

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR 6942

DATE COMPLAINT FILED: 06/16/15

DATE OF NOTIFICATION: 06/19/15

DATE RESPONSE FILED: 07/01/15

DATE SUPP. FILED: 10/21/15

DATE SUPP. RESPONSE FILED: 11/19/15

DATE ACTIVATED: 08/17/15

EXPIRATION OF SOL: 09/1993-09/2017

ELECTION CYCLE: 1987-88 through 2011-12

COMPLAINANTS:

Green Party of the United States

Libertarian National Committee, Inc..

RESPONDENTS:

Commission on Presidential Debates ("CPD")

Frank Fahrenkopf, Jr., Co-Chair, CPD

Michael D. McCurry, Co-Chair, CPD

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30101(9)(B)(ii)¹

52 U.S.C. § 30103

52 U.S.C. § 30104

52 U.S.C. § 30116(f)

52 U.S.C. § 30118(a)

11 C.F.R. § 110.13

11 C.F.R. § 114.4(f)

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

I. FACTUAL AND LEGAL ANALYSIS

The Complaint in this matter is a copy of the Complaint in MUR 6869 that alleged that the Commission on Presidential Debates and Co-Chairs Frank Fahrenkopf, Jr. and Michael D. McCurry violated the Federal Election Campaign Act of 1971, as amended, and

¹ On September 1, 2014, the Federal Election Campaign Act of 1971, as amended, was transferred from Title 2 to new Title 52 of the United States Code.

1 the Commission's regulations in connection with the CPD's hosting of the general election
2 presidential debates. The Complaint asserts no new allegations, and instead incorporates fully
3 the allegations contained in MUR 6869.² Respondents filed a response requesting that the
4 Commission dismiss the Complaint and incorporating by reference their responses in MUR
5 6869, in which they deny the Complaint's allegations, and assert that the Commission and
6 courts have considered and rejected Complainant's arguments on multiple occasions.³

7 Thereafter, Complainants filed a Supplement providing "additional evidence" in
8 support of their allegation that CPD's use of pre-election polls discriminates against
9 independent and third-party candidates in violation of the Commission's candidate debate
10 regulation.⁴ The "additional evidence" is a news report that the Gallup Organization recently
11 announced it will no longer conduct public opinion polling for the 2016 presidential election,
12 which, Complainants argue, indicates that Gallup recognizes that "horse-race polling has
13 become inherently unreliable."⁵ In response, Respondents assert that CPD does not rely on a
14 single organization's polling results, but rather on an average of five national polls, and deny
15 Complainants' assertion that Gallup no longer has confidence in the accuracy of its public

² The MUR 6942 Complainants each submitted a copy of the MUR 6869 Complaint with a cover letter and a document styled as a "Request to Join Complaint in MUR 6869 or Complaint" ("Request"). See letter and Request from Green Party of the United States ("Green Party") (June 16, 2015) and letter and Request from Libertarian National Committee, Inc. ("Libertarian Party") (June 19, 2015). Each Complainant states that their presidential candidates "have been excluded from all general election presidential debates since the CPD adopted [its] selection criteria challenged in the Complaint." Green Party Request at 2; Libertarian Party Request at 2.

³ MUR 6942 Resp. (July 1, 2015); MUR 6869 Resp. (Dec. 14, 2014); MUR 6869 Supp. Resp. (May 26, 2015).

⁴ Supp. at 1-2 (Oct. 21, 2015).

⁵ *Id.* at 3, Ex. 9 (Steven Shepard, *Gallup Gives Up The Horse Race*, POLITICO (Oct. 7, 2015), <http://www.politico.com/story/2015/10/gallup-poll-2016-pollsters-214493>).

1 opinion polling.⁶ Respondents support this assertion with a sworn declaration by the Gallup
2 Polls' editor-in-chief Frank M. Newport, who avers that "Gallup's decision not to engage in
3 horse race polling in the 2016 primary campaign season is based on allocation of resources[,]
4 not any lack of confidence in Gallup's ability to conduct accurate polls."⁷

5 In MUR 6869, on July 13, 2015, the Commission found that there is no reason to
6 believe that the CPD or Frank Fahrenkopf, Jr. and Michael D. McCurry as Co-Chairs violated
7 52 U.S.C. §§ 30118(a) or 30116(f), and no reason to believe that the CPD violated 52 U.S.C.
8 §§ 30103 or 30104, and closed the file.⁸ Inasmuch as the allegations in this matter are
9 identical in all respects to those in MUR 6869, we incorporate by reference the Commission's
10 Factual and Legal Analysis in that matter. As for the Supplement's "additional evidence"
11 regarding Gallup's decisions and motivations, it appears to be speculative and it is rebutted by
12 a sworn declaration. Thus, based on the MUR 6869 Factual and Legal Analysis, in MUR
13 6942 we recommend that the Commission likewise find no reason to believe that the
14 Commission on Presidential Debates or Frank Fahrenkopf, Jr. and Michael D. McCurry as
15 Co-Chairs violated 52 U.S.C. §§ 30118(a) or 30116(f), and no reason to believe that the
16 Commission on Presidential Debates violated 52 U.S.C. §§ 30103 or 30104, and close the
17 file.

⁶ Supp. Resp. at 2 (Nov. 19, 2015).

⁷ Newport Aff. ¶ 15.


⁸ Certification, MUR 6869 (Commission on Presidential Debates) (July 14, 2015). The MUR 6869 Complainants, Level the Playing Field and Peter Ackerman, have filed a lawsuit against the Commission challenging the failure of the Commission to proceed in that matter. *See Level the Playing Field, et al. v. FEC*, No. 15-cv-01397 (D.D.C. filed Aug. 27, 2015).


II. RECOMMENDATIONS

1. Find no reason to believe that the Commission on Presidential Debates or Frank Fahrenkopf, Jr. and Michael D. McCurry as Co-Chairs violated 52 U.S.C. § 30118(a).
2. Find no reason to believe that the Commission on Presidential Debates or Frank Fahrenkopf, Jr. and Michael D. McCurry as Co-Chairs violated 52 U.S.C. § 30116(f).
3. Find no reason to believe that the Commission on Presidential Debates violated 52 U.S.C. §§ 30103 or 30104.
4. Approve the attached Factual and Legal Analysis.
5. Approve the appropriate letters.
6. Close the file.

12.1.15

Date


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for Enforcement


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