

**BEFORE THE  
FEDERAL ELECTION COMMISSION**

Mark W. Everson  
108 Third Street, Suite 304  
Des Moines, IA 50309

Complainant,

v.

Fox News Network, LLC  
1211 Avenue of the Americas, 15<sup>th</sup> Floor  
New York, NY 10036

Respondent.

**COMPLAINT**

Mark Everson files this complaint under 52 U.S.C. § 30109(a)(1) against Fox News Network, LLC for violating 11 C.F.R. § 110.13(b)(2) and (c) relating to staging organizations responsibilities for candidate debates.

**I. FACTS**

Mark Everson formally announced his candidacy for the presidency on March 5, 2015.

Everson's credentials are extensive in both the private and public sectors and are detailed in *Exhibit 1*. His federal executive branch experience exceeds that of any candidate in the Republican field and arguably that of the GOP candidates in aggregate.

Everson served six years in the Reagan Administration and six years under President George W. Bush. Under Reagan, Everson oversaw operations at the Immigration and Naturalization Service. In the Bush Administration he was the management deputy at the powerful White House budget office and helped create the Department of Homeland Security. As our nation's 46th Commissioner of Internal Revenue, Everson managed the nation's tax system. Immigration, homeland security and taxes are all issues central to the 2016 election.

Everson was the first declared GOP candidate to open an office in Iowa and has actively campaigned in 22 counties across the state. He has also made campaign stops in New Hampshire and is planning events in South Carolina. He has developed a platform of key initiatives that can be found at [MarkForAmerica.com](http://MarkForAmerica.com). In the words of Fox Business News anchor and commentator Neil Cavuto, Everson is “a serious guy addressing serious issues.”

On January 17, 2015, the Republican National Committee announced that Ohio would host the first of nine GOP Presidential debates. Fox News was chosen to sponsor that debate (Date and location TBD). Here is a brief chronology of announcements by Fox News for the upcoming first debate.

1. **May 20.** Fox News announces the debate will be August 6 in Cleveland. It identifies as a “must” candidate criteria: Placement in the top 10 of an average of the five most recent national polls, as recognized by Fox News, leading up to August 4, 2015. Fox News announces it will also “provide additional coverage and air time on August 6th to those candidates who do not place in the top 10.” No criteria are mentioned for the selection of the second tier candidates.

2. **June 11.** Fox News announces it will provide a second, 90-minute “candidate forum” for those who do not qualify for the main, first-tier debate (later reduced to 60 minutes). It will be held on the same day and Fox News lists this as a “must” candidate criteria: Score 1% or higher in an average of the five most recent national polls, as recognized by Fox News leading up to August 4, 2015.

3. **July 27.** Fox News just ten days before the debate announces it will eliminate the 1% polling requirement in the candidate forum, notionally opening it to *all* those who don’t make the cut for the first-tier, top 10 event. The sponsor however announces the forum will be available only “to all declared candidates whose names are consistently being offered to respondents in major national polls, as recognized by Fox News.” Fox News offers no specificity or clarity on this new benchmark.

*POLITICO* reports on July 30 that elimination of the 1% polling criteria, “amounts to an insurance policy for candidates who were in danger of being disqualified from the vital first debate based on low polls – Carly Fiorina, former New York Gov. George Pataki, and Sen. Lindsey Graham (R-S.C).” The *New York Times* draws the same conclusion. Noteworthy, without these three the second tier candidate forum would slim down to just three participants.<sup>1</sup>

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<sup>1</sup> *New York Magazine* (July 30, 2015) highlights the economic significance of the debate to Fox News (“Could draw the biggest audience in cable news history”) and then reports that, “‘There is total confusion about it all. The second floor is making it up as they go along’ one Fox personality told me, referring to [Roger] Ailes’s executive suit. According to sources, Fox executives are still undecided about which polls to use and who will be allowed on the stage.”

The *Weekly Standard* reported on May 13 the RNC had released a new online “straw poll” for presidential candidates to gauge voter sentiment. ([www.gop.com/presidential-straw-poll](http://www.gop.com/presidential-straw-poll)). The poll asks one simple question: “*Who would you like to see as the Republican nominee in the 2016 Presidential election?*” – and then asks the respondent to choose three names. Thirty-six prospective presidential candidates were identified by the RNC in the initial poll; the roster of candidates has evolved over time; and today, the number is narrowed down to 18. Mark Everson, along with the other 17, have all been choices from the outset.<sup>2</sup>

## II. LEGAL FRAMEWORK

11 C.F.R. § 110.13 relating to **Candidate Debates** stipulates:

(b)(2) **Debate structure.** The staging organization(s) [shall] 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. (Emphasis added)

*La Botz v. FEC*, 889 F. Supp. 2d 51 (D.D.C. 2012) is instructive on the debate criteria and structure issues:

- (a) “Pre-established” and “objective” criteria are two distinct components.
- (b) Staging organizations are well advised to reduce their objective criteria to writing and to make the criteria available to all candidates before the debate.
- (c) Staging organizations must be able to show their objective criteria were used to pick the participants, and were not designed to result in the selection of certain pre-chosen participants.

## III. LEGAL ANALYSIS

Mark Everson respectfully submits that his exclusion from the upcoming August 6th Fox News Candidate Forum is a violation of (a) 11 C.F.R. §110.13(b)(2) for improper candidate promotion and advancement, and (b) 11 C.F.R. §110.13(c) for improper use of criteria by the debate sponsor.

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<sup>2</sup> Attached as *Exhibit 2* is a screenshot of the RNC website page portraying the straw poll and the 18 candidates. *Politics1.com* (<http://politics1.com/p2016.htm>) has also consistently featured Everson as one of 18 “major” candidates, while mentioning 120 “minor” candidates as well.

To recap the key facts on the candidate forum –

- Fox News initially (June 11) announces a threshold 1% eligibility requirement, based on five most recent national polls (as selected by Fox News); to be measured just two days before the actual event.
- Fox News just ten days before the event jettisons the 1% threshold and introduces a subjective qualifier: the candidate’s name has to be “consistently” offered to respondents taking the polls, and then for only those “major national polls” recognized by Fox News. This July 27 announcement is noticeably silent on the meaning of “consistently” and likewise is completely quiet on which polls Fox News might “recognize.”
- Fox News’ eleventh hour change in the ground rules results in “grandfathering” into the forum three candidates who would not likely have qualified and, at the same time, likely eliminates Everson as a participant. Noteworthy is that all four were registering below 1% recognition in the polls, yet all four were recognized as “major players” (along with 14 others) by the guardian of the Republican party in its national online straw poll.

#### 1. Candidate Selection Criteria -- 11 C.F.R. §110.13(c)

While the August 6th GOP presidential debate will be the first of nine, few dispute its criticality -- particularly for candidates on the margin. Mark Everson is one of those candidates and he respectfully submits that Fox News has fumbled the political football in staging this event.

Let’s first take note of the sequencing of the three announcements – “pre-establish” in federal election law parlance. The first on May 20 provided no information or criteria on the ground rules for the candidate forum. The second announcement on June 11 established the 1% threshold for inclusion. The third on July 27 and just *ten days* before the event, jettisoned the 1% requirement and substituted a new set of subjective guidelines for debate inclusion. Surely, a modicum of due process, transparency and fairness would suggest less disruption and more daylight.

Let’s then turn to the key “objectivity” requirement. Just what was it that triggered the last minute decision to discard an objective standard for a fuzzy one? What better source than Fox News Executive Vice President Michael Clemente who boasted last week it was “due to the overwhelming interest in the [debate] and in a concerted effort to include and accommodate the **now 16 Republican candidate field.**”<sup>3</sup>

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<sup>3</sup> Emphasis added. Quote from *POLITICO* on July 29, <http://www.politico.com/story/2015/07/fox-republican-debate-lowers-threshold-120748.html#ixzz3hQBkFDBa>.

But wait. Had Fox News already cast in concrete the total debate field for the first and second tier debates? Mr. Clemente surely thinks so. But what about Fox News' statement that the second tier debate would be open to "all declared candidates whose names are consistently being offered to respondents in major national polls, as recognized by Fox News"? Pure window dressing, we suggest.

Even if the FEC were to give Fox News the benefit of the doubt and reinterpret Mr. Clemente's "field of 16" proclamation as a "field of dreams" invitation to the candidates, they still fall far short on the legal "objectivity" standard. Fox News does not provide any enlightenment or even any guidance to the candidates and their organizations on how it, as the sole arbiter, will define "consistently"; nor does it give even a hint about which "major national polls" it, again Fox News in its sole discretion, will use to test eligibility.

## **2. Candidate Promotion -- 11 C.F.R. §110.13(b)(2)**

Fox News as the staging organization must demonstrate the debate structure and the selection process were not designed to result in the selection of certain pre-chosen participants. The known facts again point to the conclusion Fox News crossed the regulatory red line.

It has been suggested that Fox News used the 1% candidate forum polling cutoff because it figured that even in a ridiculously fragmented field, someone like Lindsey Graham could pull one percent support.<sup>4</sup> The assumption was that "real" candidates, those with name recognition or past office holders, would comfortably pass the *de minimis* test. The remainder of the field, the 125 declared but unknown candidates, would then have to remain quietly on the sideline.

As the debate approached and the overall field crystalized, the focus narrowed on main event participants and those who would be invited to the undercard. We surmise that a combination of the debate dynamics (the dominant Trump factor) and the enlarged field (now 16, according to Mr. Clemente) skewed the Fox News logic indicating their 1% cutoff was going to backfire; resulting in an awkward three-person lineup. A debate with three candidates might normally seem like a good number -- except when large audience expectations are much higher and real candidates with high profiles would be benched. Some might also even question the need or desirability of a second debate -- why not just lump all 13 candidates into the main event?

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<sup>4</sup> "How does Fox choose who gets into the debate? It's more malleable than it seems." Washington Post, Philip Bump, July 30, 2015.

So the solution was to revert to a “soft” approach giving Fox News executives flexibility to fill the empty podiums at the forum with candidates of their choice. This eleventh hour, seemingly political maneuver does not pass the smell test mandated by 11 C.F.R. §110.13(b)(2). Mr. Clemente’s statement pretty much confirms this acknowledging, “We made a concerted effort to include and accommodate.”

**Late breaking news!** Well it turns out Mr. Clemente wasn’t exaggerating when he said last week that due to the overwhelming interest in the two debates Fox News was prepared to “accommodate.” The Sunday (August 2) political talk shows reported that Mr. Clemente’s “Sweet 16” has just grown to 17 with the last minute addition of James Gilmore, former Virginia Governor. It seems Fox News has now handpicked a fourth additional participant for the candidate forum (Graham, Fiorina, Pataki plus Gilmore).

### **3. The RNC Straw Poll.**

In January when the Republican National Committee announced the GOP would sanction nine debates for the 2016 presidential campaign season, RNC Chairman Reince Priebus said, “It is exciting that Republicans will have such a large bench of candidates to choose from, and the sanctioned debate process ensures voters will have a chance to gain a chance to hear from them.”

We have noted an RNC straw poll was launched in May with a bench of 36 participants. As an online poll it has the decided benefit of not burdening the pollster and the respondent to plow through a long list of names – a conventional polling dynamic that tends to cut short the list of participants. The online feature brings the important element of “inclusiveness” to the process – something missing from the more narrow polls Fox News apparently relies on.

The RNC poll size and composition has evolved over three months – today only 18 participants remain and Mark Everson is one of them. He has been there since the start. The party easily and without cost could have added other candidates it considered important beyond the listed 18. The RNC did not do that. This process we submit is a solid reflection of “real” GOP candidates, which objectively draws the line between serious and inconsequential candidates.

With the last minute addition of Governor Gilmore to the debate podium, Fox News will now be playing 17 of the 18 off the RNC bench. Noteworthy is that Governor Gilmore filed his paperwork with the FEC on July 29 -- just five days ago -- making his candidacy official. It seems it didn’t take long for the political establishment to successfully flex its political muscle.

**IV. Conclusion**

Fox News has plainly failed in its responsibilities to the candidates and ultimately the American public in the design and implementation of the August 6th debate. It seems that politics, economics, and perhaps even their own cable news poll ratings have trumped best practices and common sense, not to mention FEC regulations.

We reached out to Fox News (*Exhibit 1*) immediately after their latest debate announcement iteration, and have heard nothing from them.

In view of the urgency of this matter, Mark Everson asks the Federal Election Commission to intervene on an *expedited basis* and rule that Fox News Network, LLC (a) has violated 11 C.F.R. §110.13, and (b) should be compelled to include Everson in the August 6, 2015 candidate forum in Cleveland Ohio.

Respectfully submitted,

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Mark W. Everson

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Subscribed and sworn to before me this \_\_\_\_ day of August 2015.

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_