



FEDERAL ELECTION COMMISSION  
Washington, DC 20463


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April 7, 1999


**AGENDA ITEM**  
For Meeting of: 4-15-99


**MEMORANDUM**

**TO:** The Commission

**THROUGH:** James A. Pehrkon   
Acting Staff Director

**FROM:** Lawrence M. Noble   
General Counsel

N. Bradley Litchfield   
Associate General Counsel

Paul Sanford   
Staff Attorney

**SUBJECT:** Alternatives for Draft Advisory Opinion 1999-5

Advisory Opinion Request 1999-5 seeks guidance on the application of the Commission's allocation regulations to candidates for the newly created Public Regulation Commission ("PRC") in the state of New Mexico. Specifically, the request asks whether these candidates may be considered partisan statewide executive candidates for the purposes of the ballot composition ratio in section 106.5(d).

Attached are alternative drafts of Advisory Opinion 1999-5. The first version concludes that candidates for the PRC may not be treated as partisan statewide executive candidates because they do not run statewide. However, they may be treated as partisan local candidates, and may be taken into account in determining the number of points to be included in the ratio for candidates in that category. The Office of General Counsel believes this version is more consistent with the language and purposes of the allocation regulations, and therefore recommends that the Commission approve this version.

However, the Office of General Counsel recognizes that the regulations can reasonably be interpreted to support the conclusion that the office of PRC is a statewide executive office. Consequently, we have prepared an alternative draft that reaches this conclusion. The alternative version notes that PRC candidates are comparable to state legislative candidates in that they are also elected by district to positions that are part of the New Mexico state government. Therefore, the alternative draft indicates, candidates for the PRC can be treated as partisan statewide executive candidates.

The Office of General Counsel requests that both versions of Draft Advisory Opinion 1999-5 be placed on the agenda for April 15, 1999.

**Attachments**

2  
3        **Joseph E. Sandler**  
4        **Neil P. Reiff**  
5        **Sandler & Reiff, P.C.**  
6        **6 E Street SE**  
7        **Washington, DC 20003**

**DRAFT**

8  
9        **Dear Mr. Sandler and Mr. Reiff:**

10                **This responds to your letter dated February 25, 1999 requesting an advisory opinion**  
11        **on behalf of the Democratic Party of New Mexico ("DPNM" or "the Party") regarding the**  
12        **application of the Commission's allocation regulations to elections for members of New**  
13        **Mexico's Public Regulation Commission during the 1999-2000 election cycle.**

14                **You explain that in 1996, New Mexico's voters approved a referendum merging two**  
15        **existing state agencies, the Public Utility Commission and the State Corporation**  
16        **Commission, into a single agency known as the Public Regulation Commission ("PRC").**  
17        **The PRC regulates gas, water, public utilities, electricity and other public concerns**  
18        **throughout the state of New Mexico. It consists of five Commissioners elected on a partisan**  
19        **basis by voters in five defined geographic areas of the state. The first five Commissioners**  
20        **were elected in November 1998.**

21                **Ultimately, PRC Commissioners will serve four year terms. However, the initial**  
22        **terms of two of the five Commissioners have been shortened to two years in order to stagger**  
23        **the terms and provide continuity on the PRC in the future. The shortened terms will expire**  
24        **on January 1, 2001. Consequently, these seats will be on the ballot in the November 2000**  
25        **election. The next election for the three remaining Commissioners will be in November**  
26        **2002.**

1           Your request indicates that, in the past, DPNM supported Democratic nominees  
2 running for the State Corporation Commission, and intends to support Democratic nominees  
3 for the PRC in the November 2000 election. You ask how DPNM should account for PRC  
4 candidates when allocating its administrative expenses and generic voter drive expenses.  
5 Specifically, you ask “whether the State Party may include 1 or 2 non-federal points on its  
6 federal/non-federal ballot composition ratio for PRC elections as ‘other partisan executive  
7 statewide offices’ pursuant to 11 C.F.R. §106.5(d)(1), even though members are elected from  
8 defined geographic areas that include only a portion of the state’s electorate.”

9           DPNM allocates its administrative expenses and generic voter drive costs using the  
10 ballot composition method in 11 CFR 106.5(d)(1). This section requires state party  
11 committees with separate federal and nonfederal accounts to allocate these costs

12           based on the ratio of federal offices expected on the ballot to total federal and non-  
13 federal offices expected on the ballot in the next general election to be held in the  
14 committee’s state or geographic area. This ratio shall be determined by the number of  
15 categories of federal offices and the number of categories of non-federal offices on  
16 the ballot, as described in paragraph (d)(1)(ii) of this section.

17  
18 Section 106.5(d)(1)(i). Paragraph (d)(1)(ii) states that the offices of President, United States  
19 Senator and United States Representative count as one federal point each, and the offices of  
20 Governor, State Senator and State Representative count as one non-federal point each, if  
21 expected on the ballot in the next general election. In addition, state party committees  
22 include up to two points for “other partisan statewide executive candidates” and one point for  
23 “partisan local candidates,” if expected on the ballot in any regularly scheduled election  
24 during the two-year cycle. The rules also allow state parties to include an additional generic  
25 non-federal point. 11 CFR 106.5(d)(1)(ii).

1           The category of "other partisan statewide executive candidates" encompasses  
2 candidates that run statewide on a partisan basis for an executive office other than Governor.  
3 Thus, in order to fall into this category, a candidate must appear on all the ballots in the state.  
4 According to the Explanation and Justification for the allocation rules, the office of  
5 Lieutenant Governor falls into this category in states where the Governor and Lieutenant  
6 Governor are independently elected. *Methods of Allocation Between Federal and Non-*  
7 *Federal Accounts; Payments; Reporting*, 55 Fed. Reg. 26058, 26064 (June 26, 1990). Other  
8 examples include Attorney General, Secretary of State, and State Treasurer in those states  
9 where these offices are elected rather than appointed.

10           In contrast, candidates for the PRC seek office in one of five geographic districts  
11 defined by statute. N.M. Stat. Ann. §§8-7-2, 8-7-5. Thus, each PRC candidate appears on  
12 approximately one-fifth of the ballots distributed throughout the state. In November 2000,  
13 three-fifths of the ballots will contain no PRC candidates.

14           Therefore, the Commission concludes that PRC candidates are not "partisan statewide  
15 executive candidates" within the meaning of §106.5(d)(1)(ii). DPNM should not include  
16 PRC candidates in determining the number of points to be included in its ballot composition  
17 ratio for partisan statewide executive candidates.

18           However, candidates for the PRC may be treated as "partisan local candidates." As  
19 explained above, DPNM is entitled to include one additional non-federal point if any partisan  
20 local candidates will be on the ballot in any regularly scheduled election during the two-year  
21 congressional election cycle. Section 106.5(d)(1)(ii). Your request does not indicate whether  
22 DPNM is currently including a point for partisan local candidates. If DPNM is not currently  
23 including this point but wishes to do so for the remainder of the 1999-2000 election cycle, it

1 should immediately recalculate its ratio using the point for local candidates, and begin using  
2 this revised ratio. The revised ratio should be disclosed on Form H1 of DPNM's July mid-  
3 year report.

4 Presumably, DPNM has incurred administrative and generic voter drive expenses  
5 since January 1, 1999, and has transferred funds from its non-federal account to its Federal  
6 account to cover the non-federal share of those expenses. To the extent that those transfers  
7 were based on a ratio that did not include a point for partisan local candidates, the Party may  
8 now want to transfer additional amounts to make up the difference.

9 The Commission's rules allow a party committee to transfer funds from its non-  
10 federal account to its Federal account up to 10 days before and no more than 60 days after the  
11 committee pays the related allocable expense. 11 CFR 106.5(g)(2). The application of this  
12 provision here would mean that if DPNM paid an allocable expense from its Federal account  
13 on February 1, it would be unable to transfer funds for that expense after April 2. DPNM  
14 would also be precluded from transferring additional funds after April 2 to adjust for  
15 deficiencies in transfers made before that date.

16 However, this is the first election cycle in which candidates for the newly created  
17 office of Public Regulation Commissioner will have an impact on DPNM's ballot  
18 composition ratio. Since this advisory opinion request was submitted less than sixty days  
19 into the current election cycle, the Commission will allow DPNM to transfer funds to correct  
20 deficiencies in transfers made during the first sixty days of the cycle. This will allow the  
21 Party to adjust any transfers made between January 1 and March 2, 1999. These adjustments  
22 should be made by April 30, 1999. Adjustment of any transfers made after March 2, 1999,  
23 must be made within the 70 day window set out in 11 CFR 106.5(g)(2).



2  
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12        **application of the Commission's allocation regulations to elections for members of New**  
13        **Mexico's Public Regulation Commission during the 1999-2000 election cycle.**

14                **You explain that in 1996, New Mexico's voters approved a referendum merging two**  
15        **existing state agencies, the Public Utility Commission and the State Corporation**  
16        **Commission, into a single agency known as the Public Regulation Commission ("PRC").**  
17        **The PRC regulates gas, water, public utilities, electricity and other public concerns**  
18        **throughout the state of New Mexico. It consists of five Commissioners elected on a partisan**  
19        **basis by voters in five defined geographic areas of the state. The first five Commissioners**  
20        **were elected in November 1998.**

21                **Ultimately, PRC Commissioners will serve four year terms. However, the initial**  
22        **terms of two of the five Commissioners have been shortened to two years in order to stagger**  
23        **the terms and provide continuity on the PRC in the future. The shortened terms will expire**  
24        **on January 1, 2001. Consequently, these seats will be on the ballot in the November 2000**  
25        **election. The next election for the three remaining Commissioners will be in November**  
26        **2002.**

1           Your request indicates that, in the past, DPNM supported Democratic nominees  
2 running for the State Corporation Commission, and intends to support Democratic nominees  
3 for the PRC in the November 2000 election. DPNM allocates the costs of its administrative  
4 expenses and generic voter drive costs using the ballot composition method in 11 CFR  
5 106.5(d)(1). You ask whether DPNM may include one or two non-federal points for PRC  
6 elections as "other partisan executive statewide offices" in its ballot composition ratio for the  
7 1999-2000 election cycle.

8           Section 106.5(d)(1)(i) requires state party committees with separate federal and  
9 nonfederal accounts to allocate their administrative expenses and generic voter drive costs  
10 based on the ratio of federal offices expected on the ballot to total federal and non-  
11 federal offices expected on the ballot in the next general election to be held in the  
12 committee's state or geographic area. This ratio shall be determined by the number of  
13 categories of federal offices and the number of categories of non-federal offices on  
14 the ballot, as described in paragraph (d)(1)(ii) of this section.

15  
16 Paragraph (d)(1)(ii) groups federal and non-federal offices into categories, and lists the  
17 number of points to be included in the ratio for each category of office. The offices of  
18 President, United States Senator and United States Representative count as one federal point  
19 each, and the offices of Governor, State Senator and State Representative count as one non-  
20 federal point each, if expected on the ballot in the next general election. If other partisan  
21 statewide executive candidates will be on the ballot, these offices count as no more than two  
22 non-federal points in the ratio. Similarly, if any partisan local offices are expected on the  
23 ballot in any regularly scheduled election during the two-year cycle, these offices count as  
24 one non-federal point. Finally, the rules also allow state parties to include an additional  
25 generic non-federal point. 11 CFR 106.5(d)(1)(ii).

1           The category of “other partisan statewide executive candidates” encompasses  
2 candidates for state-level executive offices other than Governor, where those offices are  
3 elected by popular vote from amongst partisan candidates. For example, the office of  
4 Lieutenant Governor falls into this category in states where the Governor and Lieutenant  
5 Governor are independently elected. *Methods of Allocation Between Federal and Non-*  
6 *Federal Accounts; Payments; Reporting*, 55 Fed. Reg. 26058, 26064 (June 26, 1990)  
7 (“Explanation and Justification”). Other examples include Attorney General, Secretary of  
8 State, and State Treasurer in those states where these offices are elected rather than  
9 appointed.

10           In your request, you recognize that the office of New Mexico Public Regulation  
11 Commissioner differs from these examples in one respect. Typically, candidates for these  
12 offices run statewide. In contrast, PRC Commissioners are elected from five geographic  
13 districts defined by statute. N.M. Stat. Ann. §§ 8-7-2, 8-7-5. As you indicate, your request  
14 presents the “unique issue” of whether candidates for state-level executive offices are  
15 “partisan statewide executive candidates” within the meaning of section 106.5(d)(1)(ii) if  
16 they are elected by only a portion of the state’s electorate.

17           The Commission concludes that candidates for the office of New Mexico Public  
18 Regulation Commissioner are “partisan statewide executive candidates” within the meaning  
19 of section 106.5(d)(1)(ii). Candidates for the PRC are comparable to candidates for State  
20 Senator and State Representative in that they are elected by district to positions that are part  
21 of the New Mexico state government. Therefore, DPNM may treat candidates for the office  
22 of Public Regulation Commissioner as “partisan statewide executive candidates,” and may

1 take these candidates into account in calculating its ballot composition ratio for the 1999-  
2 2000 election cycle.

3 The question remains whether DPNM is entitled to include one or two non-federal  
4 points in its ratio, since two Democratic Party candidates for the PRC will be on the ballot in  
5 November 2000. Generally, a state party committee with two partisan statewide executive  
6 candidates on the ballot is entitled to include two non-federal points in its ballot composition  
7 ratio. However, the situation here is atypical in that PRC candidates only appear on the  
8 ballot in the district in which they seek election. Thus, no more than one of DPNM's PRC  
9 candidates will appear on any single ballot. Furthermore, in November 2000, approximately  
10 60% of the ballots distributed in New Mexico will contain no PRC candidates.

11 The Explanation and Justification for the allocation regulations explains that the  
12 ballot composition method uses an "average ballot" approach to determining a state party  
13 committee's allocation ratio. 55 Fed. Reg. at 26064 (June 26, 1990). In other words, the  
14 ratio is designed to reflect the ballot that will be seen by the average voter in the next general  
15 election. Thus, the rules allow a state party committee to include only one non-federal point  
16 for the office of State Representative in its ratio even if a number of its candidates for that  
17 office will be on the ballot in various districts around the state, because the average voter will  
18 only be able to vote for one of those candidates. The Commission incorporated the average  
19 ballot concept into the rules in an effort to simplify the ballot composition method. 55 FR at  
20 26064.

21 Applying these principles to the November 2000 election in New Mexico, the  
22 Commission concludes that DPNM may include only one point for the office of PRC  
23 Commissioner in its ballot composition ratio. Although two DPNM candidates for

1 Commissioner will be on the ballot in the November 2000 election, no more than one DPNM  
2 candidate will appear on any single ballot. Consequently, the average voter will have an  
3 opportunity to vote for no more than one PRC candidate. Thus, under the average ballot  
4 concept, DPNM is entitled to include no more than one non-federal point in its ballot  
5 composition ratio.

6 Finally, your request indicates that DPNM is currently using a ballot composition  
7 ratio that does not include any non-federal points for partisan statewide executive candidates,  
8 pending the disposition of its advisory opinion request. If the Commission concludes that  
9 DPNM is entitled to include a non-federal point or points for these offices, you request that  
10 the DPNM be allowed to adjust its ratio retroactive to January 1, 1999.

11 DPNM is not required to formally declare its ballot composition ratio until it files its  
12 mid-year report for the first six months of the election cycle. That report is not due until July  
13 31, 1999. Consequently, it is not necessary for DPNM to formally adjust its allocation ratio.  
14 However, DPNM should immediately begin using its revised ratio, and should disclose this  
15 revised ratio on Form H1 of its July mid-year report.

16 Presumably, DPNM has incurred administrative and generic voter drive expenses  
17 since January 1, 1999, and has transferred funds from its non-federal account to its Federal  
18 account to cover the non-federal share of those expenses. To the extent that those transfers  
19 were of lesser amounts than would have been allowed had DPNM included a non-federal  
20 point for PRC candidates in its ballot composition ratio, the Party may now want to transfer  
21 additional amounts to make up the difference.

22 The Commission's rules allow a party committee to transfer funds from its non-  
23 federal account to its Federal account up to 10 days before and no more than 60 days after the

1 committee pays the related allocable expense. 11 CFR 106.5(g)(2). The application of this  
2 provision here would mean that if DPNM paid an allocable expense from its Federal account  
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4 would also be precluded from transferring additional funds after April 2 to adjust for  
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6 However, this is the first election cycle in which candidates for the newly created  
7 office of Public Regulation Commissioner will have an impact on DPNM's ballot  
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9 into the current election cycle, the Commission will allow DPNM to transfer funds to correct  
10 deficiencies in transfers made during the first sixty days of the cycle. This will allow the  
11 Party to adjust any transfers made between January 1 and March 2, 1999. These adjustments  
12 should be made by April 30, 1999. Adjustment of any transfers made after March 2, 1999,  
13 must be made within the 70 day window set out in 11 CFR 106.5(g)(2).

14 This response constitutes an advisory opinion concerning application of the Act, or  
15 regulations prescribed by the Commission, to the specific transaction or activity set forth in  
16 your request. See 2 U.S.C. §437f.

17 Sincerely,

18  
19 Scott E. Thomas  
20 Chairman