

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL'S REPORT

MUR: 7756R

DATE COMPLAINT: July 6, 2020

DATE OF NOTIFICATION: July 8, 2020

RESPONSE RECEIVED: July 23, 2020

DATE ACTIVATED: April 22, 2021¹

EXPIRATION OF SOL: April 15, 2025

ELECTION CYCLE: 2020

COMPLAINANT:

Mark D. Smith

RESPONDENT:Americas PAC and Tom Donelson
in his official capacity as treasurer**RAD REFERRAL 20L-28**

DATE REFERRED: December 15, 2020

DATE OF NOTIFICATION: December 17, 2020

RESPONSE RECEIVED: January 25, 2021

DATE ACTIVATED: April 22, 2021

EXPIRATION OF SOL: April 15, 2025

ELECTION CYCLE: 2020

SOURCE:

Internally Generated

RESPONDENT:Americas PAC and Tom Donelson
in his official capacity as treasurer**RELEVANT STATUTES AND
REGULATIONS:**

52 U.S.C. § 30104(b)(4)(H)(iii), (6)(B)(iii)

52 U.S.C. § 30104(g)(2)

11 C.F.R. § 104.3(b)(1)(vii)

11 C.F.R. § 104.4(b)(2)

INTERNAL REPORTS CHECKED:

Disclosure Reports

¹ On August 21, 2020, MUR 7756 was initially transferred to the Alternative Dispute Resolution Office. However, on September 21, 2020, this matter was transferred back to the Office of General Counsel ("OGC")

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

These matters involve allegations that Americas PAC and Tom Donelson in his official capacity (the “Committee”) failed to timely file independent expenditure reports in 2020. In MUR 7756R, the Complaint alleges that beginning on May 13, 2020, the Committee ran a paid radio advertisement, attacking Democrats generally as well as attacking the Democratic incumbent for Iowa’s First Congressional District, Representative Abby Finkenauer, but failed to file a 48-Hour Report for the ad.² In response to the MUR 7756 Complaint, the Committee acknowledges that it failed to timely disclose the radio advertisements and amended its 2020 April Quarterly Report on July 13, 2020.³

Based on the disclosures made in the amended 2020 April Quarterly Report, the Reports Analysis Division (“RAD”) referred the Committee for failure to file three 48-Hour Reports to support six independent expenditures totaling \$620,832 that were disclosed in the Committee’s Amended 2020 April Quarterly Report.⁴ The referral includes the same reporting allegations at issue in the Complaint. In its Response, the Committee acknowledges that there were some errors in reporting its activities but contends that the reporting errors were made in “good faith,” caused in part by vendor error, and quickly remedied.⁵ The Committee therefore argues that further action by the Commission is not warranted.⁶

² Compl. (Jul. 6, 2020).

³ Resp. at 1, MUR 7756 (July 23, 2020) (“MUR 7756 Resp.”).

⁴ Referral at 1, RR 20L-28 (Americas PAC) (Dec. 15, 2020).

⁵ Referral Resp. at 1 (Jan. 25, 2021).

⁶ *Id.*

As discussed further below, the Committee did not timely and accurately disclose the amount spent and candidates supported or opposed in a number of its independent expenditures. And Commission precedent does not support the Committee's arguments that it should not be held responsible for its reporting violations. Accordingly, we recommend that the Commission: (1) open a Matter Under Review ("MUR") in connection with the RAD Referral and merge it into MUR 7756R; (2) find reason to believe that Americas PAC and Tom Donelson in his official capacity as treasurer violated 52 U.S.C. § 30104(g) and 11 C.F.R. § 104.4(b)(2) by failing to timely and accurately file independent expenditure reports; (3) authorize pre-probable cause conciliation; and (4) approve a proposed conciliation agreement.

II. FACTUAL BACKGROUND

Americas PAC is an independent expenditure-only committee that first registered with the Commission in 2014.⁷ Tom Donelson has been the Committee's treasurer since its inception.⁸

The Committee's original 2020 April Quarterly Report, filed on April 15, 2020, disclosed 19 independent expenditures totaling \$2,470,110.50, supporting or opposing three candidates: Joni K. Ernst, Tricia Zunker, and John James. On May 13, 2020, the Committee filed two 24-Hour Reports, disclosing 14 independent expenditures totaling \$2,220,190.50 supporting two candidates: Joni K. Ernst and John James. The following chart identifies the independent expenditures disclosed in the Committee's 2020 April Quarterly Report and 24-Hour Reports:

⁷ See Americas PAC, Statement of Organization (Mar. 19, 2014) (amended on Sept. 30, 2014, Sept. 2, 2016, and July 18, 2018).

⁸ *Id.*

Independent Expenditures Disclosed in Americas PAC Original April Quarterly Report (filed April 15, 2020)

Name of Payee	Date of Dissemination	Expenditure Amount	Candidate Supported/Opposed	Election	24-Hour Report Filed
Cumulus KHKI	5/13/2020	\$130,000.00	ERNST, JONI K	2020 General	5/13/2020
Cumulus Media - Flint	5/13/2020	\$63,000.00	JAMES, JOHN	2020 General	5/13/2020
Des Moines Radio Group	5/13/2020	\$185,000.00	ERNST, JONI K	2020 General	5/13/2020
iHeart Media - Cedar Rapids	5/13/2020	\$180,000.00	ERNST, JONI K	2020 General	5/13/2020
iHeart Media - Detroit	5/13/2020	\$330,998.50	JAMES, JOHN	2020 General	5/13/2020
iHeart Media - WMXD	5/13/2020	\$359,992.00	ERNST, JONI K	2020 General	5/13/2020
Katz Radio Group	5/13/2020	\$103,000.00	JAMES, JOHN	2020 General	5/13/2020
StateNet	5/13/2020	\$119,680.00	JAMES, JOHN	2020 General	5/13/2020
StateNet	5/13/2020	\$179,520.00	ERNST, JONI K	2020 General	5/13/2020
Townsquare - Flint	5/13/2020	\$90,000.00	JAMES, JOHN	2020 General	5/13/2020
Townsquare KOEL	5/13/2020	\$72,500.00	ERNST, JONI K	2020 General	5/13/2020
Townsquare Media - IA	5/13/2020	\$219,500.00	ERNST, JONI K	2020 General	5/13/2020
Townsquare Media - Lansing	5/13/2020	\$115,000.00	JAMES, JOHN	2020 General	5/13/2020
WSRW - Grand Rapids	5/13/2020	\$72,000.00	JAMES, JOHN	2020 General	5/13/2020
	TOTAL:	\$2,220,190.50			

On July 6, 2020, the Complaint was filed in this matter, alleging that Americas PAC failed to file a 48-Hour Report for a radio ad that ran beginning on May 13, 2020. After the Committee was notified of the Complaint, the Committee filed an Amended 2020 April Quarterly Report on July 13, 2020, which included a Schedule E disclosing the same dollar amount of expenditures as in the original 2020 April Quarterly, but increasing the number of independent expenditures disclosed from 14 to 24, and increasing the number of candidates supported or opposed from three to five, adding candidates Cindy Axne and Abby Finkenauer.⁹

⁹ Americas PAC, Amended 2020 April Quarterly Report (July 13, 2020).

In addition, on the same date, the Committee filed two 24-Hour reports for independent expenditures that were disseminated on May 13, 2020, but were incorrectly or not previously disclosed: (1) the Committee filed an amended a 24-Hour Report, which included five independent expenditures totaling \$260,840, made in opposition to Axne and Finkenauer, that had not been previously disclosed;¹⁰ (2) the Committee filed a second 24-Hour Report on the same day, which included a previously disclosed expenditure totaling \$359,992.00, but changed the name of the Federal candidate and office sought from Joni K. Ernst for the Iowa Senate General 2020 Election to John James for the Michigan Senate General 2020 Election.¹¹ The six independent expenditures, totaling \$620,832, are shown below.

Previously Undisclosed or Incorrectly Disclosed Independent Expenditures in Americas PAC Amended April Quarterly Report (filed July 13, 2020)

Name of Payee	Date of Dissemination	Expenditure Amount	Candidate Supported/Opposed	Election	24-Hour Report Filed
Cumulus KHKI	5/13/2020	\$41,600.00	Cindy Axne	2020 General	7/13/2020
Des Moines Radio Group	5/13/2020	\$59,200.00	Cindy Axne	2020 General	7/13/2020
iHeart Media - Cedar Rapids	5/13/2020	\$57,600.00	Abby Finkenauer	2020 General	7/13/2020
Townsquare KOEL	5/13/2020	\$23,200.00	Abby Finkenauer	2020 General	7/13/2020
Townsquare Media - IA	5/13/2020	\$79,240.00	Abby Finkenauer	2020 General	7/13/2020
i Heart Media - WMXD	5/13/2020	\$359,992.00	John James	2020 General	7/13/2020
	TOTAL:	\$620,832.00			

In September 2020, RAD sent the Committee two Requests for Additional Information (“RFAs”) referencing its Amended 2020 April Quarterly Report and noting that the Committee may have failed to file one or more 48-Hour Reports for independent expenditures.¹² According

¹⁰ Americas PAC, Amended 24-Hour Report of Independent Expenditures (July 13, 2021).

¹¹ Americas PAC, 24-Hour Report of Independent Expenditures (July 13, 2021).

¹² Americas PAC, RFAI at 1 (Sept. 13, 2020); Americas PAC, RFAI at 1 (Sept. 17, 2020).

to RAD, the Committee should have filed 48-Hour Reports for six independent expenditures totaling \$620,832.00, as described above.

The Committee's counsel contacted RAD to dispute the apparent violations noted in the RFAIs.¹³ The Committee also filed two FEC Form 99s in response to the RFAIs, noting that it had filed notices on May 13, 2020 and amended its report to correct a reporting error caused by a "last-minute change in media traffic."¹⁴

In response to the Complaint and Referral, the Committee states that it moved expeditiously to file amended reports after the Complaint was received.¹⁵ The Committee further attributed the reporting error to its media vendors splitting expenditures among different races without informing the Committee's counsel, but it did not explain what it meant by splitting expenditures or how that error occurred.¹⁶

III. LEGAL ANALYSIS

The Act requires committee treasurers to file reports of receipts and disbursements in accordance with the provisions of 52 U.S.C § 30104(b). This requirement includes reporting independent expenditures made by political committees other than authorized committees.¹⁷ Further, political committees that make or contract to make independent expenditures at any time during a calendar year — up to and including the 20th day before

¹³ The Committee asked why it was being penalized for filing 24-Hour Reports instead of 48-Hour Reports. The Committee is not being referred to OGC for filing 24-Hour instead of 48-Hour Reports but for filing new independent expenditures disclosing candidates and amounts not previously disclosed on the reports.

¹⁴ FEC Form 99, Americas PAC, Miscellaneous Report (Oct. 2, 2020).

¹⁵ MUR 7756 Resp. at 1; RAD Referral Resp. at 1.

¹⁶ Referral Resp. at 1

¹⁷ 52 U.S.C. § 30104(b)(4)(H)(iii); 11 C.F.R. § 104.3 (b)(l)(vii).

1 an election — must disclose the activity within 48 hours each time that the expenditure
2 aggregates \$10,000 or more.¹⁸ The report must be received by the Commission by 11:59 p.m.
3 on the second day following the date on which independent expenditures that aggregate \$10,000
4 or more are publicly distributed or disseminated.¹⁹ The information provided must include,
5 *inter alia*, the date, amount, and purpose of any such independent expenditure and a
6 statement which indicates whether such independent expenditure is in support of, or in
7 opposition to, a candidate, as well as the name and office sought by such candidate.²⁰

8 As identified in the referral, the available information indicates that the Committee failed
9 to file 48-Hour Reports to support six independent expenditures totaling \$620,832.00 in a timely
10 and accurate manner. Specifically, each independent expenditure aggregated \$10,000 or more
11 and was disseminated on May 13, 2020, up to and including the 20th day before the 2020 general
12 election. Accordingly, these expenditures were required to be reported to the Commission
13 within 48 hours of their dissemination, that is, by May 14, 2020. However, the Committee's
14 amended reports disclosed Federal candidates and offices sought that had not been previously
15 disclosed on earlier reports that it had filed. Further, those amendments were filed on July 13,
16 2020, nearly two months after the due date.

17 The Committee contends that of the \$620,832 in independent expenditures, it timely
18 disclosed \$359,992.00 and only corrected the name of the candidate by replacing Joni Ernst,
19 who ran for U.S. Senate in Iowa and was erroneously listed on the report, with John James, who

¹⁸ 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 104.4(b)(2).

¹⁹ 11 C.F.R. § 104.4(b)(2).

²⁰ 52 U.S.C. § 30104(g)(3)(B) (requiring 48-Hour Reports to include information required by section 30104(b)(6)(B)(iii)).

1 ran for U.S. Senate in Michigan. But given that the information regarding the name of the
2 candidate and the office sought was not timely disclosed, the Committee's reports did not
3 comply with 52 U.S.C. § 30104(g)(3)(B) and 11 C.F.R. § 104.4(b)(2), which require that for
4 each independent expenditure reported, the committee provide the name of the candidate
5 supported or opposed and office sought by such candidate.

6 The Committee also contends that the failure to timely and properly file the reports was
7 due to its media vendors splitting the expenditures among various races without informing the
8 Committee's counsel. However, the Committee has provided no information to support its
9 assertion that the vendor acted without its knowledge, does not explain how such an error
10 occurred, or how that error caused the Committee to file untimely and inaccurate reports.
11 Further, the Commission has not considered vendor error to be a valid exculpatory or mitigating
12 factor in reporting matters involving section 30104.²¹ We, therefore, recommend that the
13 Commission find reason to believe that the Committee and its treasurer violated 52 U.S.C.
14 § 30104(g) and 11 C.F.R. § 104.4(b)(2).

²¹ See Factual & Legal Analysis at 1, MUR 7285 (Workers' Voice) (finding committee responsible for failing to file the necessary 24- and 48-hour reports even though it argued vendors and in-kind contributors failed to provide timely data); Factual & Legal Analysis at 1, 3, MUR 6568 (Heath Shuler for Congress) (finding that Committee failed to report disbursements caused by vendor's error); and Factual & Legal Analysis at 5-6, MUR 6300 (Republican Party of Virginia) (finding RPV responsible for its vendor's failure to timely forward contributions and RPV's consequential reporting errors).

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V. RECOMMENDATIONS

1. Open a MUR for RAD Referral 20L-28;
2. Merge the MUR created for RR 20L-28 into MUR 7756R;
3. Find reason to believe that Americas PAC and Tom Donelson in his official capacity as treasurer violated 52 U.S.C. § 30104(g) and 11 C.F.R. § 104.4(b)(2);
4. Enter into conciliation with Americas PAC and Tom Donelson in his official capacity prior to a finding of probable cause to believe;
5. Approve the attached Factual and Legal Analysis;
6. Approve the attached Conciliation Agreement; and

1 7. Approve the appropriate letter.

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3
4 Lisa J. Stevenson
5 Acting General Counsel

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7
8 Charles Kitcher
9 Associate General Counsel for Enforcement

10
11
12 7/21/2021

13 _____
14 Date

15 *Stephen Gura by JH*
16 _____
17 Stephen A. Gura
18 Deputy Associate General Counsel for Enforcement

19 *Jin Lee*
20 _____
21 Jin Lee
22 Acting Assistant General Counsel

23
24 *Dominique Dillenseger*
25 _____
26 Dominique Dillenseger
27 Attorney

28
29 Attachments:

30 1. Factual and Legal Analysis
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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Americas PAC MUR
and Tom Donelson in his official capacity
as treasurer

I. INTRODUCTION

These matters involve allegations that Americas PAC and Tom Donelson in his official capacity (the “Committee”) failed to timely file independent expenditure reports in 2020. In MUR 7756R, the Complaint alleges that beginning on May 13, 2020, the Committee ran a paid radio advertisement, attacking Democrats generally as well as attacking the Democratic incumbent for Iowa’s First Congressional District, Representative Abby Finkenauer, but failed to file a 48-Hour Report for the ad.¹ In response to the MUR 7756 Complaint, the Committee acknowledges that it failed to timely disclose the radio advertisements and amended its 2020 April Quarterly Report on July 13, 2020.²

Based on the disclosures made in the amended 2020 April Quarterly Report, the Reports Analysis Division (“RAD”) referred the Committee for failure to file three 48-Hour Reports to support six independent expenditures totaling \$620,832 that were disclosed in the Committee’s Amended 2020 April Quarterly Report.³ The referral includes the same reporting allegations at issue in the Complaint. In its Response, the Committee acknowledges that there were some errors in reporting its activities but contends that the reporting errors were made in “good faith,”

¹ Compl. (Jul. 6, 2020).

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³ Referral at 1, RR 20L-28 (Americas PAC) (Dec. 15, 2020).

caused in part by vendor error, and quickly remedied.⁴ The Committee therefore argues that further action by the Commission is not warranted.⁵

As discussed further below, the Committee did not timely and accurately disclose the amount spent and candidates supported or opposed in a number of its independent expenditures. And Commission precedent does not support the Committee's arguments that it should not be held responsible for its reporting violations. Accordingly, the Commission finds reason to believe that Americas PAC and Tom Donelson in his official capacity as treasurer violated 52 U.S.C. § 30104(g) and 11 C.F.R. § 104.4(b)(2) by failing to timely and accurately file independent expenditure reports.

II. FACTUAL BACKGROUND

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⁴ Referral Resp. at 1 (Jan. 25, 2021).

⁵ *Id.*

⁶ *See* Americas PAC, Statement of Organization (Mar. 19, 2014) (amended on Sept. 30, 2014, Sept. 2, 2016, and July 18, 2018).

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In September 2020, RAD sent the Committee two Requests for Additional Information (“RFAs”) referencing its Amended 2020 April Quarterly Report and noting that the Committee may have failed to file one or more 48-Hour Reports for independent expenditures.¹¹ According

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In response to the Complaint and Referral, the Committee states that it moved expeditiously to file amended reports after the Complaint was received.¹³ The Committee further attributed the reporting error to its media vendors splitting expenditures among different races without informing the Committee's counsel, but it did not explain what it meant by splitting expenditures or how that error occurred.¹⁴

III. LEGAL ANALYSIS

The Act requires committee treasurers to file reports of receipts and disbursements in accordance with the provisions of 52 U.S.C § 30104(b). This requirement includes reporting independent expenditures made by political committees other than authorized committees.¹⁵ Further, political committees that make or contract to make independent expenditures at any time during a calendar year — up to and including the 20th day before an election — must disclose the activity within 48 hours each time that the expenditure aggregates \$10,000 or more.¹⁶ The report must be received by the Commission by 11:59 p.m.

¹² FEC Form 99, Americas PAC, Miscellaneous Report (Oct. 2, 2020).

¹³ MUR 7756R Resp. at 1; Referral Resp. at 1.

¹⁴ Referral Resp. at 1

¹⁵ 52 U.S.C. § 30104(b)(4)(H)(iii); 11 C.F.R. § 104.3(b)(I)(vii).

¹⁶ 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 104.4(b)(2).

on the second day following the date on which independent expenditures that aggregate \$10,000 or more are publicly distributed or disseminated.¹⁷ The information provided must include, *inter alia*, the date, amount, and purpose of any such independent expenditure and a statement which indicates whether such independent expenditure is in support of, or in opposition to, a candidate, as well as the name and office sought by such candidate.¹⁸

As identified in the referral, the available information indicates that the Committee failed to file 48-Hour reports to support six independent expenditures totaling \$620,832.00 in a timely and accurate manner. Specifically, each independent expenditure aggregated \$10,000 or more and was disseminated on May 13, 2020, up to and including the 20th day before the 2020 general election. Accordingly, these expenditures were required to be reported to the Commission within 48 hours of their dissemination, that is, by May 14, 2020. However, the Committee's amended reports disclosed Federal candidates and offices sought that had not been previously disclosed on earlier reports that it had filed. Further, those amendments were filed on July 13, 2020, nearly two months after the due date.

The Committee contends that of the \$620,832 in independent expenditures, it timely disclosed \$359,992.00 and only corrected the name of the candidate by replacing Joni Ernst, who ran for U.S. Senate in Iowa and was erroneously listed on the report, with John James, who ran for U.S. Senate in Michigan. But given that the information regarding the name of the candidate and the office sought was not timely disclosed, the Committee's reports did not comply with 52 U.S.C. § 30104(g)(3)(B) and 11 C.F.R. § 104.4(b)(2), which require that for

¹⁷ 11 C.F.R. § 104.4(b)(2).

¹⁸ 52 U.S.C. § 30104(g)(3)(B) (requiring 48-Hour Reports to include information required by section 30104(b)(6)(B)(iii)).

1 each independent expenditure reported, the committee provide the name of the candidate
2 supported or opposed and office sought by such candidate.

3 The Committee also contends that the failure to timely and properly file the reports was
4 due to its media vendors splitting the expenditures among various races without informing the
5 Committee's counsel. However, the Committee has provided no information to support its
6 assertion that the vendor acted without its knowledge, does not explain how such an error
7 occurred, or how that error caused the Committee to file untimely and inaccurate reports.

8 Further, the Commission has not generally considered vendor error to be a valid exculpatory or
9 mitigating factor in reporting matters involving section 30104.¹⁹ Therefore, the Commission
10 finds reason to believe that Americas PAC and Tom Donelson in his official capacity as
11 treasurer violated 52 U.S.C. § 30104(g) and 11 C.F.R. § 104.4(b)(2).

¹⁹ See Factual & Legal Analysis at 1, MUR 7285 (Workers' Voice) (finding committee responsible for failing to file the necessary 24- and 48-hour reports even though it argued vendors and in-kind contributors failed to provide timely data); Factual & Legal Analysis at 1, 3, MUR 6568 (Heath Shuler for Congress) (finding that Committee failed to report disbursements caused by vendor's error); and Factual & Legal Analysis at 5-6, MUR 6300 (Republican Party of Virginia) (finding RPV responsible for its vendor's failure to timely forward contributions and RPV's consequential reporting errors).