

HOLTZMANVOGELJOSEFIAKTORCHINSKY PLLC

Attorneys at Law

45 North Hill Drive • Suite 100 • Warrenton, VA 20186

September 23, 2019

Federal Election Commission
 Office of General Counsel
 Office of Complaints Examination
 & Legal Administration
 attn: Kathryn Ross, Paralegal
 1050 First Street, NE
 Washington, DC 20002

Re: MUR 7627

Dear Ms. Ross:

This Response is submitted by the undersigned counsel on behalf of the following Respondents in connection with MUR 7627:

- (1) NRCC, and Keith Davis in his capacity as Treasurer;
- (2) Friends of Hagedorn, and Thomas Datwyler in his capacity as Treasurer; and
- (3) Claudia Tenney for Congress, and Lisa Lisker in her capacity as Treasurer.

The Complaint takes issue with eleven advertisements that were jointly produced, paid for, and distributed by the NRCC and Republican House candidates in 2018. More specifically, the Complaint contends that three of these advertisements were “unlawful hybrid ads,” *see* Complaint Exhibit A, while eight of the advertisements were “unlawful multicandidate ads,” *see* Complaint Exhibit B. As explained in more detail below, each of the eleven advertisements satisfies the Commission’s “hybrid ad” standards. The costs of each advertisement were allocated according to a time/space analysis in a manner that is fully consistent with the Commission’s past treatment of hybrid ads. In each case, payment allocations corresponded to the portions of the advertisements from which each payor could reasonably expect to derive a benefit. In other words, each committee paid its “fair share” of each advertisement and neither committee subsidized the other. The Complaint should be dismissed.

I. Legal Background

As previously stated in the NRCC's Response in MUR 7530, the legal basis for party/candidate hybrid television advertisements was explained in 2007 as follows:

The basic principle behind two entities sharing the cost of a mutually beneficial, single communication is expressed in 11 CFR § 106.1, which states that “[e]xpenditures, including in-kind contributions, independent expenditures, and coordinated 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. For example, in the case of a publication or broadcast communication, the attribution shall be determined by the proportion of space or time devoted to each candidate as compared to the total space or time to all candidates.” Although this regulation applies specifically to communications made jointly by two or more candidates, the Commission has consistently and repeatedly applied the principle of § 106.1 to situations not explicitly captured by the language of the regulation.¹

Since the 2004 presidential election, hybrid ads have become a firmly entrenched part of the campaign finance landscape and both parties regularly distribute different types of hybrids ads, including party/candidate hybrid ads. Though these hybrid ads have been the target of a number of complaints, the Commission has *never* found that these communications violate the Act or Commission regulations.

A. 2004 Presidential Hybrid Advertisements and Advisory Opinion 2006-11

Hybrid television advertisements date to the 2004 Presidential election. Each of the two presidential campaigns and national party committees aired hybrid advertisements that were paid for based on a 50/50 allocation. The party-allocated portions of these advertisements included the following generic references:

- our leaders in Congress;
- Congressional leaders;
- liberals in Congress;
- liberal allies;
- Democrats;
- Democrats in Congress;
- Republicans;
- Republicans in Congress; and

¹ Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky on Final Audit Report on Bush-Cheney '04, Inc. at 2.

- right wing Republicans.²

During the Commission's subsequent audits of Bush-Cheney '04 and Kerry-Edwards 2004, the Commission considered and declined to adopt audit findings that the two campaigns exceeded the applicable expenditure limitations as a result of the hybrid advertisements.³

While the 2004 audits were pending, counsel for Kerry-Edwards 2004 submitted an advisory opinion request on behalf of the Washington State Democratic Central Committee asking whether a 50/50 allocation of costs was permissible for mass mailings that contained a reference to a clearly identified federal candidate and a generic reference to other candidates of the party.⁴ This request sought to apply the hybrid ad rationale used by both 2004 presidential campaigns to mailers and was understood by all to be an effort to force a resolution to the outstanding hybrid ad issue before the Commission voted on the Final Audit Reports.⁵ Advisory Opinion 2006-11 was approved by a 4-1 vote on April 25, 2006. The Commission concluded that:

[T]he State Party Committee and the PCC of the clearly identified Federal candidate – whether a House, Senate, or presidential candidate – may each pay 50 percent of the cost of the mailing so long as the space devoted to the candidate in the mailing does not exceed the space in the mailing devoted to the generically referenced candidates of the State Party Committee.⁶

Despite the Commission's conclusion in Advisory Opinion 2006-11, it remained divided over whether the hybrid ads at issue in the still-pending presidential audits had caused the

² See Report of the Audit Division on Bush-Cheney '04, Inc. and the Bush-Cheney '04 Compliance Committee, Inc., https://transition.fec.gov/audits/2004/20070322bush_cheney_compliance_04.pdf; Report of the Audit Division on Kerry-Edwards 2004, Inc. and Kerry-Edwards 2004, Inc. General Election Legal and Accounting Compliance Fund, https://transition.fec.gov/audits/2004/20070531kerry_edwards_genl_acct_fnd.pdf.

³ *Id.*; Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky On Final Audit Report On Bush-Cheney '04 Inc., https://www.fec.gov/resources/about-fec/commissioners/von_Spakovsky/speeches/statement20070322.pdf.

⁴ See Advisory Opinion Request 2006-11 (Feb. 27, 2006).

⁵ See Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky On Final Audit Report on Bush-Cheney '04 Inc. at 7 ("Although Advisory Opinion 2006-11 was issued in April 2006, long after the events of the Audit took place, this Advisory Opinion very clearly establishes that the attribution method of 11 CFR § 106.1 may be used by candidates and political party committees that distribute mutually beneficial, joint communications. In fact, at the time this Advisory Opinion was approved, we understood it to settle the basic legal issue surrounding the 'hybrid ads' in this Audit.").

⁶ Advisory Opinion 2006-11 (Apr. 25, 2006) at 2.

campaigns to exceed the public funding expenditure limitations. On March 22, 2007, the Commission held a public hearing and final vote on the Final Audit Report of Bush-Cheney '04, Inc. Three Commissioners opposed a finding that the campaign exceeded the expenditure limitation as a result of the hybrid advertisements, while three Commissioners supported finding that the expenditure limit was exceeded. The Final Audit Report treated the hybrid ad matter as an "additional issue" rather than a "finding and recommendation" and concluded that Bush-Cheney '04 complied with the expenditure limits.⁷ The Final Audit Report, finding no violation, was adopted on a 4-1 vote.⁸

The Commissioners issued a total of three statements on the hybrid ad issue following the conclusion of the audit. Two of the three Commissioners who opposed finding a hybrid ad violation issued a Statement that serves as the audit equivalent of a controlling statement with respect to the issue.⁹ The three Commissioners who supported a finding that the hybrid ads violated the expenditure limitation issued a Statement that accused Bush-Cheney '04 of committing an approximately \$40 million violation.¹⁰ One Commissioner from this latter group issued a separate statement as well.¹¹

The Commission held a public hearing and final vote on the Final Audit Report of Kerry-Edwards 2004 over two months later, on May 31, 2007. As in the Bush-Cheney '04 audit, the Commissioners divided by the same 3-3 vote on the issue of hybrid advertisements. And as in the Bush-Cheney '04 audit, the Final Audit Report treated the hybrid ad matter as an "additional issue" rather than a "finding and recommendation." The audit concluded that the Kerry-Edwards 2004 hybrid ads did not cause an expenditure limit violation, although Kerry-Edwards 2004 was found to have violated the limit by \$1.2 million for other reasons. The Final Audit Report in Kerry-Edwards 2004, however, was adopted without dissent.¹² Thus, both final audit reports

⁷ Report of the Audit Division on Bush-Cheney '04, Inc. and the Bush-Cheney '04 Compliance Committee, Inc., https://transition.fec.gov/audits/2004/20070322bush_cheney_compliance_04.pdf

⁸ The dissenting Commissioner explained in a separate Statement that she "will not approve a Final Audit Report that contains" a finding that Bush-Cheney '04 "complied with the expenditure limit." Statement of Commissioner Ellen L. Weintraub on the Report of the Audit Division on Bush-Cheney '04, Inc. (March 22, 2017).

⁹ See Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky On Final Audit Report on Bush-Cheney '04 Inc.

¹⁰ See Statement of Chairman Robert D. Lenhard and Commissioners Steven T. Walther and Ellen L. Weintraub on the Audit of Bush-Cheney '04, Inc.

¹¹ See Statement of Commissioner Ellen L. Weintraub on the Report of the Audit Division on Bush-Cheney '04, Inc. (March 22, 2017).

¹² Kerry-Edwards 2004 did not receive the same public scolding from the three Commissioners who issued statements accusing Bush-Cheney '04, Inc. of serious, eight-figure violations of the law. We can

concluded that the hybrid advertisements aired by the national party committees and presidential campaigns did not violate, or cause any violation of, any provision of the Act or Commission regulations.

While the Commissioners differed with respect to how they would apply the Act and Commission regulations to party/candidate hybrid ads, the controlling Statement issued in the Bush-Cheney '04, Inc. audit explained that this was not the first time that Section 106.1(a) had been applied to “allocations that were not provided for in the regulations.”¹³ This Statement also makes clear that the Commission had *never* required the party-allocable “generic reference” portion to include a “specific political party reference” such as “Republican” or “Democratic.”¹⁴ The controlling Statement explains:

[I]t should be remembered that the ‘generic reference’ standard is intended primarily to indicate that it does not benefit any particular candidate, but instead benefits generally a group of candidates. We see no reason then, why only a generic reference that includes the name of a political party should be viewed as potentially beneficial to a political party. If a political party believes that it is benefited most by promoting “our leaders in Congress,” why should the Commission object? And while the phone bank regulation requires the generic reference to be “to other candidates of the Federal candidate’s party,” it is also true that casting aspersions on “liberals in Congress” would be viewed by many as beneficial to a Republican party committee. The Commission should apply

discern no justifiable legal reasoning for the differing treatment of the two campaigns that would be relevant to the Commission’s consideration of the matter — the hybrid ad activity of the two campaigns was materially indistinguishable. The Kerry-Edwards campaign’s own counsel acknowledged this when he explained that the campaign’s intention with its own hybrid ads was to duplicate the Bush-Cheney '04 effort. *See* Kenneth P. Vogel, *More ads on tap with possible FEC change*, Politico (June 15, 2007), <https://www.politico.com/story/2007/06/more-ads-on-tap-with-possible-fec-change-004507> (“It took us – the Kerry campaign – maybe 48 hours to figure out that’s what they were doing, and then we were doing the same thing,’ said Marc Elias, an election lawyer at Perkins Coie who represented the Kerry campaign. ‘For that 48 hours, they had a competitive advantage.’”). In their previously issued Statement on the Bush-Cheney '04 audit, the three Commissioners sought to distinguish the activity of the campaigns by noting that “the Kerry-Edwards effort began later, spent substantially less and the ads did make generic reference to other party candidates.” Statement of Chairman Robert D. Lenhard and Commissioners Steven T. Walther and Ellen L. Weintraub in the Audit of Bush-Cheney '04, Inc. at 2 n.5. This apparent assertion of a “lesser” violation, however, was undermined by Mr. Elias’s acknowledgement that the Kerry-Edwards campaign was “doing the same thing” within 48 hours of seeing the Bush-Cheney campaign’s first hybrid ads. *Id.*

¹³ Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky On Final Audit Report on Bush-Cheney '04 Inc. at 3.

¹⁴ *Id.* at 6.

any “generic reference” requirement with the flexibility required to avoid dictating advertising content.¹⁵

Three other Commissioners explained at the same time that the only difference between what they viewed as an illegal hybrid ad and an ad that is permissibly allocated under Section 106.1(a) is the inclusion of a second candidate’s name. These Commissioners explained:

If the advertisement clearly identifies other candidates, the expenditure is covered under a different section of the agency’s regulations. 11 C.F.R. § 106.1. When there are multiple candidates specifically mentioned, the cost can be apportioned based upon the benefit reasonably expected to be derived by each candidate. That is determined by examining the proportion of space and time devoted to each candidate as compared to the total time and space devoted to all candidates.¹⁶

This, of course, is the approach the DCCC took in 2016, as discussed below.

B. 2003 and 2007 Commission Rulemakings

1. 2003 Phone Bank Regulation

The Commission’s phone bank allocation regulation requires that “the communication *must refer generically to the other candidates* of the clearly identified Federal candidate’s party without clearly identifying them. Generic references to ‘our great Republican team’ or ‘our great Democratic ticket’ *would satisfy* the latter requirement.”¹⁷

The Complainant asserts that the 2003 phone bank regulation “specifies that the reference *must* name the party, such as by saying ‘our great Republican team’ or ‘our great Democratic ticket.’”¹⁸ This is an outright misrepresentation of the 2003 rulemaking.

¹⁵ *Id.*

¹⁶ Statement of Chairman Robert D. Lenhard and Commissioners Steven T. Walther and Ellen L. Weintraub in the Audit of Bush-Cheney ’04, Inc. at 3 n.6.

¹⁷ Final Rule on Party Committee Phone Banks, 68 Fed. Reg. 64,517, 64,518 (Nov. 14, 2003) (emphasis added).

¹⁸ Complaint at 6 (emphasis added).

The two phrases, “our great Republican team” and “our great Democratic ticket,” are obviously examples rather than requirements. Nowhere does the 2003 Explanation & Justification “specif[y] that the reference *must* name the party.”¹⁹

2. 2007 Hybrid Communications Rulemaking

The Commission’s 2007 hybrid communications rulemaking confirmed that the “generic party reference” requirement did *not* require the use of the name or nickname of a political party. In fact, that rulemaking made absolutely clear that requiring the name or nickname of a political party to be part of a “generic party reference” would be a change in the law.

Before the 2004 presidential audits had even concluded, the Commission moved to codify an approach to the allocation of hybrid ads. A Notice of Proposed Rulemaking (NPRM) on hybrid advertising was issued on May 10, 2007.²⁰ Through this NPRM, the Commission proposed to “amend current 11 CFR 106.8 to address the attribution of disbursements for hybrid communications made through all types of ‘public communication’ as defined in 11 CFR 100.26.”²¹

The NPRM included two proposals to define “generic party reference.” The first alternative, which the Complainant references, “would require the generic party reference to refer to the other candidates as candidates of a political party by using the name or nickname of the political party, such as ‘our wonderful Democratic team,’ or ‘the great Republican ticket.’”²² The Commission proposed new regulatory language to impose this requirement:

(iii) Generically refers to other Federal or non-Federal candidates of a political party *by using the name or nickname of the political party*, but without clearly identifying the candidates.²³

The second alternative, which the Complainant fails to mention, would have retained the existing regulatory language. Specifically, this proposal “would retain the language of current 11 CFR 106.8, which requires a generic reference to candidates without clearly identifying them,

¹⁹ Complaint at 6.

²⁰ See Notice of Proposed Rulemaking on Hybrid Communications, 72 Fed. Reg. 26,569 (May 10, 2007).

²¹ *Id.* at 26,571.

²² *Id.*

²³ *Id.* at 26,575.

but does not require the candidates to be identified as candidates of a political party, or that the political party be clearly identified.”²⁴

Ultimately, no further action was taken on the NPRM and no final rule was adopted. However, the Commission’s characterizations of the two proposed alternatives makes clear that the language currently in the regulations (*i.e.*, the language of current 11 C.F.R. § 106.8), which has served as the basis for the Commission’s hybrid ad rulings, does *not* require “that the political party be clearly identified” in the “generic party reference.”

C. 2016 DCCC Advertisements

In 2016, the DCCC and its candidates aired more than a dozen different ads that “either expressly advocate[d] against the candidate’s Republican opponent and Trump, or addresse[d] the Republican opponent’s support of Trump.”²⁵ These were plainly “hybrid” ads, but the Respondents argued that the allocation method of Section 106.1(a) applied because the ads identified more than one federal candidate. Specifically, “Respondents assert[ed] that they applied the allocation method for broadcast communications set forth in Section 106.1(a) of the Commission’s regulations and allocated the costs according to the space and time devoted to each entity as compared to the total space or time devoted to all candidates.”²⁶

In these ads, “[t]he portion of each ad that addressed Trump was paid for by the DCCC.”²⁷ At least five of these ads “did not expressly advocate Trump’s defeat, but instead focused on policy issues” or “criticize[d] Trump’s policy positions.”²⁸ The Office of General Counsel concluded, and the Commission unanimously agreed, that “[i]n the circumstances presented in these MURs, we believe it was reasonable for Respondents to allocate the costs of the advertisements on a time and space basis pursuant to Section 106.1(a).”²⁹

In short, the Commission accepted the Respondents’ assertions that these advertisements were *not* “hybrid ads” and the Commission concluded that it was “reasonable” to allocate these advertisements under Section 106.1(a), even though the Commission had not “explicitly

²⁴ *Id.* at 26,572 (emphasis added).

²⁵ MUR 7169, *et al.* (DCCC, *et al.*), First General Counsel’s Report at 5.

²⁶ *Id.* at 5-6.

²⁷ *Id.* at 6.

²⁸ *Id.* at 7, 8.

²⁹ *Id.* at 9.

addressed” this sort of advertisement before. As a result, the DCCC’s “innovative” approach to hybrid ads in 2016 was approved.

II. Analysis

The Complaint in this matter alleges that three of the advertisements at issue were “unlawful hybrid ads,” *see* Complaint Exhibit A, while eight of the advertisements at issue were “unlawful multicandidate ads,” *see* Complaint Exhibit B. The Complainant’s distinction appears to be based on the presence or absence of a reference to Nancy Pelosi in an advertisement – that is, ads that referred to Nancy Pelosi are alleged to be “multicandidate ads” while ads that did not refer to Nancy Pelosi are “hybrid ads.” The Complainant contends that the advertisements that included references to Nancy Pelosi “appear to be attempting to mimic [the DCCC’s 2016] multicandidate ads – by clearly identifying a Republican candidate and addressing his or her opponent’s support of Representative Pelosi.”³⁰ The Complainant is incorrect. The Respondents were not attempting to mimic the DCCC’s 2016 “multicandidate” advertisements. As discussed below, the ads at issue are hybrid ads containing generic party references that were properly allocated on a time/space basis between the NRCC and the respective candidate committees.

“Hybrid ads” (or “hybrid communications”) are “communications that refer *both* to one or more clearly identified Federal candidates and generically to candidates of a political party.”³¹ All eleven advertisements satisfy this standard. The 2016 DCCC ads were treated as “multicandidate advertisements” because the party-paid portion referenced Donald Trump but did *not* otherwise contain generic party references.³² In contrast, each advertisement that the Complainant here claims is an “unlawful multicandidate ad” includes a party-paid portion that references Nancy Pelosi *and* “Washington liberals,” “liberals in Congress,” “liberals in DC,” “two sides of a very liberal coin,” or “Washington liberals” coupled with discussion of issues of national importance on which the two political parties have taken very different positions and which would be championed by a Pelosi-led Democrat majority in the House. Accordingly, all eleven ads are hybrid ads that “refer both to one or more clearly identified Federal candidates and generically to candidates of a political party.”

³⁰ Complaint at 6.

³¹ Notice of Proposed Rulemaking on Hybrid Communications, 72 Fed. Reg. 26,569, 26,770 (May 10, 2007) (emphasis added); *see also* Statement of Reasons of Chair Ellen L. Weintraub and Commissioners Cynthia L. Bauerly and Steven T. Walther, Audit of McCain-Palin 2008, Inc. and McCain-Palin Compliance Fund, Inc. at 1 (Feb. 4, 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.”).

³² *See* MUR 7169 et al., First General Counsel’s Report at 5 n.10 (“There are no generic references, such as ‘Democrats’ or ‘Republicans,’ in any of the 15 ads at issue here.”).

The Complaint contends that “attacking Pelosi’s policies in an advertisement airing outside of California brought no benefit to the Republican Party” outside of California’s 12th District.³³ This contention is absurd and self-evidently incorrect but ultimately irrelevant. These advertisements were not intended to defeat Nancy Pelosi; rather, Nancy Pelosi’s policies are what the Republican Party opposes in every district across the country and the NRCC believes it derives benefit from linking Democratic candidates to “Nancy Pelosi and Washington liberals.” In any event, this issue is not relevant to the legal question at hand. What matters is that these advertisements referred to (1) one or more clearly identified candidate *and* (2) generically to candidates of a political party. They qualify as hybrid ads with or without the Nancy Pelosi references.

The allocation and payment for the advertisements identified in the Complaint are discussed below. The Respondents applied a time and space analysis to each advertisement, and the resulting allocation reflected the benefit reasonably expected to be derived by the candidate and the NRCC. The two committees paid for each advertisement accordingly. This approach is consistent with the Commission’s “hybrid ad” decisions from 2007 to the present.

A. NRCC / Balderson Advertisements

1. “Progressive” (Complaint Exhibit A, #1)

With respect to the advertisement titled “Progressive,” the Complaint makes the same allegations that were previously made in MUR 7530. In fact, much of this Complaint was copied verbatim from the Complaint in MUR 7530. (We do not know if the Complainant is affiliated with End Citizens United.)

As previously explained, the payment allocation for “Progressive”³⁴ was addressed in the NRCC’s response in MUR 7530. As explained in that response, the costs of “Progressive” were divided evenly between Balderson for Congress and the NRCC. Balderson for Congress and the NRCC each paid for its allocable share of the advertisement according to the well-established time-space approach. The costs of “Progressive” were as allocated as follows:

- The first two seconds, featuring Congressman Balderson’s stand by your ad message, are compliance related;
- The next six seconds, featuring Danny O’Connor speaking, were allocated to Balderson for Congress;
- The next four seconds were divided evenly, with two second allocated to Balderson for Congress and two seconds to the NRCC;

³³ Complaint at 7.

³⁴ “Progressive” can be viewed at <https://www.youtube.com/watch?v=v7y1xReMejE>.

- The next twelve seconds, discussing progressives' policy views, were allocated to the NRCC; and
- The last six seconds, discussing Danny O'Connor, were allocated to Balderson for Congress.

Thus, 14 seconds of the advertisement were allocated to Balderson for Congress based on the above time/space calculations, and 14 seconds to the NRCC. The remaining 2 seconds of compliance material was divided evenly.³⁵ Based on this allocation, Balderson for Congress and the NRCC each paid 50% of the advertisement's costs, which corresponds to the portion of the advertisement from which each could reasonably expect to derive a benefit.

The Complaint alleges that "Respondents' television advertisements involving Rep. Balderson ... clearly do not qualify as a hybrid ad because they do not include a generic party reference, which is the critical element that makes a communication allocable under the hybrid ad theory."³⁶ The Complaint observes that "[t]he advertisement[] mention[s] 'Progressives,' 'DC Liberals,' and 'Liberal Elites,' but ... the Commission's authority is clear that such terms are not substitutes for a reference to the Democratic Party."³⁷ The Complainant's source for this claim is the non-controlling Statement in the Bush-Cheney '04 audit.³⁸ The Final Audit Reports in the two presidential audits do *not* affirm this view. Advisory Opinion 2006-11 does *not* impose any such requirement.³⁹ In the 2007 Notice of Proposed Rulemaking, the Commission acknowledged that the standard it had applied in the 2004 audits and Advisory Opinion 2006-11 did *not* require a party name to be used.

The Commission has *never* required a party/candidate hybrid advertisement to include a generic reference that explicitly identifies a political party by name. Treating "Progressive" as a hybrid ad and allocating its costs on a time/space basis between the NRCC and Balderson for Congress is consistent with the Commission's conclusions in the audit of Bush-Cheney '04, Inc.

³⁵ Purely compliance-related costs were divided evenly pursuant to Advisory Opinion 2007-09 (Kerry-Edwards 2004, Inc.), in which the Commission found that a candidate's "stand by your ad" disclaimer statement does not constitute "campaign speech." If this material does not constitute "campaign speech," then it is reasonable to allocate the costs of this compelled speech among the payors.

³⁶ Complaint at 5.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Advisory Opinion 2006-11 specifies that "[i]n connection with the 2006 general election, the State Party Committee proposes to prepare and distribute one or more mass mailings, each of which will refer to only one clearly identified Federal candidate and will also generically refer to other candidates of the party who are not clearly identified." The Commission did not require, and the Requestor did not indicate, that *every* generic reference would include a party name. Rather, the request and response simply track the language of 11 C.F.R. § 106.8 regarding the allocation of phone bank communications.

The generic reference to “progressives” in “Progressive” is no different than the generic references to “liberals in Congress” and “liberal allies” included in various advertisements aired by Bush-Cheney ’04 and the Republican National Committee in 2004. The term “progressives,” like “liberals in Congress” and “liberal allies,” refers generically to other candidates of a Federal candidate’s party without clearly identifying them. Just as the Republican National Committee derived benefit from the “liberals in Congress” and “liberal allies” portions of ads in 2004, the NRCC derived benefit from the “progressives” portion of “Progressive.”

The NRCC reasonably believes that use of the term “progressives” coupled with discussion of the policy preferences of “progressives” is a beneficial way for it to refer to *other* Democratic Party candidates *like* Danny O’Connor. The NRCC reasonably believes it derived a party-wide benefit from discussing the policy preferences of “progressives” in the advertisement at issue, and that it is beneficial to the party as a whole to critique “progressives.” “[W]hy should the Commission object?”⁴⁰ It should not, and the Commission should continue to “apply any ‘generic reference’ requirement with the flexibility required to avoid dictating advertising content.”⁴¹

2. “Progressive Plan” (Complaint Exhibit A, #2)

Each of the ten other advertisements were constructed and allocated as described above. The costs of “Progressive Plan”⁴² were allocated as follows:

- The first three seconds, featuring Congressman Balderson’s stand by your ad message are compliance related;
- The next 8.5 seconds, discussing Troy Balderson and Danny O’Connor’s positions, were allocated to Balderson for Congress;
- The next 13.5 seconds, discussing the views of progressives and DC liberals, were allocated to the NRCC;
- The last 5 seconds, discussing Danny O’Connor, were allocated to Balderson for Congress.

⁴⁰ Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky On Final Audit Report on Bush-Cheney ’04 Inc. at 6 (“We see no reason then, why only a generic reference that includes the name of a political party should be viewed as potentially beneficial to a political party. If a political party believes that it is benefited most by promoting ‘our leaders in Congress,’ why should the Commission object? And while the phone bank regulation requires the generic reference to be ‘to other candidates of the Federal candidate’s party,’ it is also true that casting aspersions on ‘liberals in Congress’ would be viewed by many as beneficial to a Republican party committee. The Commission should apply any ‘generic reference’ requirement with the flexibility required to avoid dictating advertising content.”)

⁴¹ *Id.*

⁴² “Progressive Plan” can be viewed at <https://www.youtube.com/watch?v=4jGRS83iKZk>.

Thus, 13.5 seconds of the advertisement were allocated to Balderson for Congress based on the above time/space calculations, and 13.5 seconds to the NRCC. The remaining 3 seconds of compliance material was divided evenly. Based on this allocation, Balderson for Congress and the NRCC each paid 50% of the advertisement's costs, which corresponds to the portion of the advertisement from which each could reasonably expect to derive a benefit.

“Progressive Plan” refers generically to “progressives and DC liberals.” As discussed above, these terms are consistent with the Commission’s “generic party reference” standard.

3. “Dangerous Danny” (Complaint Exhibit B, #1)

The costs of “Dangerous Danny”⁴³ were allocated as follows:

- The first 13 seconds, discussing the views of “Nancy Pelosi and Washington liberals” and “liberals in Washington,” were allocated to the NRCC;
- The next 13 seconds, discussing Danny O’Connor, were allocated to Balderson for Congress; and
- The final 4 seconds were compliance related and divided evenly.

Based on this allocation, Balderson for Congress and the NRCC each paid 50% of the advertisement’s costs, which corresponds to the portion of the advertisement from which each could reasonably expect to derive a benefit.

“Dangerous Danny” refers to “Nancy Pelosi and Washington liberals” and “liberals in Washington.” The terms “Washington liberals” and “liberals in Washington” are both consistent with the Commission’s “generic party reference” standard. While Nancy Pelosi may be a clearly identified candidate, she is also the well-known leader and symbol of the House Democrats. The NRCC identified Nancy Pelosi as part of its generic reference to the Democratic Party as “Washington liberals,” and the phrase “Nancy Pelosi and Washington liberals” unquestionably includes a generic party reference.

4. “Difference” (Complaint Exhibit B, #2)

The costs of “Difference”⁴⁴ were allocated as follows:

- The first 14 seconds of “Difference,” discussing “Nancy Pelosi and liberals in Congress” and the consequences of Democratic policies in Ohio, were allocated to the NRCC;
- The next 14 seconds, discussing Danny O’Connor, were allocated to Balderson for Congress; and
- The final 2 seconds were compliance related and divided evenly.

⁴³ “Dangerous Danny” can be viewed at https://www.youtube.com/watch?v=Iexy_1ZErcs.

⁴⁴ “Difference” can be viewed at <https://www.youtube.com/watch?v=HzpEM43lnQ4>.

Based on this allocation, Balderson for Congress and the NRCC each paid 50% of the advertisement's costs, which corresponds to the portion of the advertisement from which each could reasonably expect to derive a benefit. The NRCC-allocated portion of "Difference" refers to "Nancy Pelosi and liberals in Congress" and discusses Democratic policy in general, which is consistent with the Commission's "generic party reference" standard.

5. "No More ("Liar") (Complaint Exhibit B, #3)

The costs of "No More"⁴⁵ (referred to as "Liar" in the Complaint) were allocated as follows:

- The first four seconds, discussing "liberals in DC," were allocated to the NRCC;
- The next ten seconds, discussing Danny O'Connor, were allocated to Balderson for Congress;
- The next ten seconds, discussing the policy outcomes "with liberal Nancy Pelosi as Speaker," were allocated to the NRCC;
- The next four seconds, discussing Danny O'Connor, were allocated to Balderson for Congress; and
- The final four seconds were compliance related and divided evenly.

Based on this allocation, Balderson for Congress and the NRCC each paid 50% of the advertisement's costs, which corresponds to the portion of the advertisement from which each could reasonably expect to derive a benefit.

This advertisement included two distinct party-allocated portions. The first, discussing "liberals in DC," is consistent with the Commission's "generic party reference" standard. The second, which explains "with Nancy Pelosi as speaker, America will have open borders for gangs and drugs, socialized medicine and higher taxes, pushing us back into recession," also satisfies the Commission's "generic party reference" standard. The phrase "with Nancy Pelosi as speaker" is simply another way of saying "if the Democrats become the House majority," and what follows is a description of House Democrats' policies. Thus, this segment as a whole refers generically to House Democrats. (In the alternative, this portion could be treated as referencing a clearly identified candidate and allocated to the NRCC pursuant to 11 C.F.R. § 106.1(a), as was done with the DCCC's advertisements in MUR 7169. The end result is the same under either theory.⁴⁶)

⁴⁵ "No More" can be viewed at <https://host2.advertisinganalyticsllc.com/admo/#/viewer/5f17fd27-ebd2-4e7c-8e4a-265f7679b354/>.

⁴⁶ See also the 2018 DCCC / Kirkpatrick advertisement, available at <https://host2.advertisinganalyticsllc.com/admo/#/viewer/c231ee57-e4c2-495f-93ec-e830ebf4bf90/>, in which the party-allocated portion describes Republican Party policy as "Paul Ryan and Donald Trump's big con."

B. NRCC / Davis Advertisement: “Their Candidate” (“Hollywood”) (Complaint Exhibit A, #3)

The costs of “Their Candidate”⁴⁷ (labeled “Hollywood” in the Complaint) were allocated as follows:

- The first three seconds were compliance related and divided evenly;
- The next 12 seconds, discussing the views of “liberal elites,” were allocated to the NRCC;
- The next 12 seconds, discussing Betsy Londrigan, were allocated to Rodney for Congress; and
- The final three seconds, discussing “Betsy Londrigan and her liberal elites,” were divided evenly.

Based on this allocation, Rodney for Congress and the NRCC each paid 50% of the advertisement’s costs, which corresponds to the portion of the advertisement from which each could reasonably expect to derive a benefit. “Their Candidate” refers generically to “liberal elites” and their preferred policies. As discussed above, this term is consistent with the Commission’s “generic party reference” standard.

C. NRCC / Tenney Advertisements

1. “Anthony Brindisi Stands with Nancy Pelosi on Illegal Immigration” (Complaint Exhibit B, #6)

The costs of “Stands With”⁴⁸ were allocated as follows:

- The first 2 seconds of “Stands With” are compliance related and were divided evenly;
- The next 14 seconds, discussing the positions of “Nancy Pelosi and the Washington liberals,” were allocated to the NRCC;
- The final 14 seconds, discussing Anthony Brindisi, were allocated to Claudia Tenney for Congress.

Based on this allocation, Claudia Tenney for Congress and the NRCC each paid 50% of the advertisement’s costs, which corresponds to the portion of the advertisement from which each could reasonably expect to derive a benefit. The NRCC-allocated portion of “Stands With” refers to “Nancy Pelosi and the Washington liberals,” which is consistent with the Commission’s “generic party reference” standard.

⁴⁷ “Their Candidate” can be viewed at <https://host2.advertisinganalyticsllc.com/admo/#/viewer/fb1f401d-0969-4892-ae27-b9e27b52d19b/>.

⁴⁸ “Stand With” can be viewed at <https://www.youtube.com/watch?v=dG9dUVjFnpk>.

**2. “Brindisi-Pelosi Dangerously Wrong on Illegal Immigration”
(Complaint Exhibit B, #7)**

“Wrong On Illegal Immigration”⁴⁹ consists of two distinct segments, each of which blends discussion of parties and candidates. While most hybrid ads contain discrete segments that are wholly allocable to either the party committee or the candidate, nothing in the Commission’s hybrid ad precedent requires this format. As was explained in 2007, the “basic principle” is that two entities “shar[e] the cost of a mutually beneficial, single communication … that is attributed to each … according to the benefit reasonably expected to be derived.” “[T]he attribution shall be determined by the proportion of space or time devoted to each … as compared to the total space or time to all.”⁵⁰ Nothing in this explanation requires discrete segments that are allocated wholly to one payor or the other, and nothing prohibits allocating a “blended,” mutually beneficial segment to both payors.

The first 14 second segment asserts that “Nancy Pelosi and Washington liberals bankroll Anthony Brindisi’s campaign because he’ll support their radical immigration agenda: sanctuary cities; taxpayer benefits for illegals.” The first segment concludes: “Pelosi, Washington liberals, and Anthony Brindisi: Dangerously wrong on illegal immigration.” This segment describes the policy preferences of “Nancy Pelosi and Washington liberals” and asserts that Anthony Brindisi will support that agenda. By simultaneously discussing the policies of the Democrat Party (generally referred to as “Nancy Pelosi and Washington liberals”) and Anthony Brindisi’s support for those policies, the NRCC and Claudia Tenney’s campaign determined that this segment benefited each of them equally. Accordingly, the costs were allocated evenly between them.

The second 14 second segment explains that “Claudia Tenney is working with President Trump to ban sanctuary cities, secure our border, and end taxpayer benefits for illegal immigrants. Keeping our upstate families safe. Putting America first. Claudia Tenney and President Trump.” This segment refers to President Trump as the leader of the Republican Party and discusses policies supported by the Republican Party. The segment explains that Claudia Tenney supports these policies. By simultaneously discussing the policies of the Republican Party (generally referred to as President Trump’s policies) and Claudia Tenney’s support for those policies, the NRCC and Claudia Tenney’s campaign determined that this segment benefited each of them equally. Accordingly, the costs were allocated evenly between them.

The final two seconds of the advertisement are compliance related and were divided evenly.

⁴⁹ “Wrong On Illegal Immigration” can be viewed at https://www.youtube.com/watch?v=IR_20jpAhZk.

⁵⁰ Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky on Final Audit Report on Bush-Cheney ’04, Inc. at 2.

Based on this allocation, Claudia Tenney for Congress and the NRCC each paid 50% of the advertisement's costs, which corresponds to the portion of the advertisement from which each could reasonably expect to derive a benefit.

3. **“Pelosi and Brindisi Would Jeopardize Medicare” (Complaint Exhibit B, #8)**

“Jeopardize Medicare”⁵¹ consists of two distinct segments, each of which blends discussion of parties and candidates.

The first 14 second segment asserts that “Nancy Pelosi and Anthony Brindisi schemed to give everyone Medicare, even illegal aliens, ending Medicare as we know it. Costing 32 trillion. Doubling the debt. Pelosi, Brindisi, and Washington liberals would jeopardize Medicare.” This segment describes the policy preferences of “Nancy Pelosi … and Washington liberals” and asserts that Anthony Brindisi supports that agenda. By simultaneously discussing the policies of the Democrat Party (generally referred to as “Nancy Pelosi and Washington liberals”) and Anthony Brindisi’s support for those policies, the NRCC and Claudia Tenney’s campaign determined that this segment benefited each of them equally. Accordingly, the costs were allocated evenly between them.

The second 14 second segment explains that “Claudia Tenney and President Trump are safeguarding the benefits seniors depend on. Protecting Medicare. Strengthening Social Security. Claudia Tenney and President Trump are fighting for benefits you worked a lifetime to earn.” This segment refers to President Trump as the leader of the Republican Party and discusses policies supported by the Republican Party. The segment explains that Claudia Tenney supports these policies. By simultaneously discussing the policies of the Republican Party (generally referred to as President Trump’s policies) and Claudia Tenney’s support for those policies, the NRCC and Claudia Tenney’s campaign determined that this segment benefited each of them equally. Accordingly, the costs were allocated evenly between them.

The final two seconds of the advertisement are compliance related and were divided evenly.

Based on this allocation, Claudia Tenney for Congress and the NRCC each paid 50% of the advertisement's costs, which corresponds to the portion of the advertisement from which each could reasonably expect to derive a benefit.

⁵¹ “Jeopardize Medicare” can be viewed at <https://www.youtube.com/watch?v=PNOsWshzUb8>.

4. “Fail or Succeed” (Complaint Exhibit B, #5)

“Fail or Succeed”⁵² consists of two distinct segments, each of which blends discussion of parties and candidates.

The first 14 second segment asserts that “Nancy Pelosi and Anthony Brindisi’s liberal agenda is too extreme for upstate New York. Under Nancy Pelosi and Anthony Brindisi, our economy crashed. Reckless spending, devastating unemployment, higher taxes.” This segment describes the policy preferences of Nancy Pelosi, referring to her as the leader of House Democrats, and asserts that Anthony Brindisi supports the House Democrats’ agenda. By simultaneously discussing the policies of the Democrat Party (generally referred to as Nancy Pelosi’s policies⁵³) and Anthony Brindisi’s support for those policies, the NRCC and Claudia Tenney’s campaign determined that this segment benefited each of them equally. Accordingly, the costs were allocated evenly between them.

The second 14 second segment explains that “Claudia Tenney is fighting for President Trump’s agenda in Washington. Stopping bad trade deals, better jobs, higher wages, a growing economy, middle class tax cuts. Claudia Tenney is standing with President Trump and fighting against Nancy Pelosi and the Washington liberals.” By simultaneously discussing the policies of the Republican Party (generally referred to as “President Trump’s agenda in Washington”) Claudia Tenney’s support for those policies, and her support for President Trump in “fighting against Nancy Pelosi and the Washington liberals,” the NRCC and Claudia Tenney’s campaign determined that this segment benefited each of them equally. Accordingly, the costs were allocated evenly between them.

The final two seconds of the advertisement are compliance related and were divided evenly.

Based on this allocation, Claudia Tenney for Congress and the NRCC each paid 50% of the advertisement’s costs, which corresponds to the portion of the advertisement from which each could reasonably expect to derive a benefit.

⁵² “Fail or Succeed” can be viewed at <https://www.youtube.com/watch?v=2u-uaxpsO0I>.

⁵³ In the alternative, this portion could be treated as referencing a clearly identified candidate and allocated to the NRCC pursuant to 11 C.F.R. § 106.1(a), as was done with the DCCC’s advertisements in MUR 7169.

D. NRCC / Hagedorn Advertisement: “Two Sides” (Complaint Exhibit B, #4)

“Two Sides”⁵⁴ blends discussion of parties and candidates for 28 seconds. (Two seconds are compliance related and were divided evenly.) The script is as follows:

[Stand by your ad message] I'm Jim Hagedorn and I approve this message.

Dan Feehan and Nancy Pelosi, two sides of a very liberal coin.

Feehan supports letting illegal immigrants take our Medicare dollars.

Pelosi? She's for it too.

Feehan's Medicare scheme would end Medicare as we know it, leading to a \$ 32 trillion government takeover of our healthcare system. Even threatening care at the Mayo Clinic.

And Pelosi is for that too.

With Dan Feehan and Nancy Pelosi, that's a coin toss you lose either way.

The advertisement uses the “two sides of a coin” metaphor throughout the ad. On both sides of coin is the message “In Liberals We Trust.” The ad describes the House Democrats’ policies and states that both Feehan and Nancy Pelosi support these policies as the Feehan/Pelosi coin flips back and forth. The advertisement refers generically to the House Democrats through references to Nancy Pelosi and liberals and asserts that Dan Feehan supports the House Democrats’ agenda. By simultaneously discussing the policies of the Democrat Party and Dan Feehan’s support for those policies and providing equal space and time to these two subjects, the NRCC and Jim Hagedorn’s campaign determined that the advertisement benefited each of them equally. Accordingly, the costs were allocated evenly between them.

⁵⁴ “Two Sides” can be viewed at <https://www.youtube.com/watch?v=ZiTgV8eQzs>.

III. Conclusion

For the reasons set forth above, the Complaint should be dismissed.

Sincerely,



Michael Bayes
Chris Winkelman