



FEDERAL ELECTION COMMISSION
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2009 JUL 15 P 3:48

MEMORANDUM

AGENDA ITEM
For Meeting of: 07-16-09

SUBMITTED LATE

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Esther D. Heiden *EDH*
Attorney

SUBJECT: Notice of Disposition of Petitions for Rulemaking – Alternatives A & B

Attached are two alternative draft Notices of Disposition prepared by the Office of General Counsel regarding two petitions for rulemaking concerning 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. Both alternative Notices of Disposition state 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 one of the attached Notices of Disposition for publication in the *Federal Register*; and
4. Approve the appropriate letters to the petitioners: 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 2009-**

3 **11 CFR PART 110**

4 **CANDIDATE DEBATES**

ALTERNATIVE A

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. The petitions are available for inspection in

1 the Commission's Public Records Office, and on its website,

2 www.fec.gov.

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

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

6 **CONTACT:** Mr. Robert M. Knop, Assistant General Counsel, or Ms. Esther D.
7 Heiden, 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
23 the discretion of debate staging organizations. The petition urged the Commission to revise
24 section 110.13(c) to set forth mandatory criteria for participation in Presidential and Vice

1 Presidential debates. Specifically, the Wohlford Petition recommended that the debates be
2 open to any candidate that: (1) has the mathematical potential to win the election in that he or
3 she is on the ballot in enough states to earn 270 Electoral College votes; and (2) has proven his
4 or her viability by having spent at least \$500,000 on the campaign by the end of the month
5 preceding the date of the first scheduled debate held on or after September 1 of the election
6 year. In addition, the Wohlford Petition urged that candidates have equal access to debates
7 held 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
22 Act 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, and subsequently extended the comment period on
3 July 21, 1999. 64 FR 31159 and 39095. The Commission received approximately 1000
4 comments in response to the first NOA. Most of the comments expressed support for the
5 petition. Several comments, however, expressed opposition to the establishment of mandatory
6 objective criteria by the Commission for participation in Presidential and Vice Presidential
7 debates. The Commission published a second NOA on May 9, 2002 to seek comment on the
8 News Media Petition. 67 FR 31164. The Commission received one substantive comment in
9 response to the second NOA, from the State of Connecticut State Elections Enforcement
10 Commission, which generally supported the Petition, and a response from the IRS indicating it
11 did not have substantive comments. Copies of comments on both NOAs are available on the
12 Commission’s website at www.fec.gov and in the Commission’s Public Records Office.

13 After reviewing the comments filed in response to both NOAs, as well as other
14 information, the Commission declines to open a new rulemaking in response to the Wohlford
15 or News Media petitions. A significant amount of time has passed since the petitioners filed
16 the Petitions, and the Commission has had the opportunity to observe the operation of its
17 candidate debate regulations over the course of several election cycles. The Commission
18 believes that its candidate debate regulations have worked well in practice. The Commission
19 also notes that the current version of 11 CFR 110.13 has been reviewed and upheld by two

20

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

4

5

6

7

8

9

On behalf of the Commission,

Steven T. Walther

Chairman

Federal Election Commission

10

11 DATED: _____

12 BILLING CODE: 6715-01-U

1 **FEDERAL ELECTION COMMISSION**

2 **NOTICE 2009-**

3 **11 CFR PART 110**

4 **CANDIDATE DEBATES**

ALTERNATIVE B

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 ("Wohlford
11 Petition"), urged the Commission to amend its rules so that the
12 objective criteria for inclusion in Presidential and Vice Presidential
13 debates would be established by the Commission itself, and not left to
14 the discretion of debate staging organizations. The second petition,
15 filed on April 10, 2002 by several major news organizations, urged
16 the Commission to amend its rules to state explicitly that the
17 sponsorship by a news organization (or a related trade association) of
18 a debate among candidates does not constitute an illegal corporate
19 campaign contribution or expenditure in violation of the Federal
20 Election 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. The petitions are available for inspection in

1 the Commission's Public Records Office, and on its website,

2 www.fec.gov.

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

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

6 **CONTACT:** Mr. Robert M. Knop, Assistant General Counsel, or Ms. Esther D.

7 Heiden, 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. On April 10, 2002,
12 the Commission received a Petition for Rulemaking from CBS Broadcasting Inc.; American
13 Broadcasting Companies Inc.; Belo Corp.; Cox Enterprises, Inc.; Gannett Co., Inc.; the
14 National Association of Broadcasters; National Broadcasting Co., Inc.; News America
15 Incorporated; The New York Times Company; Post-Newsweek Stations, Inc.; the Radio and
16 Television News Directors Association; the Society of Professional Journalists; and Tribune
17 Company ("News Media Petition"). Both petitions concern the Commission's candidate debate
18 regulations at 11 CFR 110.13. Section 110.13(c) states, *inter alia*, that "[f]or all debates,
19 staging organization(s) must use pre-established objective criteria to determine which
20 candidates may participate in a debate."

21 The Wohlford Petition asserts that the objective criteria for inclusion in Presidential and
22 Vice Presidential debates should be established by the Commission itself, and not left to the
23 discretion of debate staging organizations. The petition urges 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 urges that candidates have equal access to debates held before
7 September 1 without regard to the above requirements.

8 The News Media Petition asserts that 11 CFR 110.13(c) should be amended or repealed.
9 Specifically, it asserts 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 asserts that 11 CFR 110.13(c) is
15 unconstitutional because it does not 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 urges 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
22 Act 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, and subsequently extended the comment period on
3 July 21, 1999. 64 Fed. Reg. 31159 and 39095. The Commission received approximately 1000
4 comments in response to the first NOA. Most of the comments expressed support for the
5 Wohlford Petition. Several comments, however, expressed opposition to the establishment of
6 mandatory objective criteria by the Commission for participation in Presidential and Vice
7 Presidential debates.

8 The Commission published a second Notice of Availability (“second NOA”) on May 9,
9 2002 to seek comment on the News Media Petition. 67 Fed. Reg. 31164. The Commission
10 received one substantive comment in response to the second NOA, which generally supported
11 the News Media Petition. The Commission also received a response from the IRS indicating it
12 did not have substantive comments. Copies of comments on both NOAs are available on the
13 Commission’s website at www.fec.gov and in the Commission’s Public Records Office.

14 A significant period of time has passed since the petitions were filed. During that time
15 many Presidential and Vice Presidential debates have taken place. Additionally, with the
16 advent of new ways to communicate, including the Internet and the new methods of
17 communication it affords, there are now many new ways that issues are debated among
18 candidates. The factors that precipitated the filing of the petitions may now be viewed much
19 differently by some or all of the petitioners. Further, the many comments that were received
20 from the public may no longer, in the view of those commenters, accurately represent positions
21 they would now advocate to the Commission on the issues. Moreover, no formal requests have
22 been made by the petitioners in recent times to activate the petitions or to invoke the
23 jurisdiction of the Commission to consider the petitions.

1 In view of the passage of time, the events which have transpired, as well as other factors
2 discussed above, the Commission believes that any consideration of the issues raised in the
3 Wohlford Petition and the News Media Petition should be based on newly filed petitions.
4 Accordingly, the Commission declines to open a new rulemaking and will not issue a Notice of
5 Proposed Rulemaking in response to either of the petitions. The Commission emphasizes that
6 its decision not to initiate a rulemaking at this time does not foreclose the Commission from
7 considering future petitions seeking the same or similar relief.

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

On behalf of the Commission,

Steven T. Walther
Chairman
Federal Election Commission

DATED: _____
BILLING CODE: 6715-01-U
