



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	
Musgrove for U.S. Senate and)	
C. Dale Shearer, in his official capacity as treasurer)	MUR 6044
)	
Democratic Senatorial Campaign Committee and)	
John B. Poersch, Jr., in his official capacity as treasurer)	

STATEMENT OF REASONS

**Chairman STEVEN WALTHER, Vice Chairman MATTHEW S. PETERSEN and
Commissioners CYNTHIA L. BAUERLY, CAROLINE C. HUNTER and
DONALD F. McGAHN**

I. INTRODUCTION

Complainant Wicker for Senate alleges that Respondents Democratic Senatorial Campaign Committee and John B. Poersch, Jr., in his official capacity as Treasurer ("DSCC"), and Ronnie Musgrove for Senate and C. Dale Shearer, in his official capacity as Treasurer ("Musgrove Committee"), violated the Federal Election Campaign Act, as amended. Specifically the complaint alleges that an advertisement created and paid for by the DSCC and featuring Ronnie Musgrove, a candidate in the 2008 Senate race in Mississippi, is a coordinated communication, the costs should have been reported as such, and that those costs constitute an excessive contribution to the Musgrove Committee. The complaint also alleges that the advertisement violates the "stand by your ad" provision of the disclaimer regulations and that the DSCC and Musgrove Committee (collectively "Respondents") violated reporting provisions.

II. DISCUSSION

A. Facts

On July 9, 2008, the DSCC created a 30-second television advertisement featuring candidate Ronnie Musgrove.¹ The advertisement was filmed in a county office building and public square in Canton, Mississippi. According to the complaint, the DSCC bought statewide airtime for the advertisement to run from July 15 through July

¹ The advertisement may be viewed at <http://www.youtube.com/watch?v=QFocGGWXgzA&NR=1>.

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28, 2008, costing approximately \$240,214 per week.

The advertisement is as follows:

AUDIO	VISUAL
The issue: Spending is out of control in Washington. We can fix it with Mississippi common sense.	"THE ISSUE: SPENDING OUT OF CONTROL IN WASHINGTON" (picture of U.S. Capitol.)
As governor, Ronnie Musgrove balanced budgets by cutting \$200 million in waste. Took on his own party, vetoing 45 spending bills. In four years as governor, no new taxes.	(Banner) "Former Gov. Ronnie Musgrove" (RM speaking to a group, big chart) (newspaper headline "Musgrove's Budget Tightens State's Belt") (RM talking to people) (newspaper headline "Musgrove orders big cuts") (RM continues talking to people)
Fiscal common sense. It works in Mississippi. It can work in Washington. Call Congress and tell them to cut wasteful spending and start balancing the budget.	(RM talking to people, studying a document.) (picture of U.S. Capitol) "CALL CONGRESS (202) 224-3121. Tell Congress to Control Wasteful Spending."

The advertisement contains a written and an oral disclaimer at the end stating that the DSCC paid for and is responsible for its content, and that it was not authorized by any candidate or candidate's committee. The DSCC did not disclose the costs of the advertisement as a coordinated party expenditure, an independent expenditure, or as an in-kind contribution in its FEC reports.

The complaint alleges that the advertisement constitutes an excessive contribution in the form of a coordinated communication because it "republishes" campaign material that must have been prepared with Musgrove's "cooperation and coordination." The complaint also alleges that the advertisement expressly advocates Musgrove's election and that that the DSCC exceeded its party committee coordinated spending limit in Mississippi, which was \$180,800, because the cost of the advertisement in airtime alone was at least \$240,214 per week. Finally, the complaint alleges that the DSCC and the Musgrove Committee committed reporting and disclaimer violations in connection with the advertisement. According to the complaint, the advertisement should have included a disclaimer that Musgrove approved the advertisement pursuant to the "stand by your ad" provisions.

The Musgrove Committee and the DSCC reply that the advertisement does not meet the content prong of the Commission's coordination regulation and, therefore, does not constitute a coordinated communication. They state that the advertisement does not republish campaign material because the footage of the candidate, as well as the advertisement, was created by the DSCC. The DSCC also states that it paid for the

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production and dissemination of the advertisement. Respondents further argue that the advertisement is an issue ad that does not contain express advocacy.

B. Party Coordination Analysis

Under the Act, an expenditure made by any person “in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents” constitutes an in-kind contribution. 2 U.S.C.

§ 441a(a)(7)(B)(i). A political party communication is coordinated with a candidate, a candidate’s authorized committee, or agent of the candidate or committee when the communication satisfies the three-pronged test set forth in 11 C.F.R. § 109.37: (1) the communication is paid for by a political party committee or its agent; (2) the communication satisfies at least one of the content standards set forth in 11 C.F.R. § 109.37(a)(2); and (3) the communication satisfies at least one of the conduct standards set forth in 11 C.F.R. § 109.21(d).

The payment by a political party committee for a communication that is coordinated with a candidate must be treated by the political party committee making the payment as either an in-kind contribution to the candidate with whom it was coordinated or a coordinated party expenditure. 11 C.F.R. § 109.37(b). The costs of a coordinated communication must not exceed a political committee’s applicable contribution or expenditure limits set forth in the Act; specifically, the DSCC could not contribute more than \$5,000 to, or make more than \$180,800 in coordinated party expenditures on behalf of, the Musgrove Committee. *See* 2 U.S.C. §§ 441a(a)(2)(A), 441a(d)(3)(A). In addition, the Musgrove Committee may not knowingly accept an excessive contribution. *See* 2 U.S.C. § 441a(f).

The only aspect of the coordination regulation in dispute is the content prong, which, in relevant part, is satisfied if there is a public communication that “disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate’s authorized committee or an agent of any of the foregoing” or that “expressly advocates the election or defeat of a clearly identified candidate for Federal office.” 11 C.F.R. § 109.37(a)(2)(i) and (ii).²

1. Republication

The complaint’s basis for alleging that respondents republished campaign material is Musgrove’s appearance in the advertisement. The complaint states that Musgrove’s active participation in the filming of the advertisement with the DSCC constitutes coordination in the form of republication of campaign materials. *See* Complaint at 1-2.

² Subpart iii of the content prong of the coordinated communication regulation is not applicable here because the DSCC advertisement aired more than 90 days before the general election. *See* 11 C.F.R. § 109.37(a)(2)(iii).

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Respondents argue that they did not republish campaign material because the advertisement consisted of all new script and footage created by the DSCC, not the Musgrove Committee. They argue that “republishing of campaign materials” as required by the regulation covers existing campaign material emanating from the campaign and that Musgrove’s appearance in the advertisement does not convert it to campaign material.

The content prong of the coordinated communication regulation is satisfied by a “public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate’s authorized committee, or an agent of any of the foregoing.” 11 C.F.R. § 109.37(a)(2)(i). Because the material at issue in this matter was produced by the DSCC, the DSCC did not republish campaign material.³ Therefore, there is no basis to find reason to believe that the advertisement constitutes a coordinated communication based on the dissemination, distribution or republication of campaign materials standard of the content prong.

2. Express Advocacy

The complaint also argues that the advertisement expressly advocates Musgrove’s election and, thus, satisfies the express advocacy standard of the content prong. See 11 C.F.R. § 109.37(a)(2)(ii). The complaint’s basis for this allegation is “the advertisement’s very contents, and specifically by Musgrove’s own role in the ad.” Respondents claim that the advertisement is an issue ad about balanced budgets and wasteful spending and does not contain words such as “vote for,” “elect,” “vote against,” or “defeat” any candidate. According to respondents, the sole call to action in the advertisement asks viewers to telephone Congress, and the advertisement provides a phone number for doing so.

Under the Commission’s regulations, a communication contains express advocacy when it uses phrases such as “vote for the President,” “re-elect your Congressman,” or “Smith for Congress,” or uses campaign slogans or words that in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, or advertisements that say, “Nixon’s the One,” “Carter ‘76,” “Reagan/Bush,” or “Mondale!” See 11 C.F.R. § 100.22(a). Respondents argue that the advertisement does not contain language that qualifies as express advocacy under 11 C.F.R. § 100.22(a). We agree.

The Commission’s regulations further provide that express advocacy includes any communication containing an “electoral portion” that is “unmistakable, unambiguous, and suggestive of only one meaning” and about which “reasonable minds could not differ

³ Prior MURs including an analysis of republication have involved pre-existing material belonging to or emanating from the campaign. See, e.g., MUR 5743 (Betty Sutton for Congress) (photograph obtained from campaign); MUR 5672 (Save American Jobs Assoc.) (video broadcast on association’s website was originally produced and used by candidate’s campaign).

as to whether it encourages actions to elect or defeat" a candidate when taken as a whole and with limited reference to external events, such as the proximity to the election. *See* 11 C.F.R. § 100.22(b). In its discussion of then-newly promulgated section 100.22, the Commission stated that "communications discussing or commenting on a candidate's character, qualifications or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question." *See* Explanation and Justification for Express Advocacy, *et al.*, 60 Fed. Reg. 35292, 35295 (July 6, 1995).

Respondents argue that the advertisement does not fall into 11 C.F.R § 100.22(b) because its call to action "unambiguously asks viewers to call Congress and express support" for a legislative agenda. Response at 5. Even though the advertisement touts Musgrove's qualifications and accomplishments as Mississippi's former governor regarding his fiscal policies and does not ask Musgrove to take or keep a position on an issue, the advertisement concludes by asking viewers to "call Congress" and "tell them to start balancing the budget," so it could be read to highlight Musgrove's accomplishments as governor of Mississippi as an example that current Congressional legislators should follow. Taken as a whole, reasonable minds could differ as to whether the advertisement encourages actions to elect Musgrove. Thus, the advertisement does not qualify as express advocacy under § 100.22(b).

In sum, the DSCC advertisement does not constitute a coordinated communication because it does not disseminate, distribute or republish campaign material prepared by a candidate, and it does not expressly advocate Musgrove's election. Therefore, we found that there is no reason to believe that the DSCC violated 2 U.S.C. § 441a(d) or the Musgrove Committee violated 2 U.S.C. § 441a(f).

C. Reporting Violation

The complaint alleges that the respondents failed to disclose "such coordination or contribution(s)." Because the advertisement is not a coordinated party expenditure by the DSCC or an in-kind contribution to Musgrove, the respondents did not commit any reporting violations. Therefore, we found that there is no reason to believe the DSCC or the Musgrove Committee violated 2 U.S.C. § 434(b).

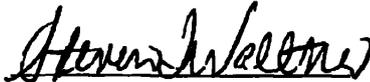
D. Disclaimer Violation

The complaint alleges that Respondents violated the Act by failing to include an accurate disclaimer. Musgrove's appearance in the advertisement raises the issue of whether he authorized the advertisement. Section 441d(a)(2) of the Act provides, "Whenever a political committee makes a disbursement for the purpose of financing any communication through any broadcasting station ... such communication - if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee." In addition, "Any

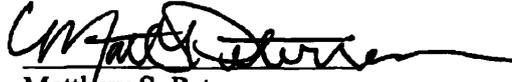
[such] communication which is transmitted through television shall include, in addition to the [above] requirements ... a statement that identifies the candidate and states that the candidate has approved the communication." See 2 U.S.C. § 441d(d)(1)(B).

The advertisement correctly discloses that the DSCC paid for it. Although it appears that Musgrove consented to be filmed and willingly participated in the filming of the advertisement, (1) he did not have a speaking part; (2) there is no indication that he reviewed the advertisement and approved it before it was broadcast; and, as noted above, (3) this was not a coordinated communication between the Musgrove Committee and the DSCC. Respondents state that the ad was created, produced and aired by the DSCC. There is no basis on which to determine that Musgrove authorized the advertisement. Based on these facts, we conclude that there are insufficient grounds to justify the use of additional Commission resources to investigate whether the candidate authorized the ad such that the DSCC should have included authorization and approval statements in its disclaimer.

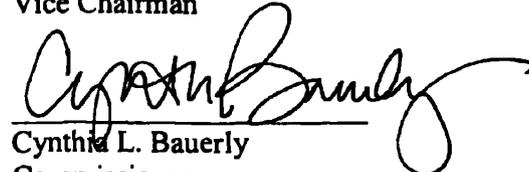
7/14/09
Date


Steven T. Walther
Chairman

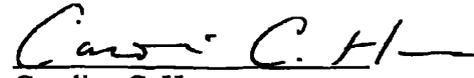
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Date


Matthew S. Petersen
Vice Chairman

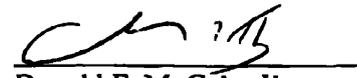
7/9/09
Date


Cynthia L. Bauerly
Commissioner

7/9/09
Date


Caroline C. Hunter
Commissioner

7/9/09
Date


Donald F. McGahn II
Commissioner

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