



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

June 21, 2002

MEMORANDUM

TO: The Commission
General Counsel
Staff Director
Public Information
Press Office
Public Records

FROM: Rosemary C. Smith *RCS*
Acting Associate General Counsel

SUBJECT: Comments on Notice of Availability of Petition for Rulemaking on
Candidate Debates

Attached are two comments that we received in response to the above Notice Availability, Notice 2002-6, published in the May 9, 2002 Federal Register (67 FR 31164). The comment period ended on June 10, 2002.

Attachments

cc: Congressional Affairs Officer
Executive Assistants



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

June 12, 2002

Rosemary C. Smith
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
JUN 20 10 34 AM '02

Dear Ms. Smith:

Thank you for sending us a copy of Notice 2002-6 containing a petition for rulemaking ("petition") regarding the candidate debate regulations. The petition urges the Federal Election Commission to repeal 11 CFR 110.13, which requires an organization staging a debate to use "pre-established objective criteria to determine which candidate may participate in a debate."

At this time we offer no comments, however, if you would like to discuss our views on how the proposal could impact tax-exempt organizations, please feel free to call Cynthia D. Morton or me at (202) 622-6070.

Sincerely,

Michael B. Blumenfeld
Assistant Branch Chief
Exempt Organizations Branch 1
Office of the Division Counsel/Associate
Chief Counsel (Tax Exempt & Government
Entities)



STATE OF CONNECTICUT
STATE ELECTIONS ENFORCEMENT COMMISSION
20 Trinity Street - Suite 101 • Hartford, Connecticut 06106 - 1628

May 17, 2002

Ms. Rosemary C. Smith
Assistant General Counsel
Federal Election Commission
999 E. Street, NW
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF THE
GENERAL COUNSEL
MAY 20 1 55 PM '02

Re: Petition for Rulemaking Filed by CBS Broadcasting Inc., et al

Dear Attorney Smith,

The State of Connecticut State Elections Enforcement Commission wishes to submit comments on the Petition for Rulemaking filed by CBS Broadcasting, Inc., et al on April 10, 2002.

The State Elections Enforcement Commission has recently had occasion to address the issue of broadcast sponsorship of candidate debates, and whether the exclusion of a minor party candidate for local office resulted in a corporate contribution to the appearing major party candidates, In the Matter of a Complaint by Daniel Presnick, Orange, File No. 2001-221. The candidates involved were running for First Selectman in the Town of Orange, and News Channel 12 hosted a debate featuring only the two major party candidates. The issue was one of first impression for the Commission, and we carefully reviewed federal election law, federal communications law and constitutional law on the issue for guidance.

The State of Connecticut's campaign finance laws are similar to, and based on, the Federal Elections Campaign Act. In this instance, the news exemptions contained in Connecticut General Statutes §9-333c(b)(5) and 2 U.S.C. §431(9)(B)(i) are identical. However, the Commission has never promulgated debate regulations, as the FEC has in 11 C.F.R. §110.13 and 11 C.F.R. §114.4(f). Consequently, the analysis under our state election laws was limited to whether the broadcaster's sponsorship of the debate was exempt from the definition of contribution under the news exemption.

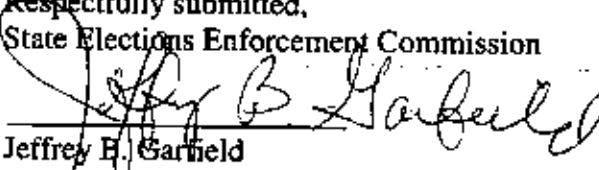
The Commission concluded that the broadcast sponsorship of a debate between state and local candidates was exempt under the news story exemption in Connecticut General Statutes §9-333c(b)(5). The Commission considered that the likely effect of requiring all legally qualified candidates to be included in broadcast sponsored debates would be the cessation of such debates. Although sympathetic to the complainant, the

Commission felt that the electorate as a whole would not be well served by being deprived of the opportunity to view candidates speaking candidly on topical issues. This is particularly true with state and local candidates, whose races do not usually get prime-time coverage, however, the rationale would still apply to federal candidates.

The Commission agrees with the petitioners that there is an apparent conflict between the FEC debate regulations and federal communications law. Federal communications law considers broadcast sponsored debates to be "on the spot coverage of bona fide news events" exempt from the equal time requirements. In Re Geller, 95 F.C.C. 2d 1236 (1983), aff'd sub nom, League of Women Voters Educ. Fund v. FCC, 731 F. 2d 995 (D.C. Cir. 1983). In the case before the Commission, News Channel 12, which was performing a public service by hosting the debate between local candidates, would have been found to have made an illegal corporate contribution if the FEC debate regulations were in place in the State of Connecticut because they did utilize "pre-established objective criteria" in determining to exclude the complainant. The Commission submits that penalizing news organizations for coverage of candidate debates is wrong as a matter of policy. Such coverage, particularly in an era of concern about the rising cost of political campaigns, should be encouraged, not penalized.

In changing its policy to permit broadcast sponsored debates in Geller, the FCC considered that "the overriding objective of the exemptions is to encourage broadcast coverage of political issues." Id. at 1242. "[A]lthough Congress expressed a concern that the freedom and flexibility accorded to broadcasters in their news programming might result in favoritism amongst candidates, Congress intended to permit that risk in order to foster a more informed electorate." Id. at 1244. The FCC considered that a broadcaster may be the only entity interested in hosting a debate between candidates for a particular office, particularly at the state or local level, and to require equal time would discourage broadcasters from sponsoring such debates. Id. at 1244-45.

The State Elections Enforcement Commission respectfully suggests that the Federal Election Commission reconsider its own news exemption with the broad public policy of a more informed electorate in mind. The Commission submits its recent decision, In the Matter of a Complaint by Daniel Presnick, Orange, File No. 2001-221, for your consideration, and encourages the FEC to find its own news exemption, which is identical to the State of Connecticut's, to encompass broadcast sponsored debates.

Respectfully submitted,
State Elections Enforcement Commission
BY: 
Jeffrey B. Garfield
Executive Director and General Counsel
State Elections Enforcement Commission
20 Trinity Street
Hartford, CT 06106-1628

STATE OF CONNECTICUT
STATE ELECTIONS ENFORCEMENT COMMISSION

In the Matter of a Complaint by
Daniel Presnick, Orange

File No. 2001-221
May 15, 2002

FINDINGS AND CONCLUSIONS

Complainant brings this complaint pursuant to Connecticut General Statutes §9-7b, alleging that: (1) News Channel 12 and Cablevision Systems of Southern Connecticut, L.P., violated state election law by excluding him from a debate and (2) Orange Government Access Television violated state election law by using public funds to rebroadcast the News Channel 12 debate and filming an AARP debate from which he was excluded, which was held in a public facility.

After the investigation of the Complainant's complaint, the Commission makes the following findings and conclusions:

1. The complainant was a candidate for First Selectman in the Town of Orange in the November 6, 2001 municipal election, endorsed by the Orange Taxpayers' party, an established minor party in the Town of Orange. The complainant also ran for First Selectman as the endorsed candidate of the Orange Taxpayers' party in the 1999 municipal election.
2. On October 25, 2001, News Channel 12 held a debate between the Democratic and Republican candidates for First Selectman in the Town of Orange, incumbent Mitchell Goldblatt and Ralph Okenquist. Although he had been included in a 1999 debate sponsored by News Channel 12, the complainant was not invited to participate in the October 25, 2001 debate.
3. The question of whether a private broadcast station may hold a candidate debate and exclude a minor party candidate consistent with state election law is one of first impression for the Commission.
4. The complainant alleges that by excluding him, News Channel 12 and Cablevision Systems of Southern Connecticut, LP made illegal corporate contributions to the major party candidates appearing in the debate.
5. Connecticut General Statutes §9-333b provides, in pertinent part:
 - (a) As used in this chapter, "contribution" means:
 - (1) Any gift, subscription, loan, advance, payment or deposit of money or anything of value, *made for the purpose of influencing the nomination for election, or election, of any person* or for the purpose of aiding or promoting the success or defeat of any referendum question or on behalf of any political party; [Emphasis added.]

6. Connecticut General Statutes §9-333c provides, in relevant part:
- (b) The term "expenditure" does not mean:
- ... (5) Any news story, commentary or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical, unless such facilities are owned or controlled by any political party, committee or candidate; [Emphasis added.]
7. The threshold question is whether the News Channel 12 debate is exempt from the definition of expenditure as a "news story, commentary or editorial" under Connecticut General Statutes §9-333(c)(b)(5).
8. The Commission frequently looks to the Federal Election Commission for guidance when interpreting cases of first impression, because the state campaign finance laws are modeled after the Federal Election Campaign Act. In this instance, the FECA contains a news story exemption identical to Connecticut General Statutes §9-333c(b)(5), in 2 U.S.C. §431 (9)(B)(i).
9. However, the FEC has promulgated regulations governing debates and has concluded that broadcast sponsored debates are governed by such regulations and do not fall within the news story exemption. The Commission has not promulgated debate regulations.
10. 11 C.F.R. § 110.13, governing candidate debates, provides, in relevant part:
- (a) *Staging organizations.* (1) Nonprofit organizations described in 26 U.S.C. 501 (c)(3) or (c)(4) and which do not endorse, support, or oppose political candidates or political parties may stage candidate debates in accordance with this section and 11 CFR 114.4(f).
- (2) **Broadcasters (including a cable television operator, programmer or producer), bona fide newspapers, magazines and other periodical publications may stage candidate debates in accordance with this section and 11 CFR 114.4(f), provided that they are not owned or controlled by a political party, political committee or candidate.** In addition, broadcasters (including a cable television operator, programmer or producer) *bona fide* newspapers, magazines and other periodical publications, acting as press entities, may also cover or carry candidate debates in accordance with 11 CFR 100.7 and 100.8. [Emphasis added.]
- (b) *Debate structure.* The structure of debates staged in accordance with this section and 11 CFR 114.4 (f) is left to the discretion of the staging organization(s), provided that:
- (1) Such debates include at least two candidates; and
- (2) The staging organization(s) does not structure the debates to promote or advance one candidate over another.

(c) *Criteria for candidate selection.* For all debates, staging organization(s) must use **pre-established objective criteria** to determine which candidates may participate in a debate. For general election debates, staging organization(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. For debates held prior to a primary election, caucus or convention, staging organizations may restrict candidate participation to candidates seeking the nomination of one party, and need not stage a debate for candidates seeking the nomination of any other political party or independent candidates. [Emphasis added.]

11. 11 C.F.R. § 114.4(f) provides, in pertinent part:

(f) *Candidate debates.* (1) A nonprofit organization described in 11 CFR §110.13(a)(1) may use its own funds and may accept funds donated by corporations or labor organizations under paragraph (f)(3) of this section to defray costs incurred in staging candidate debates held in accordance with 11 CFR §110.13.

(2) A **broadcaster** (including a cable television operator, programmer or producer), **bona fide newspaper, magazine or other periodical publication** may use its own funds to defray costs incurred in staging public candidate debates held in accordance with 11 CFR §110.13. [Emphasis added.]

(3) A corporation or labor organization may donate funds to nonprofit organizations qualified under 11 CFR §110.13(a)(1) to stage candidate debates held in accordance with 11 CFR §110.13 and 114.4(f).

12. On April 10, 2002, several major news organizations and trade associations filed a petition for rulemaking with the Federal Election Commission, asking the Commission to amend Section 110.13(c) to make clear that the sponsorship of a debate between political candidates by news organizations does not constitute an illegal corporate contribution or expenditure in violation of the Federal Election Campaign Act. See Petition of CBS Broadcasting, et al. In part, the petitioners urge that they not be subject to the requirement of utilizing "pre-established objective criteria" in selecting debate participants but be permitted to make a good faith editorial judgment independent of the FEC protected by the First Amendment. The comment period for such rule-making ends June 10, 2002.

13. Federal Communications law also governs broadcasters sponsoring debates. 47 U.S.C. §315(a) provides:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No

obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. *Appearance by a legally qualified candidate on any*

- (1) bona fide newscast,
- (2) bona fide news interview,
- (3) bona fide news documentary

(if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

- (4) *on-the-spot coverage of bona fide news events* (including but not limited to political conventions and activities incidental thereto), *shall not be deemed to be use of a broadcasting station within the meaning of this subsection.* [Emphasis added.]

14. In In Re Geller, 95 F.C.C. 2d 1236 (1983), aff'd sub nom, League of Women Voters Educ. Fund v. FCC, 731 F. 2d 995 (D.C. Cir. 1983), the Federal Communications Commission determined that broadcaster sponsored debates qualified as "on-the-spot coverage of bona fide news events" exempt from the equal time provisions under subsections 315(a)(3) and (4) of the Communications Act.
15. In changing its policy to permit broadcast sponsored debates in Geller, the FCC considered that "the overriding objective of the exemptions is to encourage broadcast coverage of political issues." Id. at 1242. "[A]lthough Congress expressed a concern that the freedom and flexibility accorded to broadcasters in their news programming might result in favoritism amongst candidates, Congress intended to permit that risk in order to foster a more informed electorate." Id. at 1244. The FCC considered that a broadcaster may be the only entity interested in hosting a debate between candidates for a particular office, *particularly at the state or local level*, and to require equal time would discourage broadcasters from sponsoring such debates. Id. at 1244-45. [Emphasis added.]
16. In fact, following the Geller decision, a marked increase in the number of broadcast sponsored debates occurred. See Kyu Ho Youm, *Editorial Rights of Public Broadcasting Stations vs. Access for Minor Political Candidates to Television Debates*, 52 Federal Communications Law Journal 687 at 697 (2000), available at <http://www.law.indiana.edu/fclj/pubs/v52/no3/youm1.pdf>.
17. The U.S. Supreme Court has determined that a state owned broadcast station does not have a constitutional obligation to provide access to a debate to every candidate in Arkansas Educational Television Commission v. Forbes, 523 U.S. 666 (1998). The debate at issue was between Republican and Democratic candidates for Arkansas' 3rd Congressional District, and independent candidate Ralph Forbes was excluded. Reversing the Eighth Circuit, the Supreme Court concluded that the debate was a non-public forum, and that broad rights of access to outside speakers would be antithetical to the editorial discretion that broadcasters must exercise to

fulfill their journalistic purpose and statutory obligations. Access to a nonpublic forum can be restricted if the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's views. The Court concluded that AETC's decision to exclude Forbes was a reasonable, viewpoint-neutral exercise of journalistic discretion consistent with the First Amendment. The case had been tried to a jury, which found that Forbes was not excluded because of his viewpoint but because he had not generated appreciable interest, and the Court concluded that an independent candidate could be excluded from a debate in such a viewpoint neutral exercise of journalistic discretion. See also Chandler v. Georgia Public Television Commission, 917 F. 2d 486 (11th Cir. 1990), cert. denied, 502 U.S. 816 (1991).

18. The Supreme Court also considered in Forbes that a broadcaster could decide that including all candidates would actually undermine the educational value and quality of debates, and that if a broadcaster were required to choose between a cacophony of voices or First Amendment liability, it might choose not to air the debate at all.
19. News Channel 12 aired the October 25, 2001 debate as part of a debate series for local elections in 1999 and 2001. The series did not cover, or attempt to cover, all local elections, but only those selected races, that in the opinion of its news director and staff, were closely contested or otherwise presented issues of special interest to the communities it serves. In 2001, News Channel 12 aired 5 debates out of a total of 16 communities in the channel's viewing area. Orange was chosen for inclusion in the series in both 1999 and 2001.
20. News Channel 12 did not utilize "pre-established objective criteria" in its determination to exclude Mr. Presnick, and in fact, did not have a written policy establishing criteria for inclusion or exclusion of candidates in a debate.
21. News Channel 12's general policy is "one of inclusion, unless there is information making clear that a candidate has no legitimate chance, no matter how remote, of winning the election in question or even carrying a significant percentage of the vote." Under these general principles of inclusion, Mr. Presnick was invited to participate in the 1999 debate.
22. In 2001, News Channel 12 excluded Mr. Presnick based upon his showing in the 1999 election, where he received only 1.5% of the vote, and determined that "he had virtually no base of support" and including him in the debate "would serve no legitimate news function and instead would dilute the news value of the events."
23. Although there is an inherent appeal to the assertions made by Mr. Presnick, the price of forcing his inclusion, and that of all legally qualified candidates, upon a broadcaster sponsoring a debate would likely be subsequent decisions by such a broadcaster not to sponsor such debates at

all, which would not be in the public interest and harmful to the electorate as a whole.

24. Accordingly, it is concluded that the sponsorship of a debate between state or local candidates by a broadcaster falls within the news story exemption in Connecticut General Statutes §9-333c(b)(5), and as such, a news organization may make a good faith journalistic determination of which candidates to include or exclude without running afoul of the state campaign finance laws.
25. The Commission sincerely hopes that such determination will serve as a catalyst to news organizations to increase the sponsorship of such debates.
26. The second allegation raised by the complainant is his exclusion from an October 9, 2001 debate sponsored by the AARP, filmed by the OGAT Coordinator, and shown on Orange Government Access Television (hereinafter "OGAT").
27. The Complainant specifically does not contest AARP's decision to exclude him, but rather OGAT's decision to film and broadcast the debate because OGAT is publicly funded.
28. Connecticut General Statutes §9-333l(d), as amended by Public Act 99-12, provides:
 - (1) No incumbent holding office shall, during the three months preceding an election in which he is a candidate for reelection or election to another office, use public funds *to mail or print flyers or other promotional materials* intended to bring about his election or reelection.
 - (2) No official or employee of the state or a political subdivision of the state *shall authorize the use of public funds for a television, radio, newspaper or magazine promotional campaign or advertisement*, which (A) features the name, face or voice of a candidate for public office or (B) promotes the nomination or election of a candidate for public office, during the five-month period preceding the election being held for the office which the candidate described in this subdivision (2) is seeking. [Emphasis added.]
29. The Commission has previously concluded that subsection (1) of Connecticut General Statutes §9-333l(d) applies only to *printed promotional materials*, and does not extend to use of town funds or equipment for political purposes. In the Matter of a Complaint by Pamela Lloyd, Somers, File No. 97-273.
30. It is found that OGAT is substantially funded through "public funds" of the Town of Orange, as defined in Connecticut General Statutes §9-333a(19),

and within the meaning of Connecticut General Statutes §9-333(d), at a cost of approximately \$70,000 annually.

31. The Commission does not have primary jurisdiction over the medium of public access television, but only has jurisdiction with respect to certain limited issues related to campaign finance.
32. The Department of Public Utility Control (DPUC), the primary state regulatory authority with respect to community access programming, has a regulation that provides that franchise holders must adopt operating rules for access use, including:

A prohibition of the presentation of any advertising material designed to promote the sale of commercial products or services (including advertising by or on behalf of candidates for public office). Regulations of Connecticut State Agencies §16-333-35(a)(4).

33. However, the regulation was challenged in a declaratory ruling, Docket No. 92-09-05, and the DPUC issued the following interlocutory order, which is still in effect:

No regulated CATV company shall prohibit any candidate for public office from broadcasting statements over public access channels which are not paid for, and do not solicit funds on behalf of any candidate or organization, based upon the Regulation. Such statements shall include, but not be limited to speeches, debates, interviews and videotaped messages. In entering this Interlocutory Order, the Department assumes that the CATV companies will abide by all other governing principles of federal and state law.

34. In the realm of public access television, the content of each individual show is determined only by the show's producer. Pursuant to federal and state law, neither the franchise holder, nor the station management of OGAT, may exercise editorial control over the content of a particular cable access producer's program, except to limit obscenity or commercial programming. 47 U.S.C. §531(e), Connecticut General Statutes §16-331a(g), and Regulations of Connecticut State Agencies §16-333-33a(b).
35. In filming and broadcasting the AARP debate, OGAT was responding to a valid request by AARP for the use of its services, and did not edit the program for content or influence the content of the program in any manner.
36. Connecticut General Statutes §9-333b(b), as amended by Public Act 99-264, which codified a prior Commission Opinion of Counsel, OC 97-24, excludes from the definition of "contribution" for purposes of political campaigns:

(14) The provision of facilities, equipment, technical and managerial support, and broadcast time by a community antenna

television company, as defined in section 16-1, for community access programming pursuant to section 16-331a, unless (A) the major purpose of providing such facilities, equipment, support and time is to influence the nomination or election of a candidate or (B) such facilities, equipment, support and time are provided on behalf of a political party.

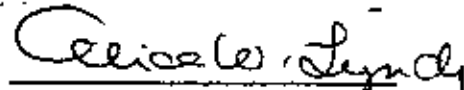
37. The October 9, 2001 AARP sponsored debate did not have as its major purpose the intent or effect of influencing the nomination or election of a particular candidate but rather providing information about the "two top candidates."
38. It is incumbent upon the station management of OGAT to ensure that the station's resources are distributed in a manner that is fair to all candidates, in order to avoid the company or station making a contribution to a particular candidate. OGAT has policies and procedures in place attempting to ensure equal treatment between candidates.
39. The Commission has previously determined that an appearance by a candidate on a community access program, which by definition is non-commercial, even if the appearance is promotional of the candidate, is not a "promotional campaign or advertisement" under Connecticut General Statutes §9-333(d), which was intended to apply to commercial advertising purchased in mass media. In the Matter of a Complaint by Ronald Bonola, Rocky Hill, File No. 2001-136.
40. Accordingly, the Commission concludes that October 9, 2001 debate shown on OGAT did not violate Connecticut General Statutes §9-333(d).
41. As stated In the Matter of a Complaint by Ronald Bonola, Rocky Hill, File No. 2001-136: "The Commission applauds the use of cable access programming to feature fair and meaningful debates between candidates. Such use of cable access programming is a low or no cost alternative to high priced advertising on commercial stations and provides substantive information to electors that might not otherwise be available." The Commission is unwilling to extend a construction of the statute, requiring the inclusion of minor party candidates in any debate, which will have the likely effect of reducing the number of debates actually held.

ORDER

The following Order is recommended on the basis of the aforementioned finding:

That the complaint be dismissed.

Adopted this 15th day of May 2002 at Hartford, Connecticut.



Alice W. Lynch
Chairperson
By Order of the Commission