

1 **FEDERAL ELECTION COMMISSION**
2
3 **FIRST GENERAL COUNSEL'S REPORT**
4

5 **MUR: 7987**

6 DATE RECEIVED: Apr. 22, 2022

7 DATE OF NOTIFICATION: Apr. 26, 2022

8 DATE OF LAST RESPONSE: May 18, 2022

9 DATE ACTIVATED: Aug. 9, 2022

10 EARLIEST EXPIRATION OF SOL: Apr. 19, 2027

11 LATEST EXPIRATION OF SOL: Apr. 20, 2027

12 ELECTION CYCLE: 2022

13
14
15 **COMPLAINANT:** William J. Palatucci, Kean for Congress, Inc.

16
17 **RESPONDENT:** Phil Rizzo for Congress and David Satterfield
18 in his official capacity as treasurer
19

20 **RELEVANT STATUTE**
21 **AND REGULATIONS:**

22 52 U.S.C. § 30120(a)

23 11 C.F.R. § 100.26

24 11 C.F.R. § 100.28

25 11 C.F.R. § 110.11

26 **INTERNAL REPORTS CHECKED:** Disclosure Reports

27
28 **FEDERAL AGENCIES CHECKED:** None
29

30 **I. INTRODUCTION**

31 The Complaint in this matter alleges that Phil Rizzo for Congress and David Satterfield in
32 his official capacity as treasurer (the "Committee") violated the Federal Election Campaign Act
33 of 1971, as amended (the "Act"), by failing to include required disclaimers on robocalls.

34 Respondent acknowledges that the Committee was responsible for the calls and that the calls did
35 not include a disclaimer; however, it requests that the Commission dismiss the matter based on

1 its assertions that the lack of disclaimer was an “isolated incident” due to the error of a third-
2 party vendor and that the Committee did not misrepresent or conceal its sponsorship of the call.¹

3 In the present matter, there is no dispute that a violation of the Act occurred. Considering
4 that it was not apparent who paid for the call on the basis of the call itself, and that the call
5 appears to have caused confusion among recipients, dismissal of this matter would be contrary to
6 Commission precedent. Accordingly, we recommend that the Commission find reason to believe
7 that the Committee violated 52 U.S.C. § 30120 and 11 C.F.R. § 110.11 by failing to include
8 required disclaimers on public communications. In addition, we recommend that the
9 Commission enter into pre-probable cause conciliation with the Committee and approve the
10 attached proposed conciliation agreement

11 **II. FACTUAL BACKGROUND**

12 Phil Rizzo was a candidate for New Jersey’s seventh congressional district in the 2022
13 primary election.² Phil Rizzo for Congress is his principal campaign committee.³

14 The Complainant in this matter is counsel to Kean for Congress, Inc., the committee of
15 Tom Kean, Jr., another candidate who ran in the same primary election.⁴ The Complaint alleges
16 that, between the hours of approximately 11:00 p.m. on April 19, 2022, and 12:30 a.m. on
17 April 20, 2022, the Rizzo for Congress campaign made robocalls to likely Republican voters in
18 the New Jersey primary consisting of an attack ad against Kean that directed voters to visit the

¹ Resp. at 1-2 (May 18, 2022).

² Phil Rizzo, Statement of Candidacy (Jan. 12, 2022).

³ Phil Rizzo for Congress, Amended Statement of Organization (Jan. 12, 2022).

⁴ Compl. at 2 (Apr. 22, 2022).

1 website “RealTomKean.com.”⁵ The Complaint includes an audio file of the call that appears to
2 begin part way into the call. We have transcribed the audio file as follows:

3 . . . energy policies, weakening our election laws, allowing biological men in
4 women’s private spaces. Tom Kean wants to allow our kids to be indoctrinated.
5 Tom Kean wants the price of homes and cars to skyrocket. Tom Kean wants to
6 make our elections less secure. Tom Kean wants to put the safety of women and
7 girls at risk. Visit RealTomKean.com to learn more.⁶

8 The Complaint alleges that “the obvious intention of the late-night call is to annoy and confuse
9 potential primary voters or to dissuade them from even participating in the June election.”⁷

10 Further, the Complainant alleges that the voice in the call was that of Phil Rizzo, but that the call
11 did not identify the caller or include any disclaimer stating who paid for it.⁸

12 In support of its allegations, the Complaint attached: (1) a partial audio file of the call;⁹
13 (2) a screenshot of an automated response allegedly sent by the Committee when someone called
14 the phone number associated with the robocall;¹⁰ and (3) emails received by the Kean campaign
15 from individuals complaining about the late night calls.¹¹ Several of the emails provided
16 indicate that the individuals receiving the call may have misunderstood, believing the call to
17 have been made by the Kean campaign rather than one of its electoral opponents.¹²

⁵ *Id.* at 1.

⁶ *Id.*, Attach. 1.

⁷ Compl. at 1.

⁸ *Id.*

⁹ *Id.*, Attach. 1.

¹⁰ *Id.*, Attach. 2.

¹¹ *Id.*, Attach. 3.

¹² *Id.* (emails sent to the Kean campaign under the impression that the Kean campaign, rather than the Rizzo campaign was responsible for the call., e.g. “At 11:17 pm on Tuesday, April 19th your automated messages called my home” and “I received a recorded phone call tonight from your campaign at 11:30 pm”).

1 Respondent acknowledges that the calls were sponsored by the Committee and that they
2 did not contain a disclaimer.¹³ Nonetheless, Respondent urges the Commission to exercise
3 prosecutorial discretion and dismiss the allegations.¹⁴ Respondent states that the call script sent
4 to the vendor contained the necessary disclaimer, but that the vendor failed to include the
5 disclaimer in the recording, “which was not presented to the Rizzo [c]ampaign for review prior
6 to its dissemination.”¹⁵

7 Respondent states that the Committee “has since permanently terminated the use of the
8 vendor’s call services” but provides no information as to whether this termination occurred
9 before or after the filing of the complaint, who the vendor was, or whether the vendor continued
10 to be retained for other services.¹⁶

11 Respondent also states that the Committee “never misrepresented or affirmatively
12 concealed its sponsorship of the call.”¹⁷ Respondent notes that “the phone number associated
13 with the call was easily traceable to the Rizzo [c]ampaign” and that listeners were directed to
14 www.RealTomKean.com, which included a disclaimer disclosing that it is “Paid for by Phil
15 Rizzo for Congress.”¹⁸

¹³ Resp. at 1.

¹⁴ *Id.*

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 1.

¹⁷ *Id.* at 2.

¹⁸ *Id.* Based on web archives it appears that www.RealTomKean.com did include a disclaimer in a small box at the bottom of the page containing the text: “Paid for by Phil Rizzo for Congress.” See THE REAL TOM KEAN (Apr. 4, 2022), <https://www.RealTomKean.com> [<https://web.archive.org/web/20220404185122/https://www.RealTomKean.com/>].

1 **III. LEGAL ANALYSIS**

2 The Act requires disclaimers on all public communications made by a political committee
3 and on public communications by any person that expressly advocate the election or defeat of a
4 clearly identified federal candidate.¹⁹ “Public communications” include “telephone bank[s] to
5 the general public,” which are more than 500 identical or substantially similar telephone calls
6 within a 30-day period,²⁰ and “any other form of general public political advertising.”²¹ For
7 communications paid for and authorized by a candidate, authorized committee of a candidate, or
8 an agent of either, the disclaimer must clearly state that the communication has been paid for by
9 the authorized committee.²² In the case of telephone calls, Commission regulations require that
10 the disclaimer “be presented in a clear and conspicuous manner, to give the . . . listener adequate
11 notice of the identity of the person or political committee that paid for” the communication.²³
12 Further, a disclaimer is not clear or conspicuous if it is difficult to hear or if the placement is
13 easily overlooked.²⁴

14 In the present matter, Respondent does not dispute that the robocall in question should
15 have, but did not, include a disclaimer as required by the Act and Commission regulations.²⁵
16 While we do not know the precise number of calls placed, the Response specifically
17 acknowledges that the robocall described in the Complaint constituted a public communication.²⁶

¹⁹ 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a).

²⁰ 52 U.S.C. § 30101(22), (24); 11 C.F.R. §§ 100.26, 100.28.

²¹ 52 U.S.C. § 30101(22); 11 C.F.R. § 100.26.

²² 11 C.F.R. § 110.11(b)(1).

²³ *Id.* § 110.11(c)(1).

²⁴ *Id.*

²⁵ Resp. at 1

²⁶ *Id.*

1 Moreover, even if there were not 500 calls in the present matter to qualify as a telephone bank
2 under the definition of public communication, under Commission precedent, the robocalls would
3 also qualify as a form of general public political advertising requiring disclaimers.²⁷

4 Despite the clear violation of the Act and Commission regulations, Respondent argues
5 that the Commission should exercise prosecutorial discretion in this instance. While it is true
6 that the Commission has dismissed matters involving disclaimers with technical errors or
7 omissions, it has done so when there was adequate information contained in the disclaimer to
8 identify the payor.²⁸ Such an exercise of discretion here would be inconsistent with how the
9 Commission has treated similarly situated respondents in past matters involving omitted
10 disclaimers and in some matters involving partial disclaimers. For instance, in MUR 6659
11 (Murray Energy Corp.) the Commission found reason to believe and conciliated with
12 respondents regarding violations involving their purchase and distribution of signs that stated
13 “STOP the WAR on COAL — FIRE OBAMA” but failed to include any disclaimer identifying
14 the payor or whether it was authorized by a candidate.²⁹ Moreover, in MURs 7190, 7208
15 (Alaska Republican Party) the Commission found reason to believe and conciliated with
16 respondents even where the mailers included partial disclaimers identifying the payor but did not

²⁷ The Commission has found that robocalls “function like a ‘telephone bank,’ even if there was no use of live operators” and qualify as public communications either as a telephone bank to the general public or otherwise as “a form of general public political advertising to which the disclaimer requirement would apply.” *See* Factual & Legal Analysis (“F&LA”) at 3-4, MURs 5401, 5422 (Texans for Henry Cuellar).

²⁸ *See e.g.*, MUR 6785 (Kwasman for Congress) (dismissing allegation because campaign materials at issue contained partial disclaimer identifying Kwasman for Congress as the payor and it was unlikely the public was misled about whether the candidate authorized the communication); MUR 6278 (Committee to Elect Joyce B. Segers for Congress) (dismissing allegations that campaign websites and flyers lacked requisite disclaimers where partial payor information in the form of contact information was included).

²⁹ F&LA at 4-6, MUR 6659 (Murray Energy Corp.); Conciliation Agreement ¶ V.1, MUR 6659 (Murray Energy Corp.).

1 state whether the mailing was authorized by the candidate.³⁰ Here, the robocalls included no
2 disclaimer at all.

3 Respondent further argues that the allegation should be dismissed because Respondent
4 did not misrepresent or conceal its sponsorship of the call, noting that the phone number
5 associated with the call was traceable to the Committee and the call directed listeners to a
6 website with a disclaimer.³¹ Here, we have no information suggesting that the call itself
7 identified the payor, and several recipients were confused about the source of the call, some even
8 believing that Rizzo's opponent, Tom Kean, was responsible for the call.³² Such confusion
9 counsels in favor of enforcement rather than a dismissal as a matter of prosecutorial discretion.
10 Moreover, Respondent's assertions that the phone number was "easily traceable" to the
11 Committee and that the referenced website contained a disclaimer do not cure the violation as it
12 would require the listener to take affirmative steps to uncover the source.³³ Placing that
13 responsibility on the receiver of the communication would be contrary to the requirement that the
14 disclaimer be "clear and conspicuous."³⁴ The Act requires an affirmative disclosure; a finding of
15 a violation of the Act is not avoided simply because there was no affirmative misrepresentation
16 or concealment of the source of the communication.³⁵

³⁰ F&LA, at 4-6, MURs 7190 & 7208 (Alaska Republican Party); Conciliation Agreement ¶ V, MURs 7190 & 7208 (Alaska Republican Party).

³¹ Resp. at 2.

³² See Compl., Attach. 3; *supra* note 12.

³³ Resp. at 2.

³⁴ 11 C.F.R. § 110.11(c)(1).

³⁵ 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a); see *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected."); *Citizens United v. FEC*, 558 U.S. 310, 368 (2010) (holding that disclaimers "provide the electorate with information and insure that the voters are fully informed about the person or group who is speaking," and stating that identifying the sources of advertising enables people "to evaluate the arguments to which they are being subjected") (internal citations and alterations removed).

1 Respondent also points to MUR 6690 (Sobhani for Congress) and MUR 6846 (DeFazio
2 for Congress) for the premise that the Commission should exercise discretion when the vendor
3 mistakenly did not include the disclaimer.³⁶ Each of these matters is distinct from the
4 circumstances presented here. In MUR 6690, a portion of the calls did not contain a disclaimer,
5 but the Committee took remedial action by contacting the vendor and requiring that a disclaimer
6 be placed on all future calls.³⁷ Similarly, in MUR 6846, some of the billboards posted by
7 DeFazio for Congress included disclaimers and some did not.³⁸ In that matter, the respondent
8 provided the Commission with emails from the vendor apologizing for the error and a
9 declaration from the candidate stating that the campaign contacted the respective vendors as soon
10 as it learned of the omitted disclaimers, and they were immediately corrected.³⁹ By contrast, in
11 the present matter, while Respondent discontinued the use of the vendor's call services, there is
12 no information suggesting it corrected the error amid the run of calls. Further, neither
13 MUR 6690 nor MUR 6846 included evidence of actual voter confusion as in this matter.

14 Finally, Respondent's argument that the allegation should be dismissed because it was
15 "an isolated infraction" and the Committee's "public communications have consistently

³⁶ Respondent also cites to several other matters that were dismissed through the Enforcement Priority System ("EPS"). Resp. at 1. Unlike those matters, the present matter was not rated low enough to qualify for an EPS dismissal, and thus those matters are not analogous for a variety of reasons; further, in each instance, the respondents subject to the EPS dismissal also undertook efforts to remedy the lack of a disclaimer. *See id.* (citing Gen. Counsel's Rpt., MUR 7489 (Diehl for U.S. Senate) (EPS Dismissal) (dismissing allegations where respondent failed to include disclaimers on yard signs and a bus, but purchased stickers with a proper disclaimer and added them to over 1,000 yard signs and added a disclaimer to the bus); Gen. Counsel's Rpt., MUR 7644 (Matt Prosch for Congress) (EPS Dismissal) (dismissing allegations where respondent destroyed or returned signs lacking disclaimers and obtained corrected signs); Gen. Counsel's Rpt., MUR 7046 (Matthew Evans for Congress) (EPS Dismissal) (dismissing allegations where the respondent's website initially did not include a disclaimer, but the respondent added a disclaimer soon after they became aware of the issue)).

³⁷ F&LA at 3-4, MUR 6690 (Sobhani for Congress).

³⁸ F&LA at 3, 6-7, MUR 6846 (Defazio for Congress).

³⁹ *Id.*

1 contained clear, conspicuous and compliant disclaimers,”⁴⁰ is similarly unpersuasive. The
2 communication in question was not a single yard sign or even a single billboard among a string
3 of billboards that otherwise included disclaimers;⁴¹ it was, by the Committee’s admission,
4 hundreds of robocalls, which confused numerous listeners.

5 Accordingly, we recommend that the Commission find reason to believe that the
6 Committee violated 52 U.S.C. § 30120 and 11 C.F.R. § 110.11(b) by failing to include required
7 disclaimers on public communications.

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⁴⁰ Resp. at 2.

⁴¹ The lone matter cited by Respondent to support their argument for dismissal based on it being an isolated event is an EPS dismissal matter that involved an independent-expenditure-only political committee that used mobile billboards and only one out of the three uses of these billboard did not contain the required disclaimer. *See id.* (citing Gen. Counsel’s Rpt., MUR 7289 (Take Back the Tenth) (EPS Dismissal)).

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4 IV. RECOMMENDATIONS

5 1. Find reason to believe that Phil Rizzo for Congress and David Satterfield in his
6 official capacity as treasurer violated 52 U.S.C. § 30120 and 11 C.F.R. § 110.11
7 by failing to include required disclaimers on public communications;

8 2. Approve the attached Factual and Legal Analysis;

9 3. Enter into conciliation with Phil Rizzo for Congress and David Satterfield in his
10 official capacity as treasurer prior to a finding of probable cause to believe;

11 4. Approve the attached conciliation agreement; and

12

1 5. Approve the appropriate letter.

2 Lisa J. Stevenson
3 Acting General Counsel

4
5 Charles Kitcher
6 Associate General Counsel for Enforcement

7
8
9 Nov. 3, 2022
10 _____

11 *Jin Lee*
12 _____
13 Jin Lee
14 Deputy Associate General Counsel
15 for Enforcement

16 *Ana J. Peña-Wallace*
17 _____
18 Ana J. Peña-Wallace
19 Assistant General Counsel

20 *Nicholas O. Mueller* /by APW
21 _____
22 Nicholas O. Mueller
23 Attorney

24 Attachments:
25 1. Factual and Legal Analysis

26

FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: Phil Rizzo for Congress and David Satterfield
in his official capacity as treasurer

MUR 7987**I. INTRODUCTION**

This matter arises from a Complaint alleging that Phil Rizzo for Congress and David Satterfield in his official capacity as treasurer (the “Committee”) violated the Federal Election Campaign Act of 1971, as amended (the “Act”), by failing to include required disclaimers on robocalls. Respondent acknowledges that the Committee was responsible for the calls and that the calls did not include a disclaimer; however, it requests that the Commission dismiss the matter based on its assertions that the lack of disclaimer was an “isolated incident” due to the error of a third-party vendor and that the Committee did not misrepresent or conceal its sponsorship of the call.¹

In the present matter, there is no dispute that a violation of the Act occurred. Considering that it was not apparent who paid for the call on the basis of the call itself, and that the call appears to have caused confusion among recipients, dismissal of this matter would be contrary to Commission precedent. Accordingly, the Commission finds reason to believe that the Committee violated 52 U.S.C. § 30120 and 11 C.F.R. § 110.11 by failing to include required disclaimers on public communications.

¹ Resp. at 1-2 (May 18, 2022).

1 **II. FACTUAL BACKGROUND**

2 Phil Rizzo was a candidate for New Jersey’s seventh congressional district in the 2022
3 primary election.² Phil Rizzo for Congress is his principal campaign committee.³

4 The Complainant in this matter is counsel to Kean for Congress, Inc., the committee of
5 Tom Kean, Jr., another candidate who ran in the same primary election.⁴ The Complaint alleges
6 that, between the hours of approximately 11:00 p.m. on April 19, 2022, and 12:30 a.m. on
7 April 20, 2022, the Rizzo for Congress campaign made robocalls to likely Republican voters in
8 the New Jersey primary consisting of an attack ad against Kean that directed voters to visit the
9 website “RealTomKean.com.”⁵ The Complaint includes an audio file of the call that appears to
10 begin part way into the call. We have transcribed the audio file as follows:

11 . . . energy policies, weakening our election laws, allowing
12 biological men in women’s private spaces. Tom Kean wants to
13 allow our kids to be indoctrinated. Tom Kean wants the price of
14 homes and cars to skyrocket. Tom Kean wants to make our
15 elections less secure. Tom Kean wants to put the safety of women
16 and girls at risk. Visit RealTomKean.com to learn more.⁶

17 The Complaint alleges that “the obvious intention of the late-night call is to annoy and confuse
18 potential primary voters or to dissuade them from even participating in the June election.”⁷

19 Further, the Complainant alleges that the voice in the call was that of Phil Rizzo, but that the call
20 did not identify the caller or include any disclaimer stating who paid for it.⁸

2 Phil Rizzo, Statement of Candidacy (Jan. 12, 2022).

3 Phil Rizzo for Congress, Amended Statement of Organization (Jan. 12, 2022).

4 Compl. at 2 (Apr. 22, 2022).

5 *Id.* at 1.

6 *Id.*, Attach. 1.

7 Compl. at 1.

8 *Id.*

1 In support of its allegations, the Complaint attached: (1) a partial audio file of the call;⁹
2 (2) a screenshot of an automated response allegedly sent by the Committee when someone called
3 the phone number associated with the robocall;¹⁰ and (3) emails received by the Kean campaign
4 from individuals complaining about the late night calls.¹¹ Several of the emails provided
5 indicate that the individuals receiving the call may have misunderstood, believing the call to
6 have been made by the Kean campaign rather than one of its electoral opponents.¹²

7 Respondent acknowledges that the calls were sponsored by the Committee and that they
8 did not contain a disclaimer.¹³ Nonetheless, Respondent urges the Commission to exercise
9 prosecutorial discretion and dismiss the allegations.¹⁴ Respondent states that the call script sent
10 to the vendor contained the necessary disclaimer, but that the vendor failed to include the
11 disclaimer in the recording, “which was not presented to the Rizzo [c]ampaign for review prior
12 to its dissemination.”¹⁵

13 Respondent states that the Committee “has since permanently terminated the use of the
14 vendor’s call services” but provides no information as to whether this termination occurred
15 before or after the filing of the complaint, who the vendor was, or whether the vendor continued
16 to be retained for other services.¹⁶

⁹ *Id.*, Attach. 1.

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¹² *Id.* (emails sent to the Kean campaign under the impression that the Kean campaign, rather than the Rizzo campaign was responsible for the call., *e.g.* “At 11:17 pm on Tuesday, April 19th your automated messages called my home” and “I received a recorded phone call tonight from your campaign at 11:30 pm”).

¹³ Resp. at 1.

¹⁴ *Id.*

¹⁵ *Id.* at 2.

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1 Respondent also states that the Committee “never misrepresented or affirmatively
2 concealed its sponsorship of the call.”¹⁷ Respondent notes that “the phone number associated
3 with the call was easily traceable to the Rizzo [c]ampaign” and that listeners were directed to
4 www.RealTomKean.com, which included a disclaimer disclosing that it is “Paid for by Phil
5 Rizzo for Congress.”¹⁸

6 III. LEGAL ANALYSIS

7 The Act requires disclaimers on all public communications made by a political committee
8 and on public communications by any person that expressly advocate the election or defeat of a
9 clearly identified federal candidate.¹⁹ “Public communications” include “telephone bank[s] to
10 the general public,” which are more than 500 identical or substantially similar telephone calls
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12 communications paid for and authorized by a candidate, authorized committee of a candidate, or
13 an agent of either, the disclaimer must clearly state that the communication has been paid for by
14 the authorized committee.²² In the case of telephone calls, Commission regulations require that
15 the disclaimer “be presented in a clear and conspicuous manner, to give the . . . listener adequate
16 notice of the identity of the person or political committee that paid for” the communication.²³

¹⁷ *Id.* at 2.

¹⁸ *Id.* Based on web archives it appears that www.RealTomKean.com did include a disclaimer in a small box at the bottom of the page containing the text: “Paid for by Phil Rizzo for Congress.” See THE REAL TOM KEAN (Apr. 4, 2022), <https://www.RealTomKean.com> [<https://web.archive.org/web/20220404185122/https://www.RealTomKean.com/>].

¹⁹ 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a).

²⁰ 52 U.S.C. § 30101(22), (24); 11 C.F.R. §§ 100.26, 100.28.

²¹ 52 U.S.C. § 30101(22); 11 C.F.R. § 100.26.

²² 11 C.F.R. § 110.11(b)(1).

²³ *Id.* § 110.11(c)(1).

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1 Further, a disclaimer is not clear or conspicuous if it is difficult to hear or if the placement is
2 easily overlooked.²⁴

3 In the present matter, Respondent does not dispute that the robocall in question should
4 have, but did not, include a disclaimer as required by the Act and Commission regulations.²⁵
5 While we do not know the precise number of calls placed, the Response specifically
6 acknowledges that the robocall described in the Complaint constituted a public communication.²⁶
7 Moreover, even if there were not 500 calls in the present matter to qualify as a telephone bank
8 under the definition of public communication, under Commission precedent, the robocalls would
9 also qualify as a form of general public political advertising requiring disclaimers.²⁷

10 Despite the clear violation of the Act and Commission regulations, Respondent argues
11 that the Commission should exercise prosecutorial discretion in this instance. While it is true
12 that the Commission has dismissed matters involving disclaimers with technical errors or
13 omissions, it has done so when there was adequate information contained in the disclaimer to
14 identify the payor.²⁸ Such an exercise of discretion here would be inconsistent with how the
15 Commission has treated similarly situated respondents in past matters involving omitted
16 disclaimers and in some matters involving partial disclaimers. For instance, in MUR 6659

²⁴ *Id.*

²⁵ Resp. at 1

²⁶ *Id.*

²⁷ The Commission has found that robocalls “function like a ‘telephone bank,’ even if there was no use of live operators” and qualify as public communications either as a telephone bank to the general public or otherwise as “a form of general public political advertising to which the disclaimer requirement would apply.” *See* Factual & Legal Analysis (“F&LA”) at 3-4, MURs 5401, 5422 (Texans for Henry Cuellar).

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1 (Murray Energy Corp.) the Commission found reason to believe and conciliated with
2 respondents regarding violations involving their purchase and distribution of signs that stated
3 “STOP the WAR on COAL — FIRE OBAMA” but failed to include any disclaimer identifying
4 the payor or whether it was authorized by a candidate.²⁹ Moreover, in MURs 7190, 7208
5 (Alaska Republican Party) the Commission found reason to believe and conciliated with
6 respondents even where the mailers included partial disclaimers identifying the payor but did not
7 state whether the mailing was authorized by the candidate.³⁰ Here, the robocalls included no
8 disclaimer at all.

9 Respondent further argues that the allegation should be dismissed because Respondent
10 did not misrepresent or conceal its sponsorship of the call, noting that the phone number
11 associated with the call was traceable to the Committee and the call directed listeners to a
12 website with a disclaimer.³¹ Here, we have no information suggesting that the call itself
13 identified the payor, and several recipients were confused about the source of the call, some even
14 believing that Rizzo’s opponent, Tom Kean, was responsible for the call.³² Such confusion
15 counsels in favor of enforcement rather than a dismissal as a matter of prosecutorial discretion.
16 Moreover, Respondent’s assertions that the phone number was “easily traceable” to the
17 Committee and that the referenced website contained a disclaimer do not cure the violation as it
18 would require the listener to take affirmative steps to uncover the source.³³ Placing that

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³⁰ F&LA, at 4-6, MURs 7190, 7208 (Alaska Republican Party); Conciliation Agreement ¶ V, MURs 7190 & 7208 (Alaska Republican Party).

³¹ Resp. at 2.

³² See Compl., Attach. 3; *supra* note 12.

³³ Resp. at 2.

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1 responsibility on the receiver of the communication would be contrary to the requirement that the
2 disclaimer be “clear and conspicuous.”³⁴ The Act requires an affirmative disclosure; a finding of
3 a violation of the Act is not avoided simply because there was no affirmative misrepresentation
4 or concealment of the source of the communication.³⁵

5 Respondent also points to MUR 6690 (Sobhani for Congress) and MUR 6846 (DeFazio
6 for Congress) for the premise that the Commission should exercise discretion when the vendor
7 mistakenly did not include the disclaimer.³⁶ Each of these matters is distinct from the
8 circumstances presented here. In MUR 6690, a portion of the calls did not contain a disclaimer,
9 but the Committee took remedial action by contacting the vendor and requiring that a disclaimer
10 be placed on all future calls.³⁷ Similarly, in MUR 6846, some of the billboards posted by
11 DeFazio for Congress included disclaimers and some did not.³⁸ In that matter, the respondent
12 provided the Commission with emails from the vendor apologizing for the error and a
13 declaration from the candidate stating that the campaign contacted the respective vendors as soon

³⁴ 11 C.F.R. § 110.11(c)(1).

³⁵ 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a); see *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) (“Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected.”); *Citizens United v. FEC*, 558 U.S. 310, 368 (2010) (holding that disclaimers “provide the electorate with information and insure that the voters are fully informed about the person or group who is speaking,” and stating that identifying the sources of advertising enables people “to evaluate the arguments to which they are being subjected”) (internal citations and alterations removed).

³⁶ Respondent also cites to several other matters that were dismissed through the Enforcement Priority System (“EPS”). Resp. at 1. Unlike those matters, the present matter was not rated low enough to qualify for an EPS dismissal, and thus those matters are not analogous for a variety of reasons; further, in each instance, the respondents subject to the EPS dismissal also undertook efforts to remedy the lack of a disclaimer. See *id.* (citing Gen. Counsel’s Rpt., MUR 7489 (Diehl for U.S. Senate) (EPS Dismissal) (dismissing allegations where respondent failed to include disclaimers on yard signs and a bus, but purchased stickers with a proper disclaimer and added them to over 1,000 yard signs and added a disclaimer to the bus); Gen. Counsel’s Rpt., MUR 7644 (Matt Prosch for Congress) (EPS Dismissal) (dismissing allegations where respondent destroyed or returned signs lacking disclaimers and obtained corrected signs); Gen. Counsel’s Rpt., MUR 7046 (Matthew Evans for Congress) (EPS Dismissal) (dismissing allegations where the respondent’s website initially did not include a disclaimer, but the respondent added a disclaimer soon after they became aware of the issue)).

³⁷ F&LA at 3-4, MUR 6690 (Sobhani for Congress).

³⁸ F&LA at 3, 6-7, MUR 6846 (Defazio for Congress).

1 as it learned of the omitted disclaimers, and they were immediately corrected.³⁹ By contrast, in
2 the present matter, while Respondent discontinued the use of the vendor's call services, there is
3 no information suggesting it corrected the error amid the run of calls. Further, neither
4 MUR 6690 nor MUR 6846 included evidence of actual voter confusion as in this matter.

5 Finally, Respondent's argument that the allegation should be dismissed because it was
6 "an isolated infraction" and the Committee's "public communications have consistently
7 contained clear, conspicuous and compliant disclaimers,"⁴⁰ is similarly unpersuasive. The
8 communication in question was not a single yard sign or even a single billboard among a string
9 of billboards that otherwise included disclaimers;⁴¹ it was, by the Committee's admission,
10 hundreds of robocalls, which confused numerous listeners.

11 Accordingly, the Commission finds reason to believe that the Committee violated
12 52 U.S.C. § 30120 and 11 C.F.R. § 110.11(b) by failing to include required disclaimers on public
13 communications.

³⁹ *Id.*

⁴⁰ Resp. at 2.

⁴¹ The lone matter cited by Respondent to support their argument for dismissal based on it being an isolated event is an EPS dismissal matter that involved an independent-expenditure-only political committee that used mobile billboards and only one out of the three uses of these billboard did not contain the required disclaimer. *See id.* (citing Gen. Counsel's Rpt., MUR 7289 (Take Back the Tenth) (EPS Dismissal)).