization(s) must use pre-established objective criteria to determine which candidates may participate in a debate. For general election debates, staging organizations(s) shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate.

11 C.F.R. § 110.13(c). To qualify as a staging organization under the regulation, a nonprofit organization must be exempt from taxation under Section 501(c)(3) of the Internal Revenue Code and must not endorse, support, or oppose political candidates or political parties. 11 C.F.R. § 110.13(a)(1).

A business entity may donate funds to a nonprofit organization qualified under 11 C.F.R. § 110.13(a)(1) to defray the cost of staging candidate debates that are held in accordance with the other requirements of the Commission's regulations. *Id.* § 114.4(f)(1)-(3). In addition, the regulations authorize "bona fide newspapers, magazines and other periodical publications...provided that they are not owned or controlled by a political party, political committee or candidate" to stage candidate debates using their own funds. 11 C.F.R. § 110.13(a)(2).

B. Factual Background

Please see the attached declaration of Managing Editor Paul Heintz. Mr. Heintz's Declaration provides the objective, pre-existing, and non-partisan criteria applied to determine debate participation. That Declaration also explains how these criteria justify VTDigger's debate participation decision. VTDigger.org also makes reference to the response submitted in this matter by the Necrason Group through its designated attorney, Anthony Iarrapino, and the facts stated in that response.

C. VTDigger is a Qualified Nonprofit Organization

VTDigger is a project of the Vermont Journalism Trust which is a 501(c)(3) tax-exempt not-for-profit corporation. The information about VTDigger's tax-exempt status and independent governance is publicly available at the above links and Paul Heintz's attached Declaration. VTDigger does not endorse, support, or oppose political candidates or political parties. Further, VTDigger maintains a strict firewall between its journalism and its donors and sponsors. This firewall extends to debates. As such, VTDigger qualifies as a nonprofit staging organization and eligible to receive sponsorships in support of its 2022 Debate Series.

D. VTDigger is a Bona Fide Journalistic Enterprise Not Owned or Controlled by a Political Party, Political Committee, or Candidate

In addition to being a qualified nonprofit organization, VTDigger is qualified to stage debates under FEC regulations as a bona fide journalistic enterprise unaffiliated with political entities. Information about its journalistic bona fides, including awards it has won from the New England Newspaper and Press Association, among others, are available on the above-referenced websites.

E. VTDigger Applied Pre-Established, Objective, and Non-Partisan Candidate Selection Criteria to Determine Candidate Participation in the Debate

As detailed in the attached Declaration of Managing Editor Paul Heintz, VTDigger applied multiple, pre-established, objective and non-partisan criteria in determining that Democratic Party nominee, Rep. Peter Welch and Republican Party nominee Gerald Malloy would be the two candidates to participate in the September 8, 2022 debate. A criterion, but not the only criterion, applied to make this determination was major party status affiliation, a criterion expressly recognized as being appropriate under FEC regulations. As detailed in Managing Editor Paul Heintz's attached Declaration, major party status was not determinative. Vermont has a rich history of independent and third-party candidates. Here, however, Ms. Ericson simply has not succeeded at garnering public support, raising enough money to run a competitive campaign, operating a statewide campaign, securing public office, or holding a leadership position in the public or private sector despite repeated runs for various public offices. Application of VTDigger's objective, pre-existing, and non-partisan criteria justifies the debate participation decision Ms. Ericson complains of.

F. Conclusion

VTDigger applied pre-established, objective and non-partisan criteria as required by FEC regulations to determine debate participation. MUR 8065 does not establish any violation. No further action is warranted. MUR 8065 should be dismissed.

MUR 8065
October 5, 2022
Page 4

VTDigger looks forward to this matter's prompt resolution. Please let me know if we can provide any further information.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ron Shems", is positioned above the printed name.

Ronald A. Shems
Tarrant, Gilles & Shems
Designated Counsel for VTDigger

cc: Cris Ericson
Anthony Iarrapino
VT Attorney General's Office

VTDigger Response to MUR 8065

DECLARATION OF PAUL HEINTZ

I, Paul Heintz, pursuant to 28 U.S.C. § 1746 and based on personal knowledge, make the following declaration:

1. I am VTDigger's Managing Editor. I have held this position since January 2021.

2. VTDigger is a statewide news organization that publishes daily reports on state government, politics, public policy and local news. We also publish in-depth stories, investigative pieces, video and audio, in addition to raw information in the form of press releases and government documents, and we host occasional public events to inform our readers. See: <https://vtdigger.org/>

3. VTDigger is a project of The Vermont Journalism Trust, a 501(c)(3) nonprofit organization.

4. I coordinated the VTDigger news team's involvement in the planning and execution of the September 8, 2022 debate that is the subject of Ms. Ericson's complaint. That work involved, among other tasks, determining which debates to hold and which candidates to invite; advertising and promoting the debates; and working with fellow editors and reporters to draft questions for the participants. I was not involved with matters related to sponsorship of the debate.

5. Current debate policy and criteria have been effective since May 3, 2022 and predate the debate that is the subject of Ms. Ericson's complaint. VTDigger's policy that governs debates, and participation in debates, follows:

VTDigger cannot, does not, and will not invite or accept input into the selection of participants in debates from any government official, sponsor, contributor, board member, underwriter, advocacy organization, political party or campaign. In short, the decision is to be made by the editorial staff free from outside influences. Examples of some the factors that may be considered in determining participation in any public forum include:

- Filing Status with the Federal Election Commission and/or Vermont Secretary of State's Office
- Past or present leadership in the public or private sector
- Major party status
- Past performance in political campaigns
- Public polling
- Fundraising and other indications of support such as public sentiment or demonstrated reach and appeal to the electorate

Again, the decisions on whether to host debates, when and where to do so, and who to invite is vested in the sole discretion of the editorial staff of VTDigger and is required to be exercised in a nonpartisan manner based on the editorial staff's professional opinion as to how best to present a forum to the public that will best serve the public's interest and advance the mission of VTDigger.

6. VT Digger's mission and other relevant policies follow:

The mission of the Vermont Journalism Trust is to produce rigorous journalism that explains complex issues, promotes public accountability and fosters democratic and civic engagement.

We subscribe to standards of editorial independence adopted by the Institute for Nonprofit News. Our organization retains full authority over editorial content to protect the best journalistic and business interests of our organization.

We maintain a firewall between news coverage decisions and sources of all revenue. Acceptance of financial support does not constitute implied or actual endorsement of donors or their products, services or opinions. VTDigger reserves the unconditional right to reject or require disclaimers for any content which as determined in VTDigger's sole discretion may be misleading, offensive or which could undermine the mission of the organization.

7. These criteria and policies were objectively applied to determine the participants in and the conduct of the September 8, 2022 debate that is the subject of Ms. Ericson's complaint. The policies were applied in a non-partisan manner and without outside influence. No one criterion was determinative. Rather, participant selection was based on application of several or all of the above-listed criteria.

8. Specifically, we determined to not include Ms. Ericson as a participant because, among other factors, over the course of approximately 20 years running for numerous statewide offices, Ericson has not succeeded at garnering public support, raising enough money to run a competitive campaign, operating a statewide campaign, securing public office, or holding a leadership position in the public or private sector.

9. VTDigger has, in the past, invited independent and non-major party candidates to participate in debates. The most recent example of this was our decision to invite Ericka Redic, the U.S. House nominee of the Vermont Libertarian Party, which is designated by the Vermont Secretary of State's Office as a minor party, to our September 15, 2022 U.S. House candidate debate. Indeed, Vermont has a rich history of independent and non-major-party candidates, such as U.S. Senator (formerly U.S. Representative) Bernie Sanders, an independent, taking part in statewide debates.

MUR 8065


October 5, 2022

Page 3

10. The Necrason Group was a sponsor of the September 8, 2022 debate. As stated in the above policies, The Necrason Group's sponsorship had no influence over, and was not determinative of, who was allowed to participate in that debate. I had no communication with Necrason Group principals or employees about the debate, debate participants, or debate content ahead of the September 8 debate.

I declare under penalty of perjury that the foregoing is true and correct.

October 5, 2022


Paul Heintz