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FEDERAL ELECTION
COMMISSION
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FEDERAL ELECTION COMMISSION
Washington, DC 20463

2004 SEP -2 P 4: 23

September 2, 2004

MEMORANDUM

AGENDA ITEM
For Meeting of: 9-9-04

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Mai T. Dinh *MTD*
Assistant General Counsel

Robert M. Knop *RMK*
Senior Attorney

SUBJECT: Draft Notice of Disposition of Petitions for Rulemaking

During the June 18, 2004 Regulations Committee meeting, the Committee directed the Office of General Counsel to forward its recommendation on two petitions for rulemaking regarding the Commission's candidate debate regulations at 11 CFR 110.13. One petition was filed by Mary Clare Wohlford, William T. Wohlford, and Martin T. Mortimer. The other petition was filed by several major news organizations. The draft Notice of Disposition states that the Commission has decided not to initiate a rulemaking in response to either of these petitions at this time.

Recommendations

The Office of the General Counsel recommends that the Commission:

1. Decline to open a rulemaking in response to the Petition for Rulemaking filed on May 25, 1999, by Mary Clare Wohlford, William T. Wohlford, and Martin T. Mortimer;
2. Decline to open a rulemaking in response to the Petition for Rulemaking filed on April 10, 2002, by counsel for CBS Broadcasting, Inc.; American Broadcasting Companies, Inc.; Cox Enterprises, Inc.; Gannett Co., Inc.; Belo

Corp.; National Broadcasting Co., Inc.; News America Incorporated; The New York Times Company; Post-Newsweek Stations, Inc.; National Association of Broadcasters; Radio and Television News Directors Association; Society of Professional Journalists; and Tribune Company;

3. Approve the attached Notice of Disposition for publication in the *Federal Register*; and
4. Approve the attached letters to Mr. and Mrs. Wohlford, Mr. Mortimer, and counsel for CBS Broadcasting, Inc.; American Broadcasting Companies, Inc.; Cox Enterprises, Inc.; Gannett Co., Inc.; Belo Corp.; National Broadcasting Co., Inc.; News America Incorporated; The New York Times Company; Post-Newsweek Stations, Inc.; National Association of Broadcasters; Radio and Television News Directors Association; Society of Professional Journalists; and Tribune Company.

Attachments

1 **FEDERAL ELECTION COMMISSION**

2 **NOTICE 2004-**

3 **11 CFR PART 110**

4 **CANDIDATE DEBATES**

5 **AGENCY:** Federal Election Commission.

6 **ACTION:** Notice of Disposition of Petitions for Rulemaking.

7 **SUMMARY:** The Commission announces its disposition of two Petitions for
8 Rulemaking regarding the Commission's candidate debate
9 regulations. The first petition, filed on May 25, 1999 by Mary Clare
10 Wohlford, William T. Wohlford, and Martin T. Mortimer, urged the
11 Commission to amend its rules so that the objective criteria for
12 inclusion in Presidential and Vice Presidential debates would be
13 established by the Commission itself, and not left to the discretion of
14 debate staging organizations. The second petition, filed on April 10,
15 2002 by several major news organizations, urged the Commission to
16 amend its rules to state explicitly that the sponsorship by a news
17 organization (or a related trade association) of a debate among
18 candidates does not constitute an illegal corporate campaign
19 contribution or expenditure in violation of the Federal Election
20 Campaign Act of 1971, as amended ("the Act") and that the
21 Commission would have no jurisdiction over such sponsorship. The
22 Commission has decided not to initiate a rulemaking in response to
23 either of these petitions at this time. The petitions are available for

1 inspection in the Commission's Public Records Office, through its
2 FAXLINE service, and on its website, www.fec.gov.

3 **DATE:** [INSERT DATE OF PUBLICATION]

4 **FOR FURTHER**
5 **INFORMATION**

6 **CONTACT:** Ms. Mai T. Dinh, Assistant General Counsel, or Mr. Robert M. Knop,
7 Staff Attorney, 999 E Street, NW, Washington, D.C. 20463,
8 (202) 694-1650 or (800) 424-9530.

9 **SUPPLEMENTARY**

10 **INFORMATION:** On May 25, 1999, the Commission received a Petition for Rulemaking
11 from Mary Clare Wohlford, William T. Wohlford, and Martin T. Mortimer ("Wohlford
12 Petition"). On April 10, 2002, the Commission received a Petition for Rulemaking from CBS
13 Broadcasting Inc.; American Broadcasting Companies Inc.; Belo Corp.; Cox Enterprises, Inc.;
14 Gannett Co., Inc.; the National Association of Broadcasters; National Broadcasting Co., Inc.;
15 News America Incorporated; The New York Times Company; Post-Newsweek Stations, Inc.;
16 the Radio and Television News Directors Association; the Society of Professional Journalists;
17 and Tribune Company ("News Media Petition"). Both petitions concern the Commission's
18 candidate debate regulations at 11 CFR 110.13. Section 110.13(c) states, *inter alia*, that "[f]or
19 all debates, staging organization(s) must use pre-established objective criteria to determine
20 which candidates may participate in a debate."

21 The Wohlford Petition asserted that the objective criteria for inclusion in Presidential
22 and Vice Presidential debates should be established by the Commission itself, and not left to the
23 discretion of debate staging organizations. The petition urged the Commission to revise section
24 110.13(c) to set forth mandatory criteria for participation in Presidential and Vice Presidential

1 debates. Specifically, the Wohlford Petition recommends that the debates be open to any
2 candidate that: (1) has the mathematical potential to win the election in that he or she is on the
3 ballot in enough states to earn 270 Electoral College votes; and (2) has proven his or her
4 viability by having spent at least \$500,000 on the campaign by the end of the month preceding
5 the date of the first scheduled debate held on or after September 1 of the election year. In
6 addition, the Wohlford Petition recommends that candidates have equal access to debates held
7 before September 1 without regard to the above requirements.

8 In contrast, the News Media Petition asserted that 11 CFR 110.13(c) should be amended
9 or repealed. It argued that any regulation of the sponsorship by a news organization (or a
10 related trade association) is: (1) contrary to the clear intent of Congress in adopting the Act; (2)
11 irreconcilable with the Commission's own decisions that media entities do not violate the Act
12 by providing free time to candidates; and (3) in conflict with long-established policies of the
13 Federal Communications Commission concerning the presentation of campaign debates by
14 broadcasters. Finally, the News Media Petition asserted that 11 CFR 110.13(c) is
15 unconstitutional because it does nothing to advance the purpose of preventing corruption or the
16 appearance of corruption in the political process, which the Supreme Court has held are 'the
17 only legitimate and compelling government interests thus far identified for restricting [First
18 Amendment rights in the regulation] of campaign finances.'" (quoting FEC v. National
19 Conservative Political Action Committee, 470 U.S. 480, 496-97 (1985)). The News Media
20 Petition urged the Commission to draft new regulations that explicitly declare that sponsorship
21 of a candidate debate by a news organization or a related trade association is legal under the Act
22 and to refrain from any further regulatory jurisdiction over such sponsorship.

1 The Commission published a Notice of Availability (“first NOA”) on June 10, 1999 to
2 seek comment on the Wohlford Petition. 64 FR 31159. The Commission published a
3 subsequent notice on July 21, 1999, extending the comment period. 64 FR 39095. The
4 Commission received approximately 1000 comments in response to the first NOA. Most of the
5 comments expressed support for the petition. Several comments, however, expressed
6 opposition to the establishment of mandatory objective criteria by the Commission for
7 participation in Presidential and Vice Presidential debates. Copies of these comments are
8 available for inspection in the Commission’s Public Records Office.

9 The Commission published a second NOA on May 9, 2002 to seek comment on the
10 News Media Petition. 67 FR 31164. In the Notice of Proposed Rulemaking on Electioneering
11 Communications, 67 FR 51131, 51136 (Aug. 7, 2002) (footnote 5), the Commission stated its
12 intention to defer consideration of whether to issue a Notice of Proposed Rulemaking in
13 response to the Petition until after it completed rulemakings required by the Bipartisan
14 Campaign Reform Act of 2002. The Commission received one substantive comment in
15 response to the second NOA, from the State of Connecticut State Elections Enforcement
16 Commission, which expressed general support for the Petition, and a response from the IRS
17 indicating it does not have substantive comments. Copies of these comments are available on
18 the Commission’s website at www.fec.gov and in the Commission’s Public Records Office.

19 After reviewing the comments filed in response to both NOAs as well as other
20 information, the Commission declines to open a new rulemaking in response to the Wohlford or
21 News Media petitions. The Commission believes that its candidate debate regulations have
22 worked well in practice over the course of several election cycles. The Commission also notes
23 that the current version of 11 CFR 110.13 has been reviewed and upheld by two Federal

1 appellate courts in recent years. See Becker v. FEC, 230 F.3d 381 (1st Cir. 2000) and Perot v.
2 FEC, 97 F.3d 553 (D.C. Cir. 1996). Accordingly, the Commission does not intend to issue a
3 Notice of Proposed Rulemaking in response to either petition at this time.

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Bradley A. Smith
Chairman
Federal Election Commission

DATED: _____
BILLING CODE: 6715-01-U

Mary Clare Wohlford
William T. Wohlford
249 Tenth Street, NW
Pulaski, VA 24301

Dear Mr. and Mrs. Wohlford:

On _____, 2004, the Commission decided not to initiate a rulemaking at this time to revise 11 CFR part 110 regarding the criteria for inclusion in Presidential and Vice Presidential Debates, as proposed in the Petition for Rulemaking you filed on May 25, 1999.

The Commission believes that its debate regulations at 11 CFR 110.13(c) have worked well in practice over the course of several election cycles. Accordingly, the Commission declines to change them at this time.

Enclosed for your information are the Notice of Disposition approved by the Commission and the General Counsel's recommendations on which the Commission's decision was based.

Sincerely,

Bradley A. Smith
Chairman

Enclosures

Martin T. Mortimer
41 Indian Valley Lane
Telford, PA 18964

Dear Mr. Mortimer:

On _____, 2004, the Commission decided not to initiate a rulemaking at this time to revise 11 CFR part 110 regarding the criteria for inclusion in Presidential and Vice Presidential Debates, as proposed in the Petition for Rulemaking you filed on May 25, 1999.

The Commission believes that its debate regulations at 11 CFR 110.13(c) have worked well in practice over the course of several election cycles. Accordingly, the Commission declines to change them at this time.

Enclosed for your information are the Notice of Disposition approved by the Commission and the General Counsel's recommendations on which the Commission's decision was based.

Sincerely,

Bradley A. Smith
Chairman

Enclosures

Howard F. Jaeckel, Esq.
Counsel for CBS Broadcasting Inc.
1515 Broadway
New York, NY 10036

Dear Mr. Jaeckel:

On _____, 2004, the Commission decided not to initiate a rulemaking at this time to revise 11 CFR part 110 regarding the criteria for inclusion in Presidential and Vice Presidential Debates, as proposed in the Petition for Rulemaking you filed on April 10, 2002.

The Commission believes that its debate regulations at 11 CFR 110.13(c) have worked well in practice over the course of several election cycles. Accordingly, the Commission declines to change them at this time.

Enclosed for your information are the Notice of Disposition approved by the Commission and the General Counsel's recommendations on which the Commission's decision was based.

Sincerely,

Bradley A. Smith
Chairman

Enclosures

John W. Zucker, Esq.
Counsel for American Broadcasting Companies, Inc.
77 West 66th Street
New York, NY 10023

Dear Mr. Zucker:

On _____, 2004, the Commission decided not to initiate a rulemaking at this time to revise 11 CFR part 110 regarding the criteria for inclusion in Presidential and Vice Presidential Debates, as proposed in the Petition for Rulemaking you filed on April 10, 2002.

The Commission believes that its debate regulations at 11 CFR 110.13(c) have worked well in practice over the course of several election cycles. Accordingly, the Commission declines to change them at this time.

Enclosed for your information are the Notice of Disposition approved by the Commission and the General Counsel's recommendations on which the Commission's decision was based.

Sincerely,

Bradley A. Smith
Chairman

Enclosures

Andrew Merdek, Esq.
Stuart J. Young, Esq.
Counsel for Cox Enterprises, Inc.
1400 Lake Hearn Drive, NE
Atlanta, GA 30319

Dear Messrs. Merdek and Young:

On _____, 2004, the Commission decided not to initiate a rulemaking at this time to revise 11 CFR part 110 regarding the criteria for inclusion in Presidential and Vice Presidential Debates, as proposed in the Petition for Rulemaking you filed on April 10, 2002.

The Commission believes that its debate regulations at 11 CFR 110.13(c) have worked well in practice over the course of several election cycles. Accordingly, the Commission declines to change them at this time.

Enclosed for your information are the Notice of Disposition approved by the Commission and the General Counsel's recommendations on which the Commission's decision was based.

Sincerely,

Bradley A. Smith
Chairman

Enclosures

David P. Fleming, Esq.
Counsel for Gannett Co., Inc.
7950 Jones Branch Drive
McLean, VA 22107

Dear Mr. Fleming:

On _____, 2004, the Commission decided not to initiate a rulemaking at this time to revise 11 CFR part 110 regarding the criteria for inclusion in Presidential and Vice Presidential Debates, as proposed in the Petition for Rulemaking you filed on April 10, 2002.

The Commission believes that its debate regulations at 11 CFR 110.13(c) have worked well in practice over the course of several election cycles. Accordingly, the Commission declines to change them at this time.

Enclosed for your information are the Notice of Disposition approved by the Commission and the General Counsel's recommendations on which the Commission's decision was based.

Sincerely,

Bradley A. Smith
Chairman

Enclosures

David S. Starr, Esq.
Counsel for Belo Corp.
400 South Record Street
Dallas, TX 75252-4841

Dear Mr. Starr:

On _____, 2004, the Commission decided not to initiate a rulemaking at this time to revise 11 CFR part 110 regarding the criteria for inclusion in Presidential and Vice Presidential Debates, as proposed in the Petition for Rulemaking you filed on April 10, 2002.

The Commission believes that its debate regulations at 11 CFR 110.13(c) have worked well in practice over the course of several election cycles. Accordingly, the Commission declines to change them at this time.

Enclosed for your information are the Notice of Disposition approved by the Commission and the General Counsel's recommendations on which the Commission's decision was based.

Sincerely,

Bradley A. Smith
Chairman

Enclosures

Maya Windholz, Esq.
Counsel for National Broadcasting Co., Inc.
30 Rockefeller Plaza
New York, NY 10019

Dear Ms. Windholz:

On _____, 2004, the Commission decided not to initiate a rulemaking at this time to revise 11 CFR part 110 regarding the criteria for inclusion in Presidential and Vice Presidential Debates, as proposed in the Petition for Rulemaking you filed on April 10, 2002.

The Commission believes that its debate regulations at 11 CFR 110.13(c) have worked well in practice over the course of several election cycles. Accordingly, the Commission declines to change them at this time.

Enclosed for your information are the Notice of Disposition approved by the Commission and the General Counsel's recommendations on which the Commission's decision was based.

Sincerely,

Bradley A. Smith
Chairman

Enclosures

Ellen S. Agress, Esq.
Counsel for News America Incorporated
1211 Avenue of the Americas
New York, NY 10036

Dear Ms. Agress:

On _____, 2004, the Commission decided not to initiate a rulemaking at this time to revise 11 CFR part 110 regarding the criteria for inclusion in Presidential and Vice Presidential Debates, as proposed in the Petition for Rulemaking you filed on April 10, 2002.

The Commission believes that its debate regulations at 11 CFR 110.13(c) have worked well in practice over the course of several election cycles. Accordingly, the Commission declines to change them at this time.

Enclosed for your information are the Notice of Disposition approved by the Commission and the General Counsel's recommendations on which the Commission's decision was based.

Sincerely,

Bradley A. Smith
Chairman

Enclosures

George Freeman, Esq.
Counsel for The New York Times Company
229 West 43rd Street
New York, NY 10036

Dear Mr. Freeman:

On _____, 2004, the Commission decided not to initiate a rulemaking at this time to revise 11 CFR part 110 regarding the criteria for inclusion in Presidential and Vice Presidential Debates, as proposed in the Petition for Rulemaking you filed on April 10, 2002.

The Commission believes that its debate regulations at 11 CFR 110.13(c) have worked well in practice over the course of several election cycles. Accordingly, the Commission declines to change them at this time.

Enclosed for your information are the Notice of Disposition approved by the Commission and the General Counsel's recommendations on which the Commission's decision was based.

Sincerely,

Bradley A. Smith
Chairman

Enclosures

John Ronayne III, Esq.
Counsel for Post-Newsweek Stations, Inc.
550 W. Lafayette Boulevard
Detroit, MI 48226

Dear Mr. Ronayne:

On _____, 2004, the Commission decided not to initiate a rulemaking at this time to revise 11 CFR part 110 regarding the criteria for inclusion in Presidential and Vice Presidential Debates, as proposed in the Petition for Rulemaking you filed on April 10, 2002.

The Commission believes that its debate regulations at 11 CFR 110.13(c) have worked well in practice over the course of several election cycles. Accordingly, the Commission declines to change them at this time.

Enclosed for your information are the Notice of Disposition approved by the Commission and the General Counsel's recommendations on which the Commission's decision was based.

Sincerely,

Bradley A. Smith
Chairman

Enclosures

Jack N. Goodman, Esq.
Counsel for National Association of Broadcasters
1771 N Street, NW
Washington, DC 20036-2891

Dear Mr. Goodman:

On _____, 2004, the Commission decided not to initiate a rulemaking at this time to revise 11 CFR part 110 regarding the criteria for inclusion in Presidential and Vice Presidential Debates, as proposed in the Petition for Rulemaking you filed on April 10, 2002.

The Commission believes that its debate regulations at 11 CFR 110.13(c) have worked well in practice over the course of several election cycles. Accordingly, the Commission declines to change them at this time.

Enclosed for your information are the Notice of Disposition approved by the Commission and the General Counsel's recommendations on which the Commission's decision was based.

Sincerely,

Bradley A. Smith
Chairman

Enclosures

Kathleen A. Kirby, Esq.
Counsel for Radio and Television News Directors Association
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Dear Ms. Kirby:

On _____, 2004, the Commission decided not to initiate a rulemaking at this time to revise 11 CFR part 110 regarding the criteria for inclusion in Presidential and Vice Presidential Debates, as proposed in the Petition for Rulemaking you filed on April 10, 2002.

The Commission believes that its debate regulations at 11 CFR 110.13(c) have worked well in practice over the course of several election cycles. Accordingly, the Commission declines to change them at this time.

Enclosed for your information are the Notice of Disposition approved by the Commission and the General Counsel's recommendations on which the Commission's decision was based.

Sincerely,

Bradley A. Smith
Chairman

Enclosures

Bruce W. Sanford, Esq.
Robert D. Lystad, Esq.
Bruce D. Brown, Esq.
Counsel for Society of Professional Journalists
Baker & Hostetler LLP
1050 Connecticut Avenue, NW – Suite 11000
Washington, DC 20036-5304

Dear Messrs. Sanford, Lystad, and Brown:

On _____, 2004, the Commission decided not to initiate a rulemaking at this time to revise 11 CFR part 110 regarding the criteria for inclusion in Presidential and Vice Presidential Debates, as proposed in the Petition for Rulemaking you filed on April 10, 2002.

The Commission believes that its debate regulations at 11 CFR 110.13(c) have worked well in practice over the course of several election cycles. Accordingly, the Commission declines to change them at this time.

Enclosed for your information are the Notice of Disposition approved by the Commission and the General Counsel's recommendations on which the Commission's decision was based.

Sincerely,

Bradley A. Smith
Chairman

Enclosures

Charles J. Sennet, Esq.
Counsel for Tribune Company
435 North Michigan Avenue – 6th Floor
Chicago, IL 60611

Dear Mr. Sennet:

On _____, 2004, the Commission decided not to initiate a rulemaking at this time to revise 11 CFR part 110 regarding the criteria for inclusion in Presidential and Vice Presidential Debates, as proposed in the Petition for Rulemaking you filed on April 10, 2002.

The Commission believes that its debate regulations at 11 CFR 110.13(c) have worked well in practice over the course of several election cycles. Accordingly, the Commission declines to change them at this time.

Enclosed for your information are the Notice of Disposition approved by the Commission and the General Counsel's recommendations on which the Commission's decision was based.

Sincerely,

Bradley A. Smith
Chairman

Enclosures