



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

April 16, 1999

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1999-5

Joseph E. Sandler  
Neil P. Reiff  
Sandler & Reiff, P.C.  
6 E Street SE  
Washington, DC 20003

Dear Mr. Sandler and Mr. Reiff:

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

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

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

Your request indicates that, in the past, DPNM supported Democratic nominees running for the State Corporation Commission, and intends to support Democratic nominees

for the PRC in the November 2000 election. DPNM allocates the costs of its administrative expenses and generic voter drive costs using the ballot composition method in 11 CFR 106.5(d)(1). You ask whether DPNM may include one or two non-federal points for PRC elections as “other partisan executive statewide offices” in its ballot composition ratio for the 1999-2000 election cycle.

Section 106.5(d)(1)(i) requires state party committees with separate federal and nonfederal accounts to allocate their administrative expenses and generic voter drive costs

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

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

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

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

The Commission concludes that candidates for the office of New Mexico Public Regulation Commissioner are “partisan statewide executive candidates” within the meaning of section 106.5(d)(1)(ii). Candidates for the PRC are comparable to candidates for State Senator and State Representative in that they are elected by district to positions that are part of the New Mexico state government. Therefore, DPNM may treat candidates for the office of Public Regulation Commissioner as “partisan statewide executive candidates,” and may take these candidates into account in calculating its ballot composition ratio for the 1999-2000 election cycle.

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

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

Applying these principles to the November 2000 election in New Mexico, the Commission concludes that DPNM may include only one point for the office of PRC Commissioner in its ballot composition ratio. Although two DPNM candidates for Commissioner will be on the ballot in the November 2000 election, no more than one DPNM candidate will appear on any single ballot. Consequently, the average voter will have an opportunity to vote for no more than one PRC candidate. Thus, under the average ballot concept, DPNM is entitled to include no more than one non-federal point in its ballot composition ratio.

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

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

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

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

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

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

Sincerely,

(signed)

Scott E. Thomas  
Chairman