



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matters of)	
)	MURs 7530 & 7627
)	
NRCC and Keith A. Davis,)	
in his official capacity as treasurer)	
)	
Balderson for Congress and Matthew J. Yuskewich,)	
in his official capacity as treasurer)	
)	
Troy Balderson)	
)	
Rodney for Congress and Thomas Datwyler,)	
in his official capacity as treasurer)	
)	
Rodney Davis)	
)	
Friends of Hagedorn and Thomas Datwyler,)	
in his official capacity as treasurer)	
)	
James Hagedorn)	
)	
Claudia Tenney for Congress and Cabell Hobbs,)	
in his official capacity as treasurer)	
)	
Claudia Tenney)	
)	

**STATEMENT OF REASONS OF VICE CHAIR ALLEN DICKERSON AND
COMMISSIONERS SEAN J. COOKSEY AND JAMES E. “TREY” TRAINOR, III**

Two Complaints alleged that the National Republican Congressional Committee (“NRCC”) made, and certain congressional campaigns accepted, excessive in-kind contributions by impermissibly apportioning the costs of several television advertisements between the NRCC and the campaigns.¹ Respondents deny the allegations and assert that they properly allocated the

¹ Complaint (Oct. 30, 2018), MUR 7530 (NRCC, *et al.*); Complaint (July 31, 2019), MUR 7627 (NRCC, *et al.*).

advertisements’ costs according to “established standards” for “hybrid communications.”² In fact, the advertisements’ content and cost allocation is consistent with other hybrid ads that the Commission has examined and declined to find violated the Federal Election and Campaign Act of 1971, as amended (the “Act”). In light of those precedents, and in the absence of any intervening Commission action like a final rulemaking, we do not believe Respondents should be punished for acting consistent with prior Commission decisions. Accordingly, we voted to exercise the Commission’s prosecutorial discretion and dismiss the allegations.

I. Background

In general, the provision of “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office” is a contribution under the Act.³ In assessing the value of certain in-kind contributions, Commission regulations stipulate that “expenditures made on behalf of more than one clearly identified Federal candidate shall be attributed to each such candidate according to the benefit reasonably expected to be derived.”⁴ For broadcast communications, “the attribution shall be determined by the proportion of space or time devoted to each candidate as compared to the total space or time devoted to all candidates.”⁵

Commission regulations further address the allocation of costs related to a phone bank conducted by a national, state, or local party organization that refers to one clearly identified federal candidate, does not solicit contributions, and “includes another reference that generically refers to other candidates of the Federal candidate’s party without clearly identifying them.”⁶ These communications are generally called “hybrid communications,” and costs are apportioned evenly to the named federal candidate and to the party organization, to be paid with federal funds.⁷

Historically, the Commission has adopted a broad and flexible interpretation of the hybrid-communications regulation. In Advisory Opinion 2006-11 (Washington Democratic State Central Committee), for example, the Commission advised that a state party could use a 50/50 cost allocation for a mass mailing that referred to one federal candidate, included a generic party reference, and did not include a solicitation, so long as the candidate portion of the mailing was no larger than the generic party portion. In doing so, the Commission noted, “[a]lthough neither 11 CFR 106.1 nor 106.8 is directly applicable . . . , the Commission concludes that there is nonetheless an appropriate method for allocating the costs of the mailings described in your request.”⁸

² See, e.g., Response of the NRCC (Dec. 10, 2018), MUR 7530 (NRCC, *et al.*); Response of the NRCC (Sept. 23, 2019), MUR 7627 (NRCC, *et al.*).

³ 52 U.S.C. § 30101(8)(A). See also 11 C.F.R. § 100.52(d)(1) (addressing in-kind contributions).

⁴ 11 C.F.R. § 106.1(a).

⁵ 11 C.F.R. § 106.1(a).

⁶ 11 C.F.R. § 106.8(a).

⁷ 11 C.F.R. § 106.8(b).

⁸ Advisory Op. 2006-11 (Washington Democratic State Central Committee) at 3–4.

Similarly, in a 2007 Final Audit Report for Bush-Cheney '04, Inc., the Commission did not find any violation when the committee used a 50/50 cost allocation for television advertisements that referred to a single candidate and purported to make generic party references.⁹ The Commission also did not include a finding relating to hybrid advertisements in the Final Audit Report of Kerry-Edwards 2004, Inc.,¹⁰ and excluded similar findings from audit reports in the next election cycle.¹¹ As a result, although the Commission has not issued a formal revision of the hybrid-communication rule,¹² it has allowed, through this informal guidance, the practice of allocating costs for hybrid television advertisements and other communications under a principle of “that which is not prohibited is permitted.”¹³

II. Legal Analysis

During the 2018 election cycle, the NRCC worked with several candidates for the U.S. House of Representatives to air eleven television advertisements at issue in this matter.¹⁴ These advertisements refer to a single clearly identified federal candidate as well as some variation of “D.C. liberals,” “liberal elites,” “liberals,” “two sides of a very liberal coin,” and “progressives.”¹⁵ The Respondents claim that their advertisements are hybrid communications and that they allocated costs accordingly, with the costs split evenly between the NRCC and the relevant House campaign committee.¹⁶

In its First General Counsel’s Reports in these matters, the Office of General Counsel (“OGC”) recounts the history of hybrid communications, and it implicitly accepts that these

⁹ Report of the Audit Division on Bush-Cheney '04, Inc. and the Bush-Cheney '04 Compliance Committee, Inc. (April 24, 2007) at 10–11. *See also* Statement of Vice Chairman Mason and Commissioner von Spakovsky (March 22, 2007), Final Audit Report on Bush-Cheney '04, Inc.; Statement of Chairman Lenhard and Commissioners Walther and Weintraub (March 21, 2007), Audit of Bush-Cheney '04, Inc.

¹⁰ *See* Statement of Vice Chairman Mason and Commissioner von Spakovsky (May 31, 2007), Final Audit Report on Kerry-Edwards 2004, Inc. (noting that “Kerry-Edwards 2004, Inc. aired materially indistinguishable ‘hybrid advertisements,’ sharing the costs equally with the Democratic National Committee, shortly after Bush-Cheney '04, Inc. and the Republican National Committee did so,” and that no finding relating to the hybrid advertisements was included in the final audit report.).

¹¹ *See* Certification of Preliminary Audit Report on McCain-Palin 2008, Inc. and McCain-Palin Compliance Fund (Aug. 30, 2011) (motion to include a finding relating to hybrid communications in the preliminary audit report failed to receive four affirmative votes).

¹² *See* Notice of Proposed Rulemaking on Hybrid Communications, 72 Fed. Reg. 26,569 (May 10, 2007).

¹³ *See* Statement of Vice Chairman Mason and Commissioner von Spakovsky at 2 (March 22, 2007), Final Audit Report on Bush-Cheney '04, Inc. (“Others may argue that attribution was impermissible because no specific exemption ... exists in our regulations. By the same token, no specific prohibition exists either, and in the face of consistent Commission sanction, the parties involved cannot be faulted for believing their actions to be within the bounds of the law, as in fact they were.”).

¹⁴ *See* Response of the NRCC at 1 (Sept. 23, 2019), MUR 7627 (NRCC, *et al.*).

¹⁵ *Id.* at 9–19.

¹⁶ *Id.* at 10–19.

advertisements should be evaluated under the hybrid-advertisement framework.¹⁷ But OGC concluded that the NRCC ads do not meet the requirements for hybrid ads because they lack a sufficient generic party reference.

We agree with OGC's conclusion that the hybrid-advertisement framework applies to television advertisements, but we disagree that the advertisements at issue in these matters do not contain generic party references. The relevant portion of the advertisement in MUR 7530 refers to "progressives" and "progressive values."¹⁸ The relevant portion of the advertisements in MUR 7627 refer to "D.C. liberals," "liberal elites," and "progressives."¹⁹ OGC claims that these references are "too vague" and that they do not qualify as hybrid communications because they are, at most, generic references to the opposing party, not the party that paid for the communication.²⁰

We believe OGC's analysis of the text of the advertisements is inconsistent with the Commission's past decisions. At least nine of the advertisements at issue in the Bush-Cheney '04 audit refer to "John Kerry" and "the liberals in Congress" or "liberal allies."²¹ There, the Commission failed to find that those hybrid advertisements violated the Act by the required four affirmative votes, and no finding was included in the Final Audit Report. In context, referring to "progressives," "liberal elites," and "D.C. liberals" is no vaguer than referring to "liberals in Congress." Likewise, many of the 2004 Bush-Cheney advertisements opposed a named federal candidate and generic party candidates of the opposing party without referencing other sponsoring-party candidates.²² We agree with past Commissioners who concluded that "[t]he Commission should apply any 'generic reference' requirement with the flexibility required to avoid dictating advertising content."²³

¹⁷ See First General Counsel's Report at 5–9 (June 19, 2019), MUR 7530 (NRCC, *et al.*); First General Counsel's Report at 9–14 (March 19, 2020), MUR 7627 (NRCC, *et al.*).

¹⁸ See Complaint at 2–3 (Oct. 30, 2018), MUR 7530 (NRCC, *et al.*).

¹⁹ See First General Counsel's Report at 3–7 (March 19, 2020), MUR 7627 (NRCC, *et al.*).

²⁰ *Id.* at 14–15; see also First General Counsel's Report at 9–10 (June 19, 2019), MUR 7530 (NRCC, *et al.*).

²¹ See Statement of Commissioner Weintraub on the Report of the Audit Division on Bush-Cheney '04, Inc. at 5–6 (March 22, 2007).

²² This is not an *ex post facto* assessment. Both issues were addressed in Vice Chairman Mason and Commissioner von Spakovsky's statement in the Bush-Cheney '04, Inc. audit matter. There, Vice Chairman Mason and Commissioner von Spakovsky cautioned:

[I]t should be remembered that the "generic reference" standard is intended primarily to indicate that it does not benefit any particular candidate, but instead benefits generally a group of candidates. We see no reason then, why *only* a generic reference that includes the name of a political party should be viewed as potentially benefiting a political party. . . . And while the phone bank regulations require the generic reference to be "to other candidates of the Federal candidate's party," it is also true that casting aspersions on "liberals in Congress" would be viewed by many as beneficial to a Republican party committee. The Commission should apply any 'generic reference' requirement with the flexibility to avoid dictating advertising content.

Statement of Vice Chairman Mason and Commissioner von Spakovsky at 6 (March 22, 2007), Final Audit Report on Bush-Cheney '04, Inc. (emphasis in the original) (citations omitted).

²³ *Id.*

* * *

The NRCC’s approach in these matters is materially indistinguishable from the Bush-Cheney ‘04 committee’s approach. With respect to the Bush-Cheney ‘04 advertisements, two Commissioners wrote over a decade ago that “[t]he permissibility of such cost-sharing is well-established by agency precedent, and the parties acted entirely reasonably and in reliance on prior decisions by the Federal Election Commission.”²⁴ This is even more true today, with an additional fourteen years of water under the bridge. If the Commission wishes to adopt a new approach to hybrid advertisements, it must do so in a way that gives the regulated community prior notice and clear guidance about what is and is not permitted.²⁵ In light of the Respondents’ reasonable reliance on the Commission’s past precedents on this issue, and because like cases should be treated alike, we voted to dismiss the Complaints in these matters pursuant to *Heckler v. Chaney*.²⁶

Allen Dickerson
Vice Chair

November 8, 2021

Date

Sean J. Cooksey
Commissioner

November 8, 2021

Date

James E. “Trey” Trainor, III

November 8, 2021

Date

²⁴ *Id.* at 1–2.

²⁵ See Factual & Legal Analysis at 6 (Sept. 15, 2021), MUR 7358 (Rosen for Nevada, *et al.*) (dismissing allegations as a matter of prosecutorial discretion where “[t]he Commission has yet to provide guidance to the regulated community”); Factual & Legal Analysis at 9 (Sept. 13, 2021), MUR 7390 (Republican National Committee, *et al.*) (same).

²⁶ See Certification (Sept. 28, 2021), MUR 7530 (NRCC, *et al.*); Certification (Sept. 28, 2021), MUR 7627 (NRCC, *et al.*); *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).