

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of Kentucky

CONWAY FOR SENATE

Plaintiff

v.

FEDERAL ELECTION COMMISSION

Defendant

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)  
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)

Civil Action No. 3:12CV-244-S

OFFICE OF THE CLERK OF COURT  
277 WEST MAIN STREET  
COLUMBIANA, KY 40305  
TEL: 502-223-1100  
FAX: 502-223-1101

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) FEDERAL ELECTION COMMISSION  
Office of General Counsel  
999 E. Street, NW  
Washington, DC 20463

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Glenn D. Denton  
Denton & Keuler, LLP  
555 Jefferson Street, Suite 301  
Paducah, KY 42001

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Date: 5/14/2012



Signature of Clerk or Deputy Clerk

148326

*Electronically filed*

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
PADUCAH DIVISION  
CASE NO. 3:12CV-244-S

CONWAY FOR SENATE

PLAINTIFF

VS.

COMPLAINT

FEDERAL ELECTION COMMISSION  
(Office of General Counsel  
999 E Street, NW  
Washington, DC 20463)

DEFENDANT

Comes the plaintiff, Conway for Senate, by and through counsel, and for its Complaint states as follows:

**Introduction**

1. This action arises under the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.* (2001) (“FECA”), and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (“APA”).

2. Plaintiff brings this action for review of a final determination by the Federal Election Commission (“FEC” or “Commission”) that (1) Plaintiff violated 2 U.S.C. § 434(a), and (2) its assessment of a civil penalty of \$4,950.00 under the schedule of penalties at 11 C.F.R. §111.43.

3. The FEC found the above violation and assessed the above penalty in spite of the un-rebutted, un-contradicted evidence that Plaintiff timely sent the 2010 Year End Report in a package to the FEC’s agent, the Senate Office of Public Records, via Federal Express overnight delivery, on January 25, 2011. The FEC ignored the statements and sworn affidavits from the Conway for Senate campaign and its agents that the Federal Express package contained a copy

of the 2010 Year End report when Plaintiff mailed it and when it was received by Federal Express.

**Jurisdiction and Venue**

4. This Court has jurisdiction under 2 U.S.C. § 437g(a)(4)(C)(iii) and 28 U.S.C. § 1331.

5. Venue lies in this judicial district pursuant to 2 U.S.C. § 437g(a)(4)(C)(iii) and 28 U.S.C. § 1391(e).

**Parties**

6. The plaintiff, Conway for Senate, is a political committee that was the principal campaign committee for Jack Conway's 2010 campaign for the United States Senate. Plaintiff is registered with the Federal Election Commission pursuant to 11 C.F.R. § 102.1(a), and its FEC Committee Identification Number is C00460766. Plaintiff's treasurer is R. Wayne Stratton.

7. The defendant, Federal Election Commission, is the federal agency responsible for the administrative and civil enforcement of the FECA. 2 U.S.C. § 437c(b).

**Facts**

8. Under the FECA, a political committee, like the plaintiff, must file a Year End Quarterly Report covering the period from November 23 to December 31, by January 31 of the following calendar year. 2 U.S.C. § 434(a)(2)(A)(iii).

9. On January 24, 2011, Nick Braden, Director of Operations for Conway for Senate, emailed a zip folder containing several FEC reports to Treasurer R. Wayne Stratton, Mr. Stratton's assistant Paula Pasley, and Sean Riley, former Finance Director for Conway for Senate. The email included as an attachment the 2010 Year End Report which Mr. Braden informally described as the "Q4 Report."

10. R. Wayne Stratton reviewed each of the reports emailed by Mr. Braden in preparation for mailing.

11. On January 25, 2011, Lynn-Marie Johnson, a receptionist at treasurer R. Wayne Stratton's office "packed" the "year-end report of receipts and disbursements covering the period from November 23, 2010 to December 31, 2010" into a Federal Express envelope. Johnson sent the envelope overnight to the Senate Office of Public Records.

12. Federal Express Tracking Records indicate the package was shipped on January 25, 2011 under the tracking number 794355102161 and the package had a weight of 1.0 lb.

13. Federal Express tracking records indicate that the package was delivered and signed for by "A. Turner" on January 26, 2011 at 11:01 AM. See Affidavit of Lynn-Marie Johnson, May 5, 2011, and attached documents thereto, which is attached hereto as Exhibit A.

14. The hard-copy version of the report submitted to the FEC is available online at: [http://images.nictusa.com/cgi-bin/fecimg/?\\_11020093308+0](http://images.nictusa.com/cgi-bin/fecimg/?_11020093308+0).

15. On February 17, 2011, an agent of the FEC wrote to Mr. Stratton indicating that the 2010 Year End Report had not been filed.

16. Plaintiff avers that the report was timely filed and included all of the required information by the FEC in a timely fashion.

17. Defendant has relied upon and concluded, based on nothing more than a belief in the infallibility of FEC procedures and employees that the report must not have been sent to them in the Federal Express package. A position similar to that of their position in *Greenwood for Congress, Inc. vs. Federal Election Commission*, 2003 WL 22096125 (2003). A copy of that opinion is attached hereto for the Court's convenience as Exhibit B.

18. On April 1, 2011, the Commission found Reason To Believe (“RTB”) that Plaintiff violated 2 U.S.C. § 434(a) and assessed a civil penalty of \$4,950.00 under the schedule of penalties at 11 C.F.R. §111.43.

19. On April 20, 2011, Raymond Davis with the FEC’s Office of Public Records told Treasurer Wayne Stratton and Paula Pasley in a telephone call that it was possible, when the envelope was opened for review by the Senate Sergeant at Arms, that not all information may have been returned to the envelope before being forwarded on. *See* Affidavit of Paula Pasley, July 8, 2011, which is attached hereto as Exhibit C.

20. The Commission received a written response challenging the RTB on May 6, 2011.

21. The Reviewing Officer made a recommendation dated June 29, 2011, that the Commission make a final determination that Plaintiff violated 2 U.S.C. § 434(a) and assess a \$4,950.00 civil money penalty.

22. Treasurer R. Wayne Stratton subsequently issued a written response that was sent to the Commission and dated July 8, 2011, which is attached hereto as Exhibit D.

23. Treasurer R. Wayne Stratton disputed the fact from the Reviewing Officer Recommendation (“ROR”), stating he does not recall having told the Compliance Analyst that the Year End Report was mailed separate from the other reports sent via Federal Express on January 25.

24. On April 10, 2012 the FEC sent a certified letter to R. Wayne Stratton in his official capacity as treasurer advising that it had adopted the reviewing officer’s recommendation and made its final determination.

25. This is an appeal of that Final Determination and Civil Money Penalty.

**Cause of Action – APA Violation**

26. The FEC's finding that Plaintiff violated 2 U.S.C. § 434 (a) for filing its 2010 Year End report late, and its assessment of a monetary penalty in the amount of \$4,950.00 is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the law for the following reasons:

a. In making its final determination, the FEC failed to consider or adequately take into account the only objective evidence introduced by either party.

b. In making its final determination, the FEC failed to consider or adequately take into account the statements and sworn affidavits submitted that the 2010 Year End Report was included in the January 25, 2011 overnight Federal Express package sent to the Senate Office of Public Records.

c. The Commission's final determination runs counter to the evidence before it, which demonstrated an "existence of factual errors," justifying the setting aside or modification of the April 1, 2011 RTB.

d. There has been substantial compliance with the law, and the Commission's opinion, that there has been a technical violation which justifies the imposition of a monetary penalty, is unreasonable and an abuse of discretion under the facts.

WHEREFORE, Plaintiff requests:

1. A declaration that the Commission's final determination that Plaintiff violated 2 U.S.C. § 434(a) by filing its 2010 Year End Report late, and its assessment of a civil money penalty of \$4,950.00, is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law;

2. An order modifying or setting aside the Commission's final determination and assessment of a civil money penalty pursuant to 2 U.S.C. § 437g(a)(4)(c)(iii) and 11 C.F.R. § 111.38;
3. An injunction against the Commission enforcing or collecting the \$4,950.00 civil money penalty;
4. Legal fees and costs of suit incurred by Plaintiff; and
5. Such other relief as this Court deems just and appropriate.

Respectfully submitted,

DENTON & KEULER, LLP  
P.O. Box 929  
Paducah, KY 42002-0929  
Tel. No.: 270-443-8253  
Fax No.: 270-442-6000

/s/Glenn D. Denton \_\_\_\_\_  
Glenn D. Denton

ATTORNEY FOR CONWAY FOR SENATE

May 5, 2011

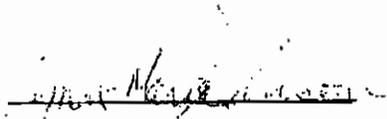
Affidavit of Lynn-Marie Johnson

Comes Lynn-Marie Johnson, after first being duly sworn, and states as follows:

I am the Receptionist at Jones, Hale & Mattingly PLC

On January 25, 2011, I was given a set of reports on the campaign of Conway for Senate to be shipped to the Senate Office of Public Records. This included three responses to inquiries and amended reports as well as one original year-end report of receipts and disbursements covering the period from November 23, 2010 through December 31, 2010. The reports and letters were packaged in a Federal Express envelope and shipped priority overnight to the Senate Office of Public Records on January 25, 2011. Tracking confirmation shows the package was delivered and signed for on January 26, 2011. Copies of the documents in question, Fed Ex shipping label, and delivery confirmation report and recipient signature are included with this statement.

Signed:

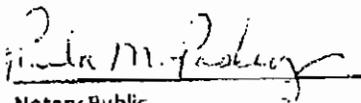


Lynn-Marie Johnson

STATE OF KENTUCKY  
COUNTY OF JEFFERSON

Sworn to and acknowledged before me by Lynn-Marie Johnson, on this 5<sup>th</sup> day of May, 2011.

My commission expires June 14, 2013.



Notary Public,  
State at Large, Kentucky

EXHIBIT A

From: (602) 583-0248  
Mark Johnson  
Jones, Hale & Mattingly  
842 S Fourth St Suite 300  
Louisville, KY 40202

Origin ID: LOUA



Ship Date: 26JAN11  
ActWgt: 1.0 LB  
CAD: 3200042/NETS130

Delivery Address Bar Code



SHIP TO: (202) 224-0785  
Senate Office of Public Records  
Senate Office of Public Records  
232 HART SENATE OFFICE BLDG  
WASHINGTON, DC 20510

BILL SENDER

Ref#  
Invoice#  
PO#  
Dept#

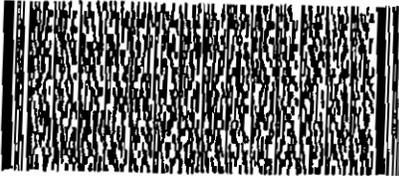
*Conway for Senate*

WED - 26 JAN A2

PRIORITY OVERNIGHT

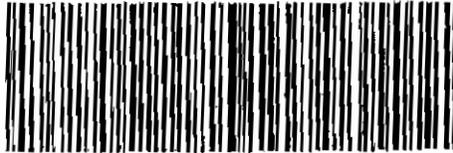
TRK# 7843 6610 2161

0201



**XC YKNA**

20510  
DC-U9  
DCA



800010811658

After printing this label:

1. Use the "Print" button on this page to print your label to your laser or inkjet printer.
2. Fold the printed page along the horizontal line.
3. Place label in shipping pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.

Warning: Use only the printed original label for shipping. Using a photocopy of this label for shipping purposes is fraudulent and could result in additional billing charges, along with the cancellation of your FedEx account number.

Use of this system constitutes your agreement to the service conditions in the current FedEx Service Guide, available on fedex.com. FedEx will not be responsible for any claim in excess of \$100 per package, whether the result of loss, damage, delay, non-delivery, mis-delivery, or mis-information, unless you declare a higher value, pay an additional charge, document your actual loss and file a timely claim. Limitations found in the current FedEx Service Guide apply. Your right to recover from FedEx for any loss, including intrinsic value of the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental, consequential, or special is limited to the greater of \$100 or the authorized declared value. Recovery cannot exceed actual documented loss. Maximum for items of extraordinary value is \$500, e.g. jewelry, precious metals, negotiable instruments and other items listed in our Service Guide. Written claims must be filed within strict time limits, see current FedEx Service Guide.

# FedEx.

## Detailed Results

| Tracking no.: 784355102181   |                                    | Selected time format: 12H           |                    |
|--|------------------------------------|-------------------------------------|--------------------|
| <b>Delivered</b>   |                                    | Delivered<br>Signed for by: ATURNER |                    |
| Shipped Date   |                                    | Destination                         |                    |
| Ship date: Jan 24, 2011  |                                    | WASHINGTON, DC                      |                    |
| Delivery date: Jan 28, 2011 11:01 AM   |                                    | Signature Proof of Delivery         |                    |
| <b>Shipment Options</b>  |                                    |                                     |                    |
| Hold at FedEx Location<br>Hold at FedEx Location service is not available for this shipment. |                                    |                                     |                    |
| <b>Shipment Facts</b>  |                                    |                                     |                    |
| Service type   | Priority Envelope                  | Ordered to                          | Shipping/Receiving |
| Weight   | 0.8 lbs/7 kg                       |                                     |                    |
| <b>Shipment Travel History</b>   |                                    |                                     |                    |
| Select time zone: Local Scan Time  |                                    |                                     |                    |
| All shipment travel activity is displayed in local time for the location.                    |                                    |                                     |                    |
| Date/Time  | Activity                           | Location                            | Details            |
| Jan 28, 2011 11:01 AM  | Delivered                          | WASHINGTON, DC                      |                    |
| Jan 28, 2011 8:48 AM   | On FedEx vehicle for delivery      | WASHINGTON, DC                      |                    |
| Jan 28, 2011 8:38 AM   | At local FedEx facility            | WASHINGTON, DC                      |                    |
| Jan 28, 2011 7:00 AM   | At destination facility            | WASHINGTON, DC                      |                    |
| Jan 28, 2011 4:18 AM   | Departed FedEx location            | MEMPHIS, TN                         |                    |
| Jan 28, 2011 12:18 AM  | Arrived at FedEx location          | MEMPHIS, TN                         |                    |
| Jan 28, 2011 10:11 PM  | Left FedEx origin facility         | LOUISVILLE, KY                      |                    |
| Jan 24, 2011 8:44 PM   | Picked up                          | LOUISVILLE, KY                      |                    |
| Jan 24, 2011 3:20 PM   | Shipment information sent to FedEx |                                     |                    |



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**Detailed Results**

Tracking no.: 794355102161

Select time format: 12H

**Delivered**

Delivered  
Signed for by: A.TURNER

**Shipment Dates**

Ship date: Jan 25, 2011  
Delivery date: Jan 26, 2011 11:01 AM

Destination:  
WASHINGTON, DC  
Signature Proof of Delivery

**Shipment Options**

Hold at FedEx Location  
Hold at FedEx Location service is not available for this shipment.

**Shipment Facts**

Service type: Priority Overnight

**Shipment Travel History**

Select time zone: Local Scan Time

All shipment travel activity is displayed in local time for the location.

| Date/Time             | Activity  | Location       | Details |
|-----------------------|-----------|----------------|---------|
| Jan 26, 2011 11:01 AM | Delivered | WASHINGTON, DC |         |



FedEx Express  
Customer Support Trace  
3875 Airways Boulevard  
Module H, 4th Floor  
Memphis, TN 38116

U.S. Mail; PO Box 727  
Memphis, TN 38194-4643  
Telephone: 801-369-3800

May 8, 2011

Dear Customer:

The following is the proof-of-delivery for tracking number 794355102191.

---

**Delivery Information:**

---

|                       |                    |                           |                       |
|-----------------------|--------------------|---------------------------|-----------------------|
| <b>Status:</b>        | Delivered          | <b>Delivery location:</b> | 6330 COLUMBIA PARK RD |
| <b>Signed for by:</b> | A.TURNER           | <b>Delivery date:</b>     | Jan 25, 2011 11:01    |
| <b>Service type:</b>  | Priority Overnight |                           |                       |

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**Shipping Information:**

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|                         |              |                   |              |
|-------------------------|--------------|-------------------|--------------|
| <b>Tracking number:</b> | 794355102191 | <b>Ship date:</b> | Jan 25, 2011 |
|-------------------------|--------------|-------------------|--------------|

---

**Recipient:**  
SENATE OFFICE OF PUBLIC RECORD  
SENATE OFFICE OF PUBLIC RECORD  
232 HART SENATE OFFICE BLDG  
WASHINGTON, DC 20510 US

**Shipper:**  
MARIE JOHNSON  
JONES, NALE & MATTINGLY  
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LOUISVILLE, KY 40202 US

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**Greenwood For Congress, Inc. v. Federal Elec. Com'n, Not Reported in F.Supp.2d (2003)**

2003 WL 22096125

Only the Westlaw citation is currently available.

United States District Court,  
E.D. Pennsylvania.

GREENWOOD FOR CONGRESS, INC., Plaintiff,

v.

FEDERAL ELECTION COMMISSION, Defendant.

No. Civ.A. 03-0307. | Aug. 15, 2003.

**Attorneys and Law Firms**

Robert O. Baldi, Baldi, Cepparulo & Williams, P.C., New Hope, PA, for Plaintiff.

Lawrence H. Norton, Leigh G. Hildebrand, Richard B. Bader, Stephen E. Hershkowitz, Federal Election Commission, Washington, DC, Linda Shafer Bocchino, U.S Attorney's Office, Philadelphia, PA, for Defendant.

**Opinion**

**MEMORANDUM AND ORDER**

SCHILLER, J.

\*1 This lawsuit arises from a dispute between Greenwood for Congress, Inc. (the "Committee") and the Federal Election Commission (the "FEC" or the "Commission") over an alleged late electronic filing of financial reports required under the Federal Election Commission Act ("FECA"), 2 U.S.C. §§ 431-437 (2001). Presently before the Court are the parties' cross-motions for summary judgment. For the reasons set forth below, I deny the FEC's motion and grant the Committee's motion.

**I. BACKGROUND**

The Committee is the principal campaign committee for the Honorable James C. Greenwood, who currently is the United States Representative for the Eighth Congressional District of Pennsylvania. Under FECA, the treasurers of principal campaign committees of candidates for the United States House of Representatives must file periodic reports detailing such committee's receipts and expenditures. On December 28, 2001, the FEC sent to the principal campaign offices of all congressional candidates, including the Committee, notices informing them that their Year-End Financial Reports would be due on January 31, 2002, as required by 2 U.S.C.

§ 434(a)(2)(B)(ii) and 11 C.F.R. § 104.5(a)(2)(B) (2001). Included with the notice was an instructional guide entitled "Electronic Filing." The guide detailed which organizations were required to file electronically, and it appears from the record that the Committee understood that it was required to file electronically.

On January 30, 2002, the FEC received a FedEx package from the Committee (the "Initial Package"). The FEC asserts that the package contained only a paper copy of the Committee's 2001 Year-End Report and a cover letter detailing the contents of the package. (Administrative Record<sup>1</sup> at 81.) The Committee maintains, however, that in addition, the package contained a high-capacity Zip disk that held an electronic copy of the report in the format required by the FEC. (*Id.* at 55.)

On February 4, 2002, the FEC sent a Mailgram to the Committee indicating that the FEC had not received an electronic version of the report and that the Committee's reporting requirement would be considered unfulfilled until such time as they filed electronically. (*Id.* at 14.) In response, Eric Clare, the Campaign Manager for the Committee, called FEC employee Dayna Brown on February 6, 2002. Ms. Brown stated that although the FEC records available to her indicated that no disk had been received, the cover letter to the January 30, 2002 package referenced a disk as being included with the package. (*Id.* at 78.)

After the phone conversation, Mr. Clare created a copy of the report, saved it to a Zip disk, and sent the disk via Federal Express with another cover letter to the FEC. This package was received on February 7, 2002. On that same day, a staff member in the FEC's Electronic Filing Office phoned Mr. Clare and indicated that the FEC was rejecting the filing because it was submitted on an "incorrect medium." In response, Mr. Clare saved another copy of the report to a 3.5 inch floppy disk, which he sent via Federal Express to the Commission on February 7, 2002. (*Id.* at 79.) On February 8, 2002, the 3.5 inch disk was received and its contents were processed and posted on the Internet by the FEC. (*Id.* at 80.)

\*2 On June 14, 2002, the Commission determined that the Committee and its treasurer, Robert Baldi, had failed to file their 2001 Year-End Report on time and assessed the Committee an administrative fine of \$3,100.00. On June 19, 2002, a notice of the determination and fine was sent to the Committee, and the Committee filed a timely response with supporting documentation. (*Id.* at 78.) After reviewing the Committee's response, the FEC's Reviewing Officer

**Greenwood For Congress, Inc. v. Federal Elec. Com'n, Not Reported in F.Supp.2d (2003)**

sent requests for supplemental information to appropriate members of the FEC's staff.

As part of the Committee's review of the matter, Mr. Clare weighed the different items allegedly sent to the FEC. As indicated in his affidavit on the matter submitted to the FEC, Mr. Clare reported that through reenactments, a Zip disk, a hard-copy version of the Report with a binder clip, a copy of the cover letter and a manila envelope weighed 2 1/8 pounds. (*Id.* at 55.) The same package without the Zip disk weighed 1 7/8 pounds. The air bill of the package received by the FEC on January 30, 2002, as filled out by Mr. Clare, indicated a weight of 2.20 pounds. (*Id.* at 61.) FedEx listed the weight of the package as 3 pounds. (*Id.* at 63.) The Committee maintains that FedEx will round up to the next whole number in calculating a package's weight, and that FedEx's indication of 3 pounds implies that the package weighed between 2 and 3 pounds, and that consequently, the package received by the FEC contained a Zip disk. (*Id.* at 55.)

Notwithstanding this circumstantial evidence with respect to the Initial Package's contents, the Reviewing Officer found that: (i) The FEC did not receive a Zip disk from the Committee on January 30, 2002; (ii) a Zip disk was received on February 7, 2002 but was rejected because it was on an incorrect medium and was not accompanied by a signed summary page; and (iii) the Committee's 2001 Year-End Report was not electronically filed until February 8, 2002. (*Id.* at 81-82.) As a result of these findings, the Reviewing Officer recommended that the FEC make a final determination that the Committee and its Treasurer violated 2 U.S.C. § 434(a) and assess a \$3,100.00 civil money penalty. (*Id.* at 82.) The recommendations were sent on November 29, 2002 to the Committee, which filed a timely response to the recommendation on December 9, 2002.

On December 20, 2002, the Commission voted unanimously to follow the recommendation of the Reviewing Officer to assess a civil penalty of \$3,100.00 (*Id.* at 131.) The Committee was notified of the decision by letter dated December 23, 2002. (*Id.* at 133.) The Committee petitioned this Court for review of the Agency Verdict on January 22, 2003.

### III. DISCUSSION

#### A. Standard of Review

Summary judgment is appropriate when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson*

*v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "In a case involving judicial review of agency action, however, summary judgment is simply the procedural vehicle for asking the court to decide, on the basis of the administrative record, the legal question of whether an agency reasonably could have found the facts as it did." *Cunningham v. Fed. Election Comm'n*, 2002 WL 31431557, at \*3 (S.D.Ind.2002) (citing *Hunger v. Leininger*, 15 F.3d 664, 669 (7th Cir.1994)).

\*3 The Administrative Procedure Act, 5 U.S.C. § 706(2) (A), provides that agency action can be set aside if the court finds it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971) (discussing standard under which administrative findings may be overturned under 5 U.S.C. § 706). In assessing the agency's findings, it is incumbent upon the court to assure itself that the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'" *Bagdonas v. Dep't of Treasury*, 93 F.3d 422, 426 (7th Cir.1996) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962)).

#### B. Treatment of the Evidence by the FEC

The Court's inquiry concerns whether the FEC's determination that the Committee failed to file its 2001 Year-End Financial Report was arbitrary and capricious. In this case, there is nothing in the record to suggest that any concerted effort was made by the FEC to determine whether the disk was actually delivered in the Initial Package. There was no actual evidence in the record, such as affidavits from FEC employees who handled the package or appropriate excerpts from an employee handbook detailing the procedures by which such packages are to be handled, indicating that the FEC could declare that it was certain, or even confident, that it was not responsible for the loss of the disk. The only confirmation presented by the FEC is the fact that the report was not uploaded into their system until February 8, 2002. From this, they conclude, apparently based on nothing more than a belief in the infallibility of their procedures and employees, that the disk must not have been sent to them in the Initial Package. The only validation proffered is Ms. Brown's indication that she was unable to find a record of the disk or its contents in the FEC's system.

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Despite the lack of evidence supporting the conclusion that the disk was not included in the package, the FEC clearly disregarded relevant, albeit circumstantial, evidence presented by the Plaintiff. In an affidavit submitted to the Commission, Mr. Clare asserts that he personally placed the Zip disk in the envelope and sealed it in preparation for its submission. (Administrative Record at 55.) Furthermore, Mr. Clare's experiment of creating a duplicate of the package and weighing its contents suggests that the Zip disk was, in fact, placed in the FedEx package received by the FEC. (*Id.* at 55–56.) Defense counsel admitted at oral argument that the FEC Reviewing Officer did not even attempt to replicate Mr. Clare's experiment when making his administrative determination.

**C. Appropriateness of the Zip Disk**

The FEC also maintains that it is immaterial whether the Zip disk was included in the Initial Package, as a Zip disk represents an improper medium and would have been rejected even if it had been received and processed by the FEC. However, it is unclear what would have happened had the FEC been able to inform the Committee on January 30, 2002 that the medium submitted was improper. Under such a scenario, it is possible that the Committee would have been able to submit an electronic version of the report on a medium acceptable to the FEC, as it did on February 8, 2002, by the January 31, 2002 deadline.

\*4 More importantly, it is not clear that the Committee's choice of medium was improper. There is nothing in the record to suggest that the FEC indicated that it would only accept electronic versions of the report submitted on 3.5 inch disks.<sup>2</sup> The applicable statute and regulation do not specifically require the submission of a 3.5 inch disk. The relevant regulation states that data must be submitted on "computerized magnetic media." 11 C.F.R. § 104.18(d) (2001). The FEC's own regulations specify only that electronic submissions delivered by magnetic media must be on "floppy disks." 61 Fed.Reg. 42374 (Aug. 15, 1996). The term "floppy disk," which originally described the 5.25" format that is considered a relic today, has in common parlance become a generic term for various forms of electronic media. Both a Zip disk and a 3.5 inch disk equally comport with this general description. If the Commission intends only to accept one form of "floppy disks," it must clearly indicate that intention. Furthermore, there is nothing to suggest that the contents of the Zip disk were in an invalid format, and it appears the format accepted by the Commission

on the disk received on February 8, 2002 was the same format as the earlier versions submitted by the Committee. (Administrative Record pp. 55–57). Therefore, I find that the Committee should not have been penalized for submitting its electronic filing on a Zip disk.

Finally, the Commission maintains that the February 7, 2003 submission was non-compliant because the Zip disk was not accompanied by a valid summary page signed by the treasurer of the Committee. The Court finds the Commission's contention particularly troublesome considering the fact that both the Initial Package and the package received on February 8, 2003 contained valid, signed summary pages. In effect, the Commission claims that the Committee's effort to re-send the allegedly lost disk was inadequate due to the Committee's failure to include a duplicate of the previously acceptable summary page.

The *Overton Park* Court opined that in order to make a finding that an agency verdict was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. § 760(2)(A)), courts must consider whether "the [Agency] decision was based on a consideration of the relevant factors and whether there had been a clear error of judgment." 401 U.S. at 416. Here, failing to exercise independent judgment in arriving at its decision, without any factual basis, and without consideration of contrary evidence before it, the FEC arbitrarily and capriciously determined that the Committee had erred in failing to include a disk in the January 30, 2002 package. It simply took as a matter of faith that the disk could not have been lost once the package had been received by them. Additionally, the FEC took no steps to investigate the missing disk other than to verify that the disk did not end up in the place that it should have had it been properly processed by the FEC. Furthermore, the FEC erred in concluding that its own regulations definitively required that electronic reports submitted on magnetic media could only be delivered on 3.5 inch disks.

**III. CONCLUSION**

\*5 For the reasons set forth above, I deny Defendant's motion for summary judgment, and grant summary judgment in favor of Plaintiff. An appropriate Order follows.

**ORDER**

AND NOW, this 15<sup>th</sup> day of August, 2003, upon consideration of the cross-motions for summary judgment,

**Greenwood For Congress, Inc. v. Federal Elec. Com'n, Not Reported in F.Supp.2d (2003)**

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and following oral argument thereon, and for the foregoing reasons, it is hereby ORDERED that:

1. Plaintiff Greenwood for Congress, Inc. Motion for Summary Judgment is GRANTED.
2. Defendant Federal Election Commission Motion for Summary Judgment is DENIED.

3. Summary Judgment is entered in favor of Plaintiff and against Defendant.

4. The Clerk of the Court is directed to close this case for statistical purposes.

Footnotes

- 1 Refers to the Administrative Record for this matter, designated by the Federal Election Commission as Certified Administrative Record for Administrative Fines # 554.
- 2 The record indicates that the Frequently Asked Questions (FAQ) webpage of the FEC's website stated only 3.5 inch disks would be accepted. The Court agrees with Plaintiff's argument that there is no valid reason why the Committee ought to have been aware of the contents of the FAQ prior to submitting the report.

End of Document

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July 8, 2011

Affidavit of Paula Pasley

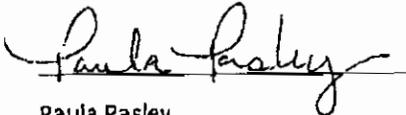
Comes Paula Pasley, after first being duly sworn, and states as follows:

I am the Office Administrator at Jones, Nale & Mattingly PLC, and I also assist R. Wayne Stratton in the filling of the Campaign Finance Reports for Conway for Senate.

On January 25, 2011, Nick Braden, who was the Director of Operations with the Jack Conway for U.S. Senate campaign, e-mailed to me four (4) reports for filing. These reports included an amendment to the Form 3 - Third Quarter 2010, an amendment to Form 3 - 12-Day Pre-Election report for the General Election 2010, an amendment to Form 3 - 30 Day Post Election Report for the General Election 2010, and an original Form 3 - Fourth Quarter 2010 report. I printed out all 4 filings, with applicable letters, and, with Treasurer Wayne Stratton, reviewed each in preparation for mailing that same day. After Wayne's review, these reports were then turned over to Marie Johnson, receptionist at Jones, Nale & Mattingly, for mailing to the Senate office of Public Records.

In response to "Analysis", paragraph three of the "Reviewing Office Recommendation", dated June 29, 2011, the Superintendent states that correspondence was sent from her office on February 17, 2011, indicating that the Year-End Report, which she had not received, must be filed immediately, and to which she said we did not respond until March 10, three weeks after the letter was sent. Please be aware that the letter was not sent directly to the campaign Treasurer, but rather to a P. O. Box used during the campaign, which is not accessible by the Treasurer. As soon as Treasurer Wayne Stratton received the letter, it was acted upon as soon as possible. We take any, and all, correspondence from the Federal Election Commission as extremely urgent in nature, and review and research in a timely manner.

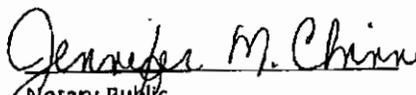
Furthermore, on April 20, during a call with Treasurer Wayne Stratton and the Compliance Analyst, and a subsequent call to Raymond Davis, with the Office of Public Records, we were made aware that, when a report is sent to 232 Hart Senate Office Building (the mailing address given to us, and used for all filings) it is received by the Senate Sergeant at Arms for opening, and then forwarded to the appropriate party. Mr. Davis indicated that it is possible, when the envelope was opened for review that not all information may have been returned to the envelope before being forwarded on. In light of this statement, we believe that the 4<sup>th</sup> quarter report could have been lost by a representative of the Senate Sergeant at Arms.



Paula Pasley

STATE OF KENTUCKY  
COUNTY OF JEFFERSON

Sworn to and acknowledged before me by Paula Pasley, on this 8 day of July, 2011  
My commission expires August 6, 2013



Notary Public,  
State at Large, Kentucky

EXHIBIT C



*Jones, Nale & Mattingly PLC*

2011 JUL -8 P 4: 41

July 8, 2011

Commission Secretary  
999 E Street, NW  
Washington, DC 20463

Re: C00460766  
AF #2414

I am Wayne Stratton, Treasurer of the Conway for Senate campaign. This is my written response to the Reviewing Officer Recommendation and Findings. The only fact I dispute is the last paragraph on page 2. I do not recall stating that the year end report was sent separate from other Conway for Senate reports received by the Senate Office of Public Records. I think I said that according to the receptionist at Jones, Nale & Mattingly, the report was sent Federal Express to the Senate Office of Public Records. I have attached 2 affidavits of individuals at JNM supporting that fact.

I think I can explain the delay in responding to the original notice of February 17, 2011. This notice was mailed to the P. O. Box of the campaign. The campaign at that time had shut down and the notice was not received in my office until March 10, 2011. We responded immediately to the notice on the day it was received. I served as Chairman of the Kentucky Registry of Election Finance and take my responsibility as Treasurer very seriously.

I would like to describe our process in the report preparation and mailing of the Conway for Senate reports. We use NGP Software for reporting. Finance reports were prepared by Nick Braden, a paid staffer of the campaign, and e-mailed to myself and Perkins Coie, a Washington DC law firm, for review. Any corrections identified were then made by Nick Braden, and a final copy was e-mailed to me for signature. I have attached his e-mail, dated January 24, 2011, in support of that fact. Paula Pasley then printed and assembled the reports for my signature. I have attached her affidavit in support of that function for the report in question. I previously attached an affidavit of Marie Johnson of JNM who sent the report via Federal Express.

I am not sure what happened, or why the 4<sup>th</sup> quarter filing was not received timely by the Federal Election Commission, but I do think it was sent by our office timely. The report was prepared timely (see e-mail) and we would have had no reason not to send it timely. Currently I volunteer as Treasurer for 1 congressional campaign (Chandler for Congress), 1 federal PAC (Kentucky Forward PAC), 2 state PAC's, and 1 statewide campaign, none of which has ever had any delinquent filings. I volunteer because I believe in the democratic process and want to do my part. I do take this responsibility seriously.

Certified Public Accountants and Advisors

642 South Fourth Street, Suite 300 Louisville, Kentucky 40202 tel: 502.583.0248 fax: 502.589.1680 www.jnmpa.com

EXHIBIT D

As stated earlier, this was a volunteer position and I received no compensation from the Conway for Senate campaign. As \$4,950.00 is a lot of money to me and my family, I ask that you please abate the penalty.

Thank you for your consideration in this matter.

Very truly yours,



R. Wayne Stratton

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RWS/pmp  
Enclosures

JS 44 (Rev. 09/11)

**CIVIL COVER SHEET**

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

**I. (a) PLAINTIFFS**  
**CONWAY FOR SENATE**

**(b) County of Residence of First Listed Plaintiff** JEFFERSON  
*(EXCEPT IN U.S. PLAINTIFF CASES)*

**(c) Attorneys (Firm Name, Address, and Telephone Number)**  
 Glenn D. Denton, Denton & Keuler, LLP  
 555 Jefferson St., Ste 301, Paducah, KY 42001  
 Tel. No. (270) 443-8253

**DEFENDANTS**  
**FEDERAL ELECTION COMMISSION**

County of Residence of First Listed Defendant WASHINGTON, DC  
*(IN U.S. PLAINTIFF CASES ONLY)*

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

**II. BASIS OF JURISDICTION** *(Place an "X" in One Box Only)*

1 U.S. Government Plaintiff

2 U.S. Government Defendant

3 Federal Question *(U.S. Government Not a Party)*

4 Diversity *(Indicate Citizenship of Parties in Item III)*

**III. CITIZENSHIP OF PRINCIPAL PARTIES** *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

|   |                            |                            |   |                            |                            |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

**IV. NATURE OF SUIT** *(Place an "X" in One Box Only)*

| CONTRACT   | TORTS   | FORFEITURE/PENALTY   | BANKRUPTCY  | OTHER STATUTES  |  |
|--|---|--|---|---|--|
| <input type="checkbox"/> 110 Insurance<br><input type="checkbox"/> 120 Marine<br><input type="checkbox"/> 130 Miller Act<br><input type="checkbox"/> 140 Negotiable Instrument<br><input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment<br><input type="checkbox"/> 151 Medicare Act<br><input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)<br><input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits<br><input type="checkbox"/> 160 Stockholders' Suits<br><input type="checkbox"/> 190 Other Contract<br><input type="checkbox"/> 195 Contract Product Liability<br><input type="checkbox"/> 196 Franchise | <b>PERSONAL INJURY</b><br><input type="checkbox"/> 310 Airplane<br><input type="checkbox"/> 315 Airplane Product Liability<br><input type="checkbox"/> 320 Assault, Libel & Slander<br><input type="checkbox"/> 330 Federal Employers' Liability<br><input type="checkbox"/> 340 Marine<br><input type="checkbox"/> 345 Marine Product Liability<br><input type="checkbox"/> 350 Motor Vehicle<br><input type="checkbox"/> 355 Motor Vehicle Product Liability<br><input type="checkbox"/> 360 Other Personal Injury<br><input type="checkbox"/> 362 Personal Injury - Med. Malpractice | <b>PERSONAL INJURY</b><br><input type="checkbox"/> 365 Personal Injury - Product Liability<br><input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability<br><input type="checkbox"/> 368 Asbestos Personal Injury Product Liability<br><b>PERSONAL PROPERTY</b><br><input type="checkbox"/> 370 Other Fraud<br><input type="checkbox"/> 371 Truth in Lending<br><input type="checkbox"/> 380 Other Personal Property Damage<br><input type="checkbox"/> 385 Property Damage Product Liability | <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881<br><input type="checkbox"/> 690 Other<br><b>LABOR</b><br><input type="checkbox"/> 710 Fair Labor Standards Act<br><input type="checkbox"/> 720 Labor/Mgmt. Relations<br><input type="checkbox"/> 740 Railway Labor Act<br><input type="checkbox"/> 751 Family and Medical Leave Act<br><input type="checkbox"/> 790 Other Labor Litigation<br><input type="checkbox"/> 791 Empl Ret. Inc. Security Act<br><b>IMMIGRATION</b><br><input type="checkbox"/> 462 Naturalization Application<br><input type="checkbox"/> 463 Habeas Corpus - Alien Detainee (Prisoner Petition)<br><input type="checkbox"/> 465 Other Immigration Actions | <input type="checkbox"/> 422 Appeal 28 USC 158<br><input type="checkbox"/> 423 Withdrawal 28 USC 157<br><b>PROPERTY RIGHTS</b><br><input type="checkbox"/> 820 Copyrights<br><input type="checkbox"/> 830 Patent<br><input type="checkbox"/> 840 Trademark<br><b>SOCIAL SECURITY</b><br><input type="checkbox"/> 861 HIA (1395ff)<br><input type="checkbox"/> 862 Black Lung (923)<br><input type="checkbox"/> 863 DIWC/DIWW (405(g))<br><input type="checkbox"/> 864 SSID Title XVI<br><input type="checkbox"/> 865 RSI (405(g))<br><b>FEDERAL TAX SUITS</b><br><input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)<br><input type="checkbox"/> 871 IRS—Third Party 26 USC 7609 | <input type="checkbox"/> 375 False Claims Act<br><input type="checkbox"/> 400 State Reapportionment<br><input type="checkbox"/> 410 Antitrust<br><input type="checkbox"/> 430 Banks and Banking<br><input type="checkbox"/> 450 Commerce<br><input type="checkbox"/> 460 Deportation<br><input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations<br><input type="checkbox"/> 480 Consumer Credit<br><input type="checkbox"/> 490 Cable/Sat. TV<br><input type="checkbox"/> 850 Securities/Commodities/Exchange<br><input type="checkbox"/> 890 Other Statutory Actions<br><input type="checkbox"/> 891 Agricultural Acts<br><input type="checkbox"/> 893 Environmental Matters<br><input type="checkbox"/> 895 Freedom of Information Act<br><input type="checkbox"/> 896 Arbitration<br><input checked="" type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision<br><input type="checkbox"/> 950 Constitutionality of State Statutes |
| <b>REAL PROPERTY</b><br><input type="checkbox"/> 210 Land Condemnation<br><input type="checkbox"/> 220 Foreclosure<br><input type="checkbox"/> 230 Rent Lease & Ejectment<br><input type="checkbox"/> 240 Torts to Land<br><input type="checkbox"/> 245 Tort Product Liability<br><input type="checkbox"/> 290 All Other Real Property   | <b>CIVIL RIGHTS</b><br><input type="checkbox"/> 440 Other Civil Rights<br><input type="checkbox"/> 441 Voting<br><input type="checkbox"/> 442 Employment<br><input type="checkbox"/> 443 Housing/Accommodations<br><input type="checkbox"/> 445 Amer. w/Disabilities - Employment<br><input type="checkbox"/> 446 Amer. w/Disabilities - Other<br><input type="checkbox"/> 448 Education  | <b>PRISONER PETITIONS</b><br><input type="checkbox"/> 510 Motions to Vacate Sentence<br><b>Habeas Corpus:</b><br><input type="checkbox"/> 530 General<br><input type="checkbox"/> 535 Death Penalty<br><input type="checkbox"/> 540 Mandamus & Other<br><input type="checkbox"/> 550 Civil Rights<br><input type="checkbox"/> 555 Prison Condition<br><input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement  |   |   |  |

**V. ORIGIN** *(Place an "X" in One Box Only)*

1 Original Proceeding

2 Removed from State Court

3 Remanded from Appellate Court

4 Reinstated or Reopened

5 Transferred from another district *(specify)*

6 Multidistrict Litigation

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity):*  
Administrative Procedure Act 5 U.S.C. § 551 et seq.

**VI. CAUSE OF ACTION**

Brief description of cause:  
Review of final administrative Finding by Federal Election Commission

**VII. REQUESTED IN COMPLAINT:**

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

**DEMAND \$** \_\_\_\_\_

CHECK YES only if demanded in complaint:  
**JURY DEMAND:**  Yes  No

**VIII. RELATED CASE(S) IF ANY** *(See instructions)*

JUDGE: \_\_\_\_\_

DOCKET NUMBER: \_\_\_\_\_

DATE: 05/10/2012

SIGNATURE OF ATTORNEY OF RECORD: /s/ Glenn D. Denton

FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_