

1 **I. INTRODUCTION**

2

3 In the weeks leading up to the 2018 election, the NRCC (f/k/a National Republican

4 Congressional Committee) and Keith A. Davis in his official capacity as treasurer ("NRCC") and

5 the respective candidate committees aired television ads that clearly identified one or more

6 candidates and opposed the stances of "Washington liberals," "liberals in DC," or "liberal elites."

7 The Complaint alleges that the NRCC improperly allocated the costs of these ads 50/50 with the

8 candidate committees because the NRCC did not receive a party-wide benefit, resulting in the

9 NRCC making and the candidate committees accepting, excessive contributions.

10 Respondents argue that they properly allocated the costs of the "hybrid" ads because

11 terms such as "Washington liberals" criticized the entire Democratic Party thereby conferring a

12 party-wide benefit to the NRCC.

13 For the reasons set forth below, we recommend that the Commission find reason to

14 believe that the NRCC made, and Balderson for Congress and Matthew J. Yuskevich in his

15 official capacity as treasurer ("Balderson Committee") and Rodney for Congress and Thomas

16 Datwyler in his official capacity as treasurer ("Davis Committee") knowingly accepted,

17 excessive in-kind contributions in violation of 52 U.S.C. § 30116(a) and (f) for improperly

18 allocating the costs of two ads, "Progressive Plan" and "Their Candidate," that did not constitute

19 hybrid ads. We recommend taking no action at this time against Troy Balderson and Rodney

20 Davis pending the results of the proposed investigation.

21 We further recommend that the Commission find no reason to believe that the NRCC

22 made, and the Balderson Committee, Balderson, Friends of Hagedorn and Thomas Datwyler in

23 his official capacity as treasurer ("Hagedorn Committee"), James Hagedorn, Claudia Tenney for

24 Congress and Cabell Hobbs in his official capacity as treasurer ("Tenney Committee"), and

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1 Claudia Tenney knowingly accepted, excessive in-kind contributions in violation of 52 U.S.C.
 2 § 30116(a) and (f) for improperly allocating the ads “Dangerous Danny,” “Difference,” “No
 3 More,” “Stand With,” “Dangerously Wrong on Illegal Immigration,” “Jeopardize Medicare,”
 4 “Fail or Succeed,” and “Two Sides,” because the ads clearly identified more than one federal
 5 candidate and could thus be allocated pursuant to 11 C.F.R. § 106.1.

6 **II. FACTUAL BACKGROUND**

7 **A. The Hybrid Ads²**

8 The NRCC is a qualified party committee “devoted to increasing the number of
 9 Republicans in the U.S. House of Representatives.”³ Troy Balderson was the Republican
 10 candidate for Ohio’s 12th district in both the special election and general election in 2018. The
 11 Balderson Committee is his principal campaign committee. Rodney Davis was the Republican
 12 candidate for Illinois’s 13th district in 2018. The Davis Committee is his principal campaign
 13 committee.

14 In the months before the 2018 general election, the NRCC and the Balderson Committee
 15 ran an ad entitled “Progressive Plan” with the following script:⁴

Speaker	Time	Script
Balderson	0:00-0:02	I’m Troy Balderson and I approve this message
Voiceover	0:03-0:11.5	Don’t believe the lies. Troy Balderson supports covering pre-existing conditions and Medicare. It’s O’Connor’s progressive plan that’ll destroy healthcare.
	0:11.5-0:25	If progressives and DC liberals get their way, socialized medicine means big government-run healthcare, eliminating private health

² The allegations pertaining to the ad “Progressive” featuring Troy Balderson are nearly identical to those in MUR 7530. We have therefore administratively severed those allegations from this MUR and added them to MUR 7530.

³ NRCC, About Page, <https://www.nrcc.org/about/> (last visited January 8, 2020).

⁴ Balderson Committee, *Progressive Plan*, Oct. 24, 2018, <https://www.youtube.com/watch?v=4iGRS83iKZk>.

		plans, losing your doctor and long lines, doubles your federal taxes and costs America trillions.
O'Connor	0:25-0:28	I've spent my entire adult life fighting for progressive values.
Voiceover	0:28-0:30	Danny O'Connor - Just too liberal.

1
 2 A text disclaimer at the end of the ad states: "Approved by Troy Balderson. Paid for by
 3 Balderson for Congress & NRCC."⁵ The NRCC asserts that the costs were evenly split between
 4 the committees pursuant to the time-space approach as follows:⁶

5 • 0:00-0:02 – Compliance (3 seconds)
 6 • 0:03-0:11.5 – Balderson Committee (8.5 seconds)
 7 • 0:11.5-0:25 – NRCC (13.5 seconds)
 8 • 0:25-0:30 – Balderson Committee (5 seconds)

9
 10 According to the NRCC, 13.5 seconds were allocable to each committee with three seconds
 11 allocable to "compliance," and thus the committees evenly divided the costs of the ad.⁷

12 The total costs of "Progressive Plan," however, are unknown at this time. Publicly filed
 13 disclosure reports show that the NRCC reported making a \$5,000 contribution to the Balderson
 14 Committee and approximately \$180,000 in party coordinated expenditures on Schedule F to a
 15 media vendor, Lakeside Communications, in June and July of 2018, but it is unclear whether
 16 those expenditures or some portion of them were for "Progressive Plan."⁸ From July through
 17 October of 2018, the NRCC disclosed itemized disbursements on Schedule B of approximately

⁵ *Id.*

⁶ NRCC, Hagedorn Committee, and Tenney Committee Resp. at 13 (Sept. 23, 2019) ("NRCC Resp.").

⁷ *Id.* at 12.

⁸ See NRCC, Party Coordinated Expenditures, 2017-18, available at https://www.fec.gov/data/party-coordinated-expenditures/?two_year_transaction_period=2018&committee_id=C00075820&candidate_id=H8OH12180&cycle=2018. In its August 2018 Monthly Report, the NRCC stated that "the NRCC has received spending authorization from both the Republican National Committee and the applicable state party committee. The Schedule F expenditures on behalf of Rep. Troy Balderson include amounts for both the August 2018 special general election (aggregate of \$ 89,700) and the November 2018 general election." NRCC August 2018 Monthly Report at 6 (Aug. 20, 2018).

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1 \$420,000 to Lakeside Communications, but it is similarly unclear whether those disbursements
 2 were for “Progressive Plan.”⁹ During this same general timeframe, the Balderson Committee
 3 disclosed almost \$1.1 million in itemized disbursements on Schedule B to Lakeside
 4 Communications.¹⁰

5 The NRCC and the Davis Committee ran an ad entitled “Their Candidate” with the
 6 following script:¹¹

Speaker	Time	Script
Davis	0:00-0:02	I'm Rodney Davis, and I approve this message.
Voiceover	0:02-0:14	From Hollywood to San Francisco to Wall Street. Liberal elites are trying to buy Congress. The liberal elites want sanctuary cities for illegal immigrants, higher taxes on working families.
	0:15-0:27	Betsy Londrigan is their candidate. Londrigan has raised more than a million dollars from out of state liberals, because they know she'll support their extreme agenda.
	0:28-0:30	Londrigan and her liberal elites are not for Illinois families.

7
 8 A text disclaimer at the end of the ad states: “Approved by Rodney Davis. Paid for by
 9 Rodney for Congress & NRCC.”¹² The NRCC asserts that the costs were evenly split between
 10 the committees as follows:¹³

11 • 0:00-0:02 – Compliance (3 seconds)
 12 • 0:02-0:14 – Davis Committee (12 seconds)
 13 • 0:15-0:27 – NRCC (12 seconds)
 14 • 0:28-0:30 – Davis Committee/NRCC (3 seconds)

⁹ See NRCC, Disbursements, 2017-18, available at https://www.fec.gov/data/disbursements/?two_year_transaction_period=2018&data_type=processed&committee_id=C00075820&recipient_name=lakeside&min_date=01%2F01%2F2017&max_date=12%2F31%2F2018.

¹⁰ See Balderson Committee, 2017-18, Disbursements to Lakeside Communications, available at https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00662650&recipient_name=lakeside&two_year_transaction_period=2018.

¹¹ Davis Committee, *Their Candidate*, <https://host2.advertisinganalyticsllc.com/admo/#/viewer/fb1f401d-0969-4892-ae27-b9e27b52d19b/> (last visited December 5, 2019). The Complaint refers to this ad as “Hollywood.”

¹² *Id.*

¹³ NRCC Resp. at 13.

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1 According to the NRCC, 12 seconds were allocable to each committee and the first and
 2 last 3 seconds were divided evenly between the committees.¹⁴ It is unclear how much the ad
 3 cost. Publicly filed disclosure reports indicate that the Davis Committee made nearly \$2 million
 4 in itemized disbursements on Schedule B to Strategic Media Services, while the NRCC reported
 5 approximately \$2.5 million in disbursements on Schedule B to the same vendor, but it is unclear
 6 whether these disbursements, or any portion of them, were attributable to “Their Candidate.”¹⁵
 7 The NRCC reported a \$5,000 contribution to the Davis Committee but did not report any party
 8 coordinated expenditures with it.¹⁶

9 The Complaint alleges that “Progressive Plan” and “Their Candidate” do not qualify as
 10 hybrid ads — ads that contain a reference to a clearly identified candidate along with “another
 11 reference that generically refers to other candidates of the Federal candidate’s party without
 12 clearly identifying them”¹⁷ (a “generic party reference”) — subject to a time-space allocation.¹⁸
 13 The Complaint alleges that the terms “progressives,” “DC liberals,” and “liberal elites” do not
 14 constitute generic party references.¹⁹ Without a qualifying generic party reference, the
 15 Complaint alleges that only the candidate committees received a benefit from the communication
 16 and, therefore, the costs should have been paid entirely by the candidate committee. But since

¹⁴ *Id.* at 15.

¹⁵ See Davis Committee, Disbursements, 2017-18, available at https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00521948&recipient_name=strategic+media+services&two_year_transaction_period=2018; NRCC, Disbursements, 2017-18, available at https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00075820&recipient_name=strategic+media+services&two_year_transaction_period=2018.

¹⁶ See Davis Committee, General Post-General Election Report at 58 (Dec. 18, 2018).

¹⁷ 11 C.F.R. § 106.8.

¹⁸ Compl. at 5 (July 31, 2019).

¹⁹ *Id.*

1 the ad was apparently allocated, the Complaint alleges that the NRCC made, and the respective
 2 candidate committees accepted, an excessive contribution.

3 In its Response, the NRCC argues that terms such as “progressives,” “DC liberals,” and
 4 “liberal elites” applies to all Democrats and, therefore, a criticism of them provided a party-wide
 5 benefit to the NRCC.²⁰ The NRCC argues that the Commission has never required a generic
 6 party reference to explicitly contain the name of the particular political party.²¹ The NRCC
 7 asserts that it properly allocated the costs of the ads with the Balderson and Davis Committees,
 8 respectively, by evenly splitting the costs of the ads according to the time-space approach.

9 Balderson and the Balderson Committee, and Davis and the Davis Committee, each filed
 10 short responses concurring with and adopting the NRCC’s arguments.²²

11 **B. Multicandidate Ads**

12 James Hagedorn was a candidate for Minnesota’s 1st District in 2018. The Hagedorn
 13 Committee is his principal campaign committee. Claudia Tenney was a candidate for New
 14 York’s 22nd district in 2018. The Tenney Committee is her principal campaign committee. In
 15 2018, Nancy Pelosi was the Minority Leader of the House of Representatives and a candidate for
 16 California’s 12th District.

18 The Complaint identifies eight ads that clearly identify a Democratic candidate for the
 19 House of Representatives and Nancy Pelosi, the Speaker of the House of Representatives and a
 20 candidate for California’s 12th district.²³ Three of the eight ads also clearly identify Donald J.

²⁰ NRCC Resp. at 10.

²¹ *Id.* at 11.

²² Balderson and Balderson Committee Resp. at 1 (Sept. 26, 2019); Davis and Davis Committee Resp. at 1 (Sept. 26, 2019).

²³ Compl. at 6-7.

1 Trump, the President of the United States and a candidate for reelection in 2020.²⁴ Each ad
 2 contains a text disclaimer stating that the ad was paid for by the NRCC and the respective
 3 candidate committee. The NRCC asserts that the costs of each ad were evenly divided between
 4 the NRCC and the respective House candidate committee that benefited from the ad.²⁵ For
 5 example, the NRCC and the Balderson Committee ran an ad critical of Balderson's Democratic
 6 opponent, Danny O'Connor, entitled "Dangerous Danny," with the following script:²⁶

Speaker	Time	Script
Voiceover	0:00-0:13	Nancy Pelosi and Washington liberals are dangerous. They can't be trusted to uphold Ohio values. Liberals in Washington want to repeal the middle class tax cuts, implement socialized medicine, and hike taxes on working families. Danny O'Connor is just as dangerous. O'Connor brags he cleaned up his office, but used taxpayer money on a life coach, gifts for friends, and to support a radical left wing group. Dangerous Danny O'Connor.
Balderson	0:26-0:30	I'm Troy Balderson, and I approve this message.

7
 8 The NRCC asserts that the costs were evenly divided between the committees by
 9 allocating the first 13 seconds to the NRCC, the next 13 seconds to the Balderson Committee,
 10 and splitting the compliance costs.²⁷ The scripts and NRCC's allocation for the seven other ads
 11 identified in the Complaint are contained in an attachment to this Report.

12 According to the Complaint, these ads do not constitute multicandidate ads — ads that
 13 clearly identify more than one federal candidate — because Nancy Pelosi was not on the ballot in

²⁴ See Attachment 1. The three ads are "Dangerously Wrong on Illegal Immigration," Jeopardize Medicare," and "Fail or Succeed."

²⁵ NRCC Resp. 10-19.

²⁶ Balderson Committee, *Dangerous Danny* (July 17, 2018),
https://www.youtube.com/watch?v=Iexy_IZErcs.

²⁷ Resp. at 13.

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1 any of the House candidates' districts and, therefore, NRCC did not receive a party-wide benefit
 2 from criticizing Pelosi because the targeted voters could not vote against Pelosi.²⁸

3 In its response, the NRCC rejects the Complaint's characterization of these eight ads as
 4 multicandidate ads, instead arguing that they constitute hybrid ads.²⁹ According to the NRCC, a
 5 hybrid ad can clearly identify more than one candidate, as long as there is a generic party
 6 reference.³⁰ Similar to its arguments for the hybrid ads above, the NRCC argues that references
 7 to "Washington liberals," "liberals in Congress," and "liberals in DC" constitute generic party
 8 references.³¹ The NRCC argues that the costs of each of these eight ads were evenly divided
 9 between the NRCC and the respective candidate committee.³²

10 **III. LEGAL ANALYSIS**

11
 12 The Act defines a contribution as "any gift, subscription, loan, advance, or deposit of
 13 money or anything of value made by any person for the purpose of influencing any election for
 14 Federal office."³³ The term "anything of value" includes all in-kind contributions.³⁴
 15 Contributions from a national or state committee to a candidate committee are limited to a total

²⁸ Compl. at 6-7.

²⁹ NRCC Resp. at 9-10. The NRCC and the Hagedorn and Tenney Committees filed a joint response. Hagedorn and Tenney did not submit separate responses.

³⁰ *Id.* at 10.

³¹ *Id.* at 9-10.

³² The NRCC reported making \$92,150 of party coordinated expenditures with the Tenney Committee, and \$94,950 with the Hagedorn Committee. NRCC, Party Coordinated Expenditures, 2017-2018, https://www.fec.gov/data/party-coordinated-expenditures/?two_year_transaction_period=2018&committee_id=C00075820&candidate_id=H4NY22051&cycle=2018 (Tenney); https://www.fec.gov/data/party-coordinated-expenditures/?two_year_transaction_period=2018&committee_id=C00075820&candidate_id=H0MN01045&cycle=2018 (Hagedorn).

³³ 52 U.S.C. § 30101(8)(A).

³⁴ 11 C.F.R. § 100.52(d)(1).

1 of \$5,000 per election, and candidates and political committees are prohibited from knowingly
 2 accepting contributions in excess of the Act's limits.³⁵ The Act grants the national and state
 3 committees of a political party authority to also support their general election candidates with
 4 coordinated expenditures subject to certain limits, which in the 2018 election cycle was \$49,700
 5 for House nominees in states that have more than one representative.³⁶ The national committee
 6 of a political party and a state committee of a political party may assign their authority to make
 7 coordinated party expenditures to another political party committee.³⁷

8 Commission regulations at 11 C.F.R. § 106 include both general allocation rules and
 9 rules for allocating specific types of expenses in particular circumstances. The general allocation
 10 rule at 11 C.F.R. § 106.1 is that “[e]xpenditures, including in-kind contributions, independent
 11 expenditures, and coordinated expenditures made on behalf of more than one clearly identified
 12 Federal candidate shall be attributed to each such candidate according to the benefit reasonably
 13 expected to be derived.”³⁸ If either party to an allocation pays for amounts that exceed their
 14 allocated share of the total costs, then those excessive amounts are in-kind contributions to the
 15 other candidate(s) involved. For broadcast communications involving more than one clearly
 16 identified candidate, the attribution is determined by the proportion of space or time devoted to

³⁵ 52 U.S.C. § 30116(a)(2)(A), (f).

³⁶ *Id.* § 30116(d); Coordinated Party Expenditure Limits for 2018, 83 Fed. Reg. 6022 (Feb. 12, 2018). Because Balderson ran in both the special and general elections in 2018, the NRCC had a combined coordinated party expenditure limit of \$198,800.

³⁷ 11 C.F.R. § 109.33(a). The NRCC disclosed receiving authority from both the Republican National Committee and “the applicable state committees.” *See, e.g.*, NRCC August 2018 Monthly Report at 6; NRCC September 2018 Monthly Report at 6.

³⁸ 11 C.F.R. § 106.1(a).

1 each candidate as compared to the total space or time devoted to all candidates, and is commonly
 2 referred to as the “time-space approach.”³⁹

3 **A. Hybrid Ads**

4 “Hybrid communications” are only explicitly addressed in the phone bank regulation at
 5 11 C.F.R. § 106.8, which allows an allocation when there is a reference to a clearly identified
 6 candidate along with “another reference that generically refers to other candidates of the Federal
 7 candidate’s party without clearly identifying them,” the so-called “generic party reference.”⁴⁰
 8 Under this regulation, half of the cost of a phone bank communication must be attributed to the
 9 clearly identified candidate, and the other half must be attributed to the party committee,
 10 regardless of the amount of time devoted to each.⁴¹ The Explanation and Justification for this
 11 regulation gives examples of generic references to other candidates of the party as “our great
 12 Republican team” or “our great Democratic ticket.”⁴² Further, it specifically notes that the
 13 Commission had considered whether to include other forms of communications, such as
 14 mailings, within the regulation’s coverage but “decided to limit the scope of new section 106.8 to
 15 phone banks . . . because each type of communication presents different issues that need to be

³⁹ *Id.*

⁴⁰ *Id.* § 106.8.

⁴¹ *Id.* § 106.8(b).

⁴² Party Committee Telephone Banks, Final Rules, 68 Fed. Reg. 64,517, 64,518 (Nov. 14, 2003).

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1 considered in further detail before establishing new rules.”⁴³ Subsequently, in Advisory Opinion
 2 2006-11 (Washington State Democratic Central Committee), the Commission extended the
 3 hybrid communication allocation rules to mass mailings.⁴⁴

4 The Commission has never explicitly extended the hybrid communications rules to radio
 5 and television advertising. But both the Complaint and NRCC’s Response cite to the
 6 Commission’s consideration of a series of television ads in the Report of the Audit Division on
 7 Bush-Cheney ‘04, Inc. (“Bush-Cheney ‘04 Audit”), where the Commission was unable to agree
 8 on whether a 50/50 allocation of costs by Bush-Cheney ‘04, Inc. and the Republican National
 9 Committee for television advertisements that clearly identified candidate George W. Bush (or his
 10 opponent John Kerry) together with generic references to other political figures such as
 11 “Congressional leaders,” “liberals in Congress” and “liberal allies” complied with the Act and
 12 Commission regulations.⁴⁵

13 The Complaint argues that respondents cannot allocate the costs of their ads under the
 14 hybrid communication rule because the ads do not contain a “generic party reference.” The
 15 Complaint cites to a Statement of Reasons issued by a group of Commissioners in the Bush-

⁴³ *Id.* The Commission initiated a proposed rulemaking in 2007 on hybrid communications, but the Commission lost quorum in late 2007 and a final rule was never adopted. *See* Notice of Proposed Rulemaking on Hybrid Communications, 72 Fed. Reg. 26,569 (May 10, 2007); First Gen. Counsel’s Rpt. at 9, MUR 6685 (Horsford for Congress).

⁴⁴ Addressing the appropriate allocation of payments for a mass mailing hybrid communication, the Commission used 11 C.F.R. §§ 106.1 and 106.8 as models and concluded that *at least* 50% of the cost of the mailing should be attributed to the clearly identified federal candidate. The Commission, however, noted if the space devoted to the clearly identified candidate exceeded the space devoted to the generically referenced candidates, then the cost attributed to each entity had to reflect the relative proportion of space devoted to that entity (*i.e.*, the cost attributed to the candidate would be greater than 50%). *See* Advisory Op. 2006-11 at 4.

⁴⁵ *See* Final Audit Report at 10, Audit of Bush-Cheney ‘04, Inc. (Apr. 2, 2007); Statement of Comm’rs Lenhard, Walther, & Weintraub, Audit of Bush-Cheney ‘04, Inc. (Mar. 21, 2007); Statement of Comm’rs Mason & von Spakovsky, Final Audit Report on Bush-Cheney ‘04, Inc. (Mar. 22, 2007); Statement of Comm’r Weintraub, Report of the Audit Division on Bush-Cheney ‘04, Inc. (Mar. 22, 2007).

1 Cheney '04 Audit that stated that "vague" references such as "liberals in Congress" and "liberal
 2 allies" did not satisfy the generic party reference requirement.⁴⁶ Similarly, the Complaint argues
 3 that the references such as "liberals in Congress" are fundamentally different from the examples
 4 of generic party references given in the Explanation and Justification of "our great Republican
 5 team" or "our great Democratic ticket."⁴⁷ The Complaint therefore concludes that no portion of
 6 the ads were allocable to the NRCC.⁴⁸

7 In response, the NRCC contends that Complainant reads the precedents too narrowly, and
 8 that the NRCC reasonably believed that criticizing liberals and liberal policies was another way
 9 of criticizing Democratic candidates generally and, therefore, conferred to it a party-wide
 10 benefit.⁴⁹ The NRCC argues that the examples given in the Explanation and Justification were
 11 not meant to be an exhaustive list.⁵⁰ Quoting the competing Commissioners' Statement in the
 12 Bush-Cheney '04 Audit, the NRCC contends that the Commission should "apply any 'generic
 13 [party] reference' requirement with the flexibility required to avoid dictating advertising
 14 content."⁵¹

15 At the outset, we note that none of the statements of reasons from the Bush-Cheney '04
 16 Audit garnered four votes. Furthermore, even after the Bush-Cheney '04 Audit, the Commission
 17 has never approved a 50/50 time-space allocation for hybrid ads absent a generic party reference

⁴⁶ Statement of Comm'r's Lenhard, Walther, & Weintraub at 3, Audit of Bush-Cheney '04, Inc.; Compl. at 5.

⁴⁷ See Compl. at 5-6; 68 Fed. Reg. at 64,518.

⁴⁸ Compl. at 5.

⁴⁹ NRCC Resp. at 9.

⁵⁰ *Id.*

⁵¹ *Id.* at 6 (quoting Statement of Comm'r's Mason & von Spakovsky at 6, Final Audit Report on Bush-Cheney '04, Inc.).

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1 similar to the examples given in the Explanation and Justification. Moreover, the Commission
 2 has not expanded the regulations for hybrid communications to broadcast communications.⁵²

3 The two hybrid ads identified in the Complaint differ in several respects from the hybrid
 4 communication precedent. First, at their essence, the ads are attack ads specifically targeting the
 5 Republican candidate's opponent. To the extent "Progressive Plan" criticizes "DC liberals" and
 6 "Their Candidate" criticizes "liberal elites," they do so to attack the policies of the Democrat in
 7 the race — not as a general critique of other Democratic candidates that could arguably be
 8 considered a party-wide benefit to the NRCC. Therefore, the candidate committees — not the
 9 Republican Party — received the benefit of the ad, and the respective candidate committee
 10 should have paid for the full cost of each ad.

11 Second, neither ad contains a generic party reference. They instead vaguely refer to
 12 "liberal elites" and "DC liberals," which is not synonymous with candidates of the Democratic
 13 Party.⁵³ Indeed, there does not appear to be an undefined group of candidates of any party that
 14 would have benefitted by these ads.

15 Finally, assuming that "DC liberals" or "liberal elites" can substitute for a generic
 16 reference to candidates of the Democratic Party, the reference would not be *to the same party* as
 17 the clearly identified candidate as required under section 106.8(a)(3). The Commission has

⁵² In MUR 6685 (Horsford for Congress), the Commission split on the question of whether evenly dividing the costs of a hybrid communication was permissible where the Democratic candidate Horsford was clearly identified along with three other state Democratic candidates and the ad included a general reference to the Democratic Party and its policy positions. *See* Certification at 1, MUR 6685 (Horsford for Congress). The First General Counsel's Report analyzed several possible applications of the time-space approach and determined that respondents' decision to split the costs evenly was a reasonable application of the rules and relevant precedent. *See* First Gen. Counsel's Rpt. at 12, MUR 6685 (Horsford for Congress).

⁵³ *See, e.g.*, F&LA at 4, n.8, MUR 7169 (DCCC) (using "Democrat" or "Republican" as an example of a generic party reference).

1 never extended the phone bank regulations to cover generic references to candidates of the
 2 *opposing party.*⁵⁴

3 Therefore, the express language of section 106.1(a) does not apply because there is only
 4 one clearly identified candidate.⁵⁵ Nor does the phone bank regulation apply, or its extension to
 5 mass mailers in AO 2006-11, because the ads lack a generic party reference. For these reasons,
 6 “Progressive Plan” and “Their Candidate” are not hybrid communications that would permit an
 7 allocation between a candidate and his or her party pursuant to the time-space approach, and we
 8 recommend that the Commission find reason to believe that the NRCC violated 52 U.S.C.
 9 § 30116(a) by making, and that the Balderson and Davis Committees violated 52 U.S.C.
 10 § 30116(f) by knowingly accepting, an excessive in-kind contribution for the costs associated
 11 with “Progressive Plan” and “Their Candidate.” We further recommend taking no action at this
 12 time against candidates Balderson and Davis pending the results of the proposed investigation.

13 **B. Multicandidate Ads**

14 The remaining ads clearly identify more than one federal candidate – first, a Republican
 15 House candidate, and then federal candidate Nancy Pelosi, and in some instances federal
 16 candidate Donald J. Trump – which have sometimes been referred to as “multicandidate ads.”⁵⁶
 17 The Commission has previously approved a time-space allocation between two entities when an

⁵⁴ The ads at issue in the Bush-Cheney Audit were ads attacking the opposing party, but the Commission split. One Commissioner issued a Statement briefly raising this issue. *See Statement of Comm'r Weintraub at 2, Report of the Audit Division on Bush-Cheney '04, Inc.*

⁵⁵ *See infra* Part III.B.

⁵⁶ Although Trump was not on the ballot in the 2018 election, Trump had filed his Statement of Candidacy for the 2020 election on January 20, 2017. *See Donald J. Trump Statement of Candidacy (Jan. 20, 2017).*

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1 ad clearly identifies two candidates.⁵⁷ In MURs 7169, *et al.* (Democratic Congressional
 2 Campaign Committee) (“DCCC”), the Commission found no reason to believe that the DCCC or
 3 the candidate committees misallocated the costs of a series of broadcast ads using the time-space
 4 approach under 11 C.F.R. § 106.1(a) where the DCCC paid for portions of the ads that expressly
 5 advocated against Trump or his policy positions and the clearly identified candidate’s principal
 6 campaign committee paid for the portion that “concerned each candidate.”⁵⁸

7 The Complaint argues that the ads do not qualify as multicandidate ads because, in
 8 MURs 7169, *et al.*, Trump was on the ballot in each House race, while here, Pelosi was not on
 9 the ballot in each individual congressional district and, therefore, the targeted voters could not
 10 vote against Pelosi and the NRCC thus did not receive a party-wide benefit.⁵⁹ Complainant’s
 11 argument reads the precedent too narrowly. In MURs 7169, *et al.*, the Commission held that the
 12 ads at issue, which criticized Trump and supported a clearly identified Democratic House
 13 candidate, were allocable not to Hillary Clinton’s principal campaign committee (Trump’s
 14 opponent), but to the DCCC as conferring a benefit to the entire Democratic Party.⁶⁰ In those
 15 ads, Trump’s positions and policies were used as a foil to compare and criticize the positions and

⁵⁷ See Advisory Op. 2007-24 (Burkee/Walz) at 5 (requiring the costs of joint ad devoting equal time and space between two candidates to be split equally between those two candidates’ committees); Advisory Op. 2004-37 (Waters) (describing payments by multiple candidates for brochure, under 106.1 allocation principles).

⁵⁸ See Advisory Op. 2006-11 at 4; Factual & Legal Analysis at 5, MUR 7169, *et al.* (Democratic Congressional Campaign Committee) (“DCCC”). The NRCC advances the same argument here that was rejected in MURs 7169, *et al.* that the eight ads identified by the Complaint are not multicandidate ads, but rather hybrid ads. NRCC Resp. at 9. The Commission noted that “[t]here are no generic references, such as ‘Democrats’ or ‘Republicans,’ in any of the 15 ads at issue here.” Factual & Legal Analysis at 4 n.8, MUR 7169, *et al.* (DCCC).).

⁵⁹ Compl. at 6-7.

⁶⁰ See Factual and Legal Analysis at 8, MURs 7169, *et al.* (DCCC).

1 policies of the Democratic candidate's Republican opponent.⁶¹ Similarly, here, the ads use the
 2 positions and policies of Pelosi to criticize the opponent of the Republican House candidate.

3 Accordingly, based on the available information, the allocation of the costs of the
 4 multicandidate ads between the candidate committees and the NRCC on a time-space basis is
 5 consistent with 11 C.F.R. § 106.1(a) and MURs 7169, *et al.* The NRCC purports to have evenly
 6 split each ad with the respective candidate committee, allocating to the NRCC the time
 7 discussing Pelosi and allocating the time discussing the candidate or the candidate's opponent to
 8 the candidate's respective principal campaign committee.⁶² This allocation appears appropriate
 9 under these circumstances, and the Complaint does not provide information to suggest otherwise.
 10 Accordingly, we recommend that the Commission find no reason to believe that the NRCC
 11 made, and the Balderson Committee, Balderson, the Hagedorn Committee, Hagedorn, the
 12 Tenney Committee, and Tenney knowingly accepted, excessive in-kind contributions in violation
 13 of 52 U.S.C. § 30116(a) and (f).⁶³

14 **IV. INVESTIGATION**

15 We propose a limited investigation to determine the amount in violation, including the
 16 total costs of "Progressive Plan" and "Their Candidate." We also propose to investigate whether
 17 the NRCC had any applicable contribution limits remaining for the ads, including any remaining
 18 party coordinated expenditure limits. For example, the NRCC disclosed approximately \$180,000
 19 in party coordinated expenditures with the Balderson Committee, but it is unclear whether this

⁶¹ *Id.* at 6-7.

⁶² *See* Attachment 1.

⁶³ The multicandidate ads are "Dangerous Danny," "Difference," "No More," "Stand With," "Dangerously Wrong on Illegal Immigration," "Jeopardize Medicare," "Fail or Succeed," and "Two Sides."

1 amount included the costs for "Progressive Plan." We will therefore seek to establish the costs
2 of "Progressive Plan" and "Their Candidate" and any remaining contribution limits that would
3 permit the NRCC to permissibly pay for the ads. We recommend that the Commission authorize
4 the use of compulsory process, including the issuance of appropriate interrogatories, document
5 subpoenas, and deposition subpoenas, as necessary.

6 **V. RECOMMENDATIONS**

- 7 1. Find reason to believe that the NRCC and Keith A. Davis in his official capacity as
8 treasurer violated 52 U.S.C. § 30116(a) by making excessive in-kind contributions in
9 connection with the television ads "Progressive Plan" and "Their Candidate;"
- 10 2. Find reason to believe that Balderson for Congress and Matthew Yuskevich in his
11 official capacity as treasurer violated 52 U.S.C. § 30118(f) by knowingly accepting
12 an excessive in-kind contribution in connection with the television ad "Progressive
13 Plan;"
- 14 3. Find reason to believe that Rodney Davis and Thomas Datwyler in his official
15 capacity as treasurer violated 52 U.S.C. § 30118(f) by knowingly accepting an
16 excessive in-kind contribution in connection with the television ad "Their Candidate;"
- 17 4. Take no action at this time against Troy Balderson;
- 18 5. Take no action at this time against Rodney Davis;
- 19 6. Find no reason to believe that the NRCC and Keith A. Davis in his official capacity
20 as treasurer violated 52 U.S.C. § 30116(a) by making excessive in-kind contributions
21 in connection with the multicandidate television ads;
- 22 7. Find no reason to believe that Balderson for Congress and Matthew Yuskevich in his
23 official capacity as treasurer, Troy Balderson, Claudia Tenney for Congress and
24 Cabell Hobbs in his official capacity as treasurer, Claudia Tenney, Friends of
25 Hagedorn and Thomas Datwyler in his official capacity as treasurer, and James
26 Hagedorn violated 52 U.S.C. § 30118(f) by knowingly accepting excessive in-kind
27 contributions in connection with the multicandidate television ads;
- 28 8. Approve the attached Factual and Legal Analyses;
- 29 9. Approve compulsory process; and

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1 10. Close the file as to Friends of Hagedorn and Thomas Datwyler in his official capacity
2 as treasurer, James Hagedorn, Claudia Tenney for Congress and Cabell Hobbs in his
3 official capacity as treasurer, and Claudia Tenney; and
4
5 11. Approve the appropriate letters.
6
7
8

9 Lisa J. Stevenson
10 Acting General Counsel
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16 Charles Kitcher
17 Acting Associate General Counsel for
18 Enforcement
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3.19.2020

Date

Peter G. Blumberg
Peter G. Blumberg
Acting Deputy Associate General Counsel
for Enforcement

Lynn Y. Tran
Lynn Y. Tran
Assistant General Counsel

Nicholas I. Bamman
Nicholas I. Bamman
Attorney

Attachments:

1. Scripts of Multicandidate Ads

1
2

MUR 7627 – SCRIPTS OF MULTICANDIDATE ADS

2

Balderson's "Difference" ¹		
Speaker	Time	Script
Voiceover	0:00-0:14	Pelosi and Strickland left Ohio broke and Ohioans unemployed. America is back on track. And now Nancy Pelosi and liberals in Congress want to eliminate the middle class tax cut and ruin our economy again.
	0:14-0:23	Strickland protégé Danny O'Connor agrees. Troy Balderson helped create half a million new jobs and cut taxes.
Balderson	0:23-0:28	My top priority will be to fight for good paying jobs and help Ohio's middle class.
Balderson	0:28-0:30	I'm Troy Balderson and I approve this message.

3

4 The NRCC and Balderson for Congress evenly split the costs of “Difference” by
5 allocating the first 14 seconds to the NRCC, the next 14 seconds to Balderson for Congress, and
6 splitting the compliance costs.²

7

Balderson's "No More" ³		
Speaker	Time	Script
Voiceover	0:00-0:04 0:04-0:14 0:14-0:24 0:24-0:28	Liberals in DC have a habit of lying about their records. O'Connor lied and inflated his resume, then lied about raising taxes. Now, O'Connor admits that after months of trying to hide it, he'd support Pelosi for speaker. And with liberal Nancy Pelosi as speaker, America will have open borders for gangs and drugs, socialized medicine and higher taxes – pushing us back into recession. Once a liar, always a liar. Danny O'Connor.
Balderson	0:28-0:30	I'm Troy Balderson and I approve this message.

8

8
9 The NRCC and Balderson for Congress evenly split the costs of “No More” by allocating
10 as follows:

11

- 0:00-0:04 – NRCC (4 seconds)
- 0:04-0:14 – Balderson for Congress (10 seconds)
- 0:14-0:24 – NRCC (10 seconds)
- 0:24-0:28 – Balderson for Congress (4 seconds)
- 0:28-0:30 – Rodney for Congress/NRCC (2 seconds)

17

¹ Balderson for Congress, *Difference* (July, 10, 2018), <https://www.youtube.com/watch?v=HzpEM43lnQ4>.

² NRCC Resp. at 13.

³ Balderson for Congress, *No More*, <https://host2.advertisinganalyticsllc.com/admo/#/viewer/5f17fd27-ebd2-4e7c-8e4a-265f7679b354/> (last visited Dec. 16, 2019).

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Tenney's "Stands With" ⁴		
Speaker	Time	Script
Tenney	0:00-0:02	I'm Claudia Tenney and I approve this message.
Voiceover	0:02-0:16 0:16-0:30	Nancy Pelosi and the Washington liberals' stance on illegal immigration is reckless and dangerous: Open borders, abolishing ICE, sanctuary cities, taxpayer benefits for illegal immigrants, putting families at risk. Yet Anthony Brindisi sides with Pelosi on illegal immigration. In Albany, Brindisi voted to give taxpayer benefits to illegal immigrants, but voted against ten bills to help our upstate veterans. Anthony Brindisi. Illegal immigrants before upstate New Yorkers.

1
 2 The NRCC and Claudia Tenney for Congress evenly split the costs by splitting the first 2
 3 seconds of compliance, allocating the next 14 seconds to the NRCC and the final 14 seconds to
 4 Claudia Tenney for Congress.⁵
 5

Tenney's "Dangerously Wrong on Illegal Immigration" ⁶		
Speaker	Time	Script
Voiceover	0:00-0:28	Nancy Pelosi and Washington liberals bankroll Anthony Brindisi's campaign because he'll support their radical immigration agenda: Sanctuary cities. Taxpayer benefits for illegals. Pelosi, Washington liberals, and Anthony Brindisi. Dangerously wrong on illegal immigration. 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.
Tenney	0:28-0:30	I'm Claudia Tenney and I approve this message.

6
 7 The NRCC asserts that the entire ad was evenly allocable to the NRCC and Claudia
 8 Tenney for Congress – *i.e.*, no single part of the ad is allocable to only one party.⁷

⁴ Claudia Tenney for Congress, *Stands With* (Aug. 1, 2018),
<https://www.youtube.com/watch?v=dG9dUVjFnpk>.

⁵ NRCC Resp. at 15.

⁶ Claudia Tenney for Congress, *Dangerously Wrong on Illegal Immigration* (Aug. 16, 2018),
<https://www.youtube.com/watch?v=hUrq7jOeUiY>.

⁷ NRCC Resp. at 16-17.

Tenney's "Jeopardize Medicare" ⁸		
Speaker	Time	Script
Voiceover	0:00-0:28	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. 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.
Tenney	0:28-0:30	I'm Claudia Tenney and I approve this message.

1
 2 The NRCC asserts that the entire ad was evenly allocable to the NRCC and Claudia
 3 Tenney for Congress – *i.e.*, no single part of the ad is allocable to only one party.⁹
 4

Tenney's "Fail or Succeed" ¹⁰		
Speaker	Time	Script
Voiceover	0:00-0:28	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. 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.
Tenney	0:28-0:30	I'm Claudia Tenney and I approve this message.

5
 6 The NRCC asserts that the entire ad was evenly allocable to the NRCC and Claudia
 7 Tenney for Congress – *i.e.*, no single part of the ad is allocable to only one party.¹¹

⁸ Claudia Tenney for Congress, *Jeopardize Medicare* (Aug. 29, 2018), <https://www.youtube.com/watch?v=PNOsWshzUb8>.

⁹ NRCC Resp. at 16-17.

¹⁰ Claudia Tenney for Congress, *Fail or Succeed* (July 22, 2018), <https://www.youtube.com/watch?v=2u-uaxpsO0I>.

¹¹ NRCC Resp. at 16-17.

Hagedorn's "Two Sides" ¹²		
Speaker	Time	Script
Hagedorn	0:00-0:02	I'm Jim Hagedorn and I approve this message.
Voiceover	0:00-0:28	Dan Feehan and Nancy Pelosi. Two sides of a very liberal coin. Feehan supporting 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.

¹
² The NRCC asserts that the entire ad was evenly allocable to the NRCC and Friends of
³ Hagedorn – *i.e.*, no single part of the ad is allocable to only one party.¹³

¹² Jim Hagedorn, *Two Sides* (Oct. 21, 2018), <https://www.youtube.com/watch?v=ZiTgV8eQzs>.

¹³ NRCC Resp. at 19.