

**BEFORE THE
FEDERAL ELECTION COMMISSION**

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Deanna Nesburg
End Citizens United
P.O. Box 66005
Washington, DC 20035

MUR # 7530

Complainant,

v.

National Republican Congressional Committee and Keith A. Davis, Treasurer
320 First Street SE
Washington, DC 20003

Troy Balderson
PO Box 2302
Zanesville, OH 43702

Balderson for Congress and Matthew J. Yuskewich, Treasurer
4679 Winterset Drive
Columbus, OH 43220

Respondents.

COMPLAINT

This complaint is filed under 52 U.S.C. § 30109(a)(1) against the National Republican Congressional Committee and Keith A. Davis in his official capacity as treasurer (the "NRCC"); Representative Troy Balderson; and Balderson for Congress and Matthew J. Yuskewich in his official capacity as treasurer (collectively, "Respondents") for apparently violating the Federal Election Campaign Act of 1971, as amended (the "Act"), and Federal Election Commission (the "Commission") regulations. Respondents appear to have impermissibly allocated the costs of a television advertisement, resulting in the NRCC making, and the Balderson campaign accepting, an excessive in-kind contribution. The Commission should immediately investigate this violation of the Act and take appropriate remedial action against Respondents.

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OFFICE OF
GENERAL COUNSEL

FACTS

Representative Troy Balderson is the Congressman from Ohio’s 12th district.¹ He is running for re-election in the current 2018 election cycle.² His principal campaign committee is Balderson for Congress and Matthew J. Yuskewich in his official capacity as treasurer (the “Committee”).³ The NRCC is a qualified party committee that supports Republican congressional candidates, like Balderson, and the Republican Party at large.⁴ Representative Balderson’s opponent in the general election is Daniel O’Connor.⁵

On or about October 17, 2018, Representative Balderson and the NRCC began airing a 30-second television advertisement attacking O’Connor entitled “Progressive.”⁶ The advertisement cost \$355,000 and is running in the Columbus market until October 30.⁷ According to statements from Balderson’s campaign spokesperson, the Balderson campaign and the NRCC are “splitting” the price of the advertisement.⁸

The script of “Progressive” reads as follows:

Speaker	Script
Balderson	I’m Troy Balderson and I approve this message.

¹ *About this Candidate: Troy Balderson*, FED. ELECTION COMM’N, <https://www.fec.gov/data/candidate/H8OH12180/?tab=about-candidate> (last visited October 18, 2018).

² Troy Balderson, FEC Form 2, Statement of Candidacy (Dec. 6, 2017), <http://docquery.fec.gov/pdf/730/201712069089122730/201712069089122730.pdf>.

³ Balderson for Congress, FEC Form 1, Statement of Organization (amended Oct. 16, 2018), <http://docquery.fec.gov/pdf/624/201810169125560624/201810169125560624.pdf>.

⁴ *About this Committee: NRCC*, FED. ELECTION COMM’N, <https://www.fec.gov/data/committee/C00075820/?tab=about-committee> (last visited Oct. 18, 2018); *About, NRCC*, <https://www.nrcc.org/about/> (last visited Oct. 18, 2018).

⁵ *About this Candidate: Daniel O’Connor*, FED. ELECTION COMM’N, <https://www.fec.gov/data/candidate/H8OH12297/?tab=about-candidate> (last visited Oct. 18, 2018).

⁶ Jeremy Pelzer, *Going in Halfsies*, CLEVELAND.COM (Oct. 18, 2018), https://www.cleveland.com/open/index.ssf/2018/10/drug-treatment_providers_trade_group.html; *Progressive*, YOUTUBE, <https://www.youtube.com/watch?v=v7y1xReMeJE> (posted Oct. 17, 2018).

⁷ Pelzer, *supra* note 6.

⁸ *Id.*

O'Connor	I've spent my entire adult life, every bit of my adult life, fighting for progressive values.
Voice Over	<p>What kind of progressive values is Danny O'Connor talking about?</p> <p>Progressives support open borders and sanctuary cities, and they want to abolish ICE, the law enforcement agency protecting our community from gangs, keeping drugs out of our schools, and terrorists out of our country.</p> <p>Danny O'Connor agrees.</p> <p>Danny O'Connor, just too liberal.⁹</p>

The text disclaimer at the end of the advertisement states, "Approved by Troy Balderson. Paid for by Balderson for Congress & NRCC."¹⁰ This disclaimer confirms that the Balderson campaign and the NRCC coordinated in creating the advertisement and allocated its costs.

LEGAL DISCUSSION

A. General Principles

Normally, when a political committee pays for a communication it has coordinated with a candidate, the cost of the communication becomes an in-kind contribution to the candidate and counts against the committee's \$5,000 per-election contribution limit to that candidate.¹¹ Party committees, however, have the unique ability to make "party coordinated expenditures" with candidates in connection with their general elections, in addition to traditional in-kind contributions.¹² These party coordinated expenditures are subject to a separate limit, which is adjusted for inflation each year.¹³ Currently, the limit for House races in states with more than

⁹ *Id.*

¹⁰ *Id.*

¹¹ See 52 U.S.C. § 30116(a)(7)(B); Factual & Legal Analysis ("F&LA") at 3, MURs 7169, *et al.* (Democratic Congressional Campaign Committee, *et al.*) (2017).

¹² 52 U.S.C. § 30116(d).

¹³ *Id.* § 30116(c)(1)(A)-(B).

one congressional district is \$49,700.¹⁴ The Act prohibits committees from making and accepting contributions beyond the applicable limits.¹⁵

The Act and Commission regulations also provide that, in certain circumstances, when two or more committees coordinate on an expenditure, the committees can avoid making a contribution to one another by allocating the costs of the expenditure. The Commission's regulations instruct that "expenditures made on behalf of more than one clearly identified Federal candidate shall be attributed to each such candidate according to the benefit reasonably expected to be derived," as "determined by the proportion of space or time devoted to each candidate as compared to the total space or time devoted to all candidates."¹⁶ Therefore, if each candidate pays for only the portion of the communication that benefits his or her campaign, no contribution results. If however, a candidate pays for more than his or her allocable share of the expenditure, the excessive amount is an in-kind contribution to the other candidate.¹⁷

Following this principle, the Commission has also provided a way for a candidate and a party committee to allocate the costs of a phone bank. The regulations provide that a party committee and a federal candidate may allocate the costs of a phone bank 50/50 when the script (1) refers to only one clearly identified federal candidate, (2) generically references without identifying other candidates of the same political party, and (3) does not solicit a contribution or donation.¹⁸

¹⁴ Price Index Adjustments for Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 83 Fed. Reg. 6022, 6022 (Feb. 12, 2018) ("Party Coordinated Expenditure Limit").

¹⁵ 52 U.S.C. § 30116(f).

¹⁶ 11 C.F.R. § 106.1(a).

¹⁷ F&LA at 3-4, MURs 7169, *et al.*

¹⁸ 11 C.F.R. § 106.8.

B. Hybrid Ads

In recent years, the Commission has used the enforcement and advisory opinion processes to identify another kind of communication that may be allocated between a candidate and a party committee: the “hybrid ad.” The Commission defines “hybrid advertisements” as “communications that refer both to one or more clearly identified Federal candidates and generically to candidates of a political party.”¹⁹ A Commission-approved example of a hybrid advertisement is “Vote for John Doe and our great Democratic team.”²⁰

In 2006, the Commission released an advisory opinion discussing the theory on which it has authorized hybrid ads and how they must be allocated. Drawing on the two allocation rules addressed above, the Commission observed that hybrid communications are allocable because, while they serve “in large measure the purpose of influencing the election of the clearly identified Federal candidate,” the party committee also “derives some benefit” by virtue of the generic party reference.²¹ Accordingly, there is a benefit that can be divided and attributed to each entity sponsoring the communication.²²

Based on the allocation rule for phone banks, the Commission concluded that, if 50% or less of the time or space in the hybrid communication is devoted to the clearly identified federal candidate, the candidate and the party can each pay for half of the communication.²³ If the communication devotes more than 50% of its time or space to the clearly identified federal

¹⁹ Notice of Proposed Rulemaking on Hybrid Communications, 72 Fed. Reg. 26,569, 26,770 (May 10, 2007). While the Commission did not move forward with the rulemaking, it appears to have embraced this definition in enforcement matters. *See, e.g.*, F&LA at 4 n.8, MURs 7169; *see also* Statement of Reasons (“SOR”) of Comm’rs Weintraub, Bauerly & Walther at 1, Audit of McCain-Palin 2008, Inc. (2013) (“Hybrid Communications are communications made by a political party (1) that refer to one or more clearly identified Federal candidates and (2) that also generically refer to other candidates of a political party without clearly identifying them.”).

²⁰ Advisory Op. 2006-11 (Washington Democratic State Central Committee) at 1 n.1 (“AO 2006-11”).

²¹ *Id.* at 4.

²² *See id.* at 3-4.

²³ *Id.*

candidate, the Commission advised that the party and the candidate must fall back on the allocation rule for expenditures involving two or more clearly identified federal candidates, and allocate their share of the costs by measuring “the amount of [time or] space devoted to the clearly identified candidate as compared to the amount of [time or] space devoted to the generically referenced party candidates.”²⁴

Subsequently, the Commission has reaffirmed that the basis for allocating a portion of the costs of a hybrid ad to the party committee is the generic party reference. Commissioners have stated that “vague references to ‘our leaders in Congress,’ ‘liberals in Congress,’ or ‘liberal allies’” are not substitutes for the party reference.²⁵ Indeed, the Commission’s Explanation and Justification for the phone bank allocation regulation specifies that the reference must name the party, such as by saying “our great Republican team” or “our great Democratic ticket.”²⁶

C. Analysis

Here, the Balderson/NRCC television advertisement clearly does not qualify as a hybrid ad because it does not include a generic party reference, which is the critical element that makes a communication allocable.²⁷ At no point does the advertisement reference Democrats, the Democratic Party, or the Democratic ticket (or the Republican Party).²⁸ While the communication discusses “progressives” and “liberals,”²⁹ the Commission has been clear that such terms do not serve as a replacement for the required generic party reference.³⁰ The

²⁴ *Id.*

²⁵ SOR of Comm’rs Lenhard, Walther & Weintraub at 3, Audit of Bush-Cheney ’04, Inc. (2007) (“Bush-Cheney SOR”).

²⁶ See Party Committee Telephone Banks, 68 Fed. Reg. 64,517, 64,518 (Nov. 14, 2003) (“Telephone Bank E&J”).

²⁷ See *id.*; AO 2006-11 at 3-4; Bush-Cheney SOR at 3.

²⁸ *Progressive*, *supra* note 6.

²⁹ *Id.*

³⁰ See Telephone Bank E&J at 64,518; Bush-Cheney SOR at 3.

Commission has even used “liberals in Congress” as an example of a term that fails to trigger the hybrid-ad allocation rules.³¹

Without a generic party reference, the NRCC derives no benefit from the advertisement.³² This means that the ad is not allocable, because the only person it benefited was Balderson.³³ By paying for a portion of the advertisement, the NRCC was therefore making an in-kind contribution to Balderson and his Committee.³⁴ Furthermore, because the advertisement cost \$355,000, and it appears that the NRCC paid for half of it, the NRCC far surpassed the regular contribution limit (\$5,000) and the party coordinated expenditure limit (\$49,700) combined.³⁵ Accordingly, the NRCC has made, and the Balderson campaign has accepted, an excessive contribution, in violation of the Act.³⁶

REQUESTED ACTION

As we have shown, Respondents appear to have violated the Act and Commission regulations by sharing the costs of a television advertisement, when there was no legal basis for allocating any of the costs of the ad to the NRCC. This appears to have resulted in the NRCC making, and the Balderson campaign accepting, an excessive contribution. As such, we respectfully request that the Commission immediately investigate these violations and that Respondents be enjoined from further violations and be fined the maximum amount permitted by law.

³¹ See Bush-Cheney SOR at 3; *Progressive*, *supra* note 6.

³² See AO 2006-11 at 3-4.

³³ See *id.*

³⁴ See F&LA at 3-4, MURs 7169, *et al.*

³⁵ See 52 U.S.C. § 30116(a)(7)(B); Party Coordinated Expenditure Limit, *supra* note 14; Pelzer, *supra* note 6.

³⁶ See 52 U.S.C. § 30116(f).

Sincerely,



End Citizens United by,
Deanna Nesburg
P.O. Box 66005, Washington, DC 20035

SUBSCRIBED AND SWORN to before me this 23 day of October 2018.



Notary Public

My Commission Expires: 2/14/2021

