James Madison

JAMES MADISON CENTER FOR FREE SPEECH

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December 19, 2008

Federal Election Commission
c/o Stephen Gura, Deputy Associate General Counsel
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Re: Comments of the James Madison Center for Free Speech on Federal Election Commission Notice 2008-13: Agency Procedures

Ladies and Gentlemen:

Please accept for your consideration the following comments on Federal Election Commission ("FEC") procedures.

When the FEC seeks public comment, it usually asks about what the FEC is doing rather than how the FEC is doing it. Notice 2008-13 is different in this respect. While the "what" and the "how" do overlap, because substance often overlaps with procedure, that does not make the FEC's seeking comment on procedure any less praiseworthy. It is good that the FEC is receiving – and is open to – suggestions about how the federal government regulates activity that is at the core of what the First Amendment protects.

These comments begin with general suggestions about how the federal government should enforce the Federal Election Campaign Act, 2 U.S.C. § 431 *et seq.* ("FECA"), and then address categories of questions in Notice 2008-13. Overall, these comments suggest that the FEC should respect first principles under the Constitution.

Among these principles are the boundaries around the limited power the federal government has to regulate political speech. Respecting these boundaries means in part that the FEC should conduct itself not as a prosecutor seeking a conviction but as an investigator who seeks the truth, *i.e.,* someone who dispassionately seeks the facts and dispassionately applies the law to the facts.

Response Time

Before turning to first principles, one aspect of FEC procedures worth considering is the Notice 2008-13 response deadline. Subscribers to the FEC's e-mail notification system received the Notice on Thursday, December 4, 2008; the *Federal Register* published the Notice on Monday, December 8, 2008, 73 FED. REG. 74494 (2008); and the deadline for responses is Monday, January 5, 2009.[1] While the response time is about a month, Hanukkah begins on Sunday, December 21; Christmas Eve and Christmas Day are on Wednesday and Thursday, December 24 and 25; and New Year's Eve and Day are on Wednesday, December 31, and Thursday, January 1. Many families have longstanding plans during this time, which commissioners must know, because in the past many commissioners have closed their own offices during the Christmas and New Year's weeks. Thus, the deadline means many people will have to finish their comments by Friday, December 19, or perhaps a few days later, which leaves only two weeks of response time. The FEC could have addressed these issues at any time, and if it wanted to address them at the beginning of an election cycle, *see* Bob Bauer, *FEC Hearing: A New Year's Resolution* (Dec. 16, 2008),[2] it could have released the Notice earlier or set a later deadline. In effect allowing only two weeks for public input on such a notice is not adequate.

First Principles

When the FEC considers its own procedures, it should recall that campaign-finance laws regulate speech that is at the heart of a society with a republican – *i.e.,*

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[1] *See* Notice 2008-13: Agency Procedures at 1 (Undated) ("Notice"), *available at* http://www.fec.gov/law/policy/enforcement/fec2008-13.pdf (all Internet sites visited Dec. 16, 2008).

[2] *Available at* http://moresoftmoneyhardlaw.com/updates/enforcement.html.

a democratically elected representative – government. Thus, it is useful to back up and recall the underlying principles, including the First Amendment. *See FEC v. Wisconsin Right to Life, Inc.,* 551 U.S. ____, ____, 127 S.Ct. 2652, 2674 (2007) (*"WRTL II"*) ("Yet, as is often the case in this Court's First Amendment opinions, we have gotten this far in the analysis without quoting the Amendment itself: 'Congress shall make no law ... abridging the freedom of speech.' The Framers' actual words put the[] cases in proper perspective. Our jurisprudence ... has rejected an absolutist interpretation of those words, but ... it is worth recalling the language we are applying."). Even before the First Amendment come the separation of powers, *see, e.g., Morrison v. Olson,* 487 U.S. 654, 697-99 (1988) (Scalia, J., dissenting), and the limited and enumerated powers of the federal government. *See, e.g.,* U.S. CONST. art. I, § 8 (1787); *id.* amend. X (1791); *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819). Even before these principles comes "the struggle of the Anglo-American people to (a) establish themselves as sovereign and (b) curb the power of government officials to prevent the people from criticizing official actions." *WRTL II,* No. 06-969 & 06-970, Appellee's Br. at 1 (U.S. March 22, 2007).[3] Centuries of history are replete with ill begotten efforts to suppress political speech. *See id.* at 1-8.

Even today when some people advocate campaign-finance laws, they appear to presume government has the power to regulate political speech however it likes, unless speakers can somehow swim to some small island where they are safe from the ocean of government power. In the United States, this presumption has it exactly backwards. The framers established a government with the consent of the governed, *see, e.g.,* U.S. CONST. preamble (1787) ("We the people of the United States"), and government has only those powers that the governed surrendered to it in the first place. In some instances, those powers may be large. Nevertheless, they are limited and enumerated.

> Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to

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[3] *Available at* http://jamesmadisoncenter.org/WI/BriefforAppellee032207.pdf.

> be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extra-constitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment – "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 528-29 (1935) (footnote omitted) (citing *Ex parte Milligan,* 71 U.S. (4 Wall.) 2, 120, 121 (1866); *Home Building & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 426 (1934)). Whatever government does, it may not exceed the power that the people have delegated to it. These powers are further constrained by other law, including the First Amendment, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I (1791).

Political speech is at the core of what the First Amendment protects. *See FEC v. Colorado Republican Fed. Campaign Comm.,* 518 U.S. 604, 616 (1996) (*"Colorado Republican I"*) (citing *Eu v. San Francisco County Democratic Cent. Comm.,* 489 U.S. 214, 231 (1989)); *Buckley v. Valeo,* 424 U.S. 1, 44-45 (1976).[4]

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[4]A government that takes away the core of what the First Amendment protects leaves the periphery: Wearing profane jackets, *FEC v. Colorado Republican Fed. Campaign Comm.,* 533 U.S. 431, 466 (2001) (*"Colorado Republican II"*) (Thomas, J., dissenting) (collecting cases), "making false defamatory statements, filing lawsuits, dancing nude, exhibiting drive-in movies with nudity, burning flags, and wearing military uniforms[, plus] begging, shouting obscenities, erecting tables on a sidewalk, and refusing to wear a

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States,* 354 U.S. 476, 484 (1957). Although First Amendment protections are not confined to "the exposition of ideas," *Winters v. New York,* 333 U.S. 507, 510 (1948), "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs of course including discussions of candidates." *Mills v. Alabama,* 384 U.S. 214, 218 (1966). This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272 (1971), "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office."

Buckley, 424 U.S. at 14-15 (brackets and ellipsis omitted), *quoted in WRTL II,* 127 S.Ct. at 2665. Thus, it is not surprising that "where the First Amendment is implicated, the tie [if there is one] goes to the speaker, not the censor." *WRTL II,* 127 S.Ct. at 2669. "[W]e give the benefit of the doubt to speech, not censorship." *Id.* at 2674.

FEC procedures should be faithful to these principles. They have not always been. Instead, the FEC frequently seeks to expand regulation and expand its turf.

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necktie." *Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 412 (2000) (Thomas, J., dissenting) (collecting cases); *see also McConnell v. FEC,* 540 U.S. 93, 265 (2003) (Thomas, J., dissenting) (referring to "defamers, nude dancers, pornographers, flag burners, and cross burners" (internal citations omitted)).

The FEC conducts itself more as a prosecutor seeking a conviction than as an investigator who seeks the truth, *i.e.,* someone who dispassionately seeks the facts and dispassionately applies the law to the facts. But for court decisions such as *WRTL II* and *Davis v. FEC,* 554 U.S. ____, 128 S.Ct. 2759 (2008), FEC regulation may well be a one-way ratchet. Consider examples of how this has occurred:

● The FEC continually asserts that precedent constraining its power applies only in the jurisdiction where the precedent arose, *see, e.g., Virginia Soc'y for Human Life, Inc. v. FEC,* 263 F.3d 379, 392-93 (4th Cir. 2001), yet when precedent expands the FEC's power, the FEC applies the precedent nationwide, expands it, *see, e.g., Express Advocacy; Independent Expenditures; Corporate and Labor Organization,* 60 FED. REG. 35292, 35294-95 (1995) (enacting 11 C.F.R. § 100.22(b) by expanding *FEC v. Furgatch,* 807 F.2d 857, 863-64 (9th Cir. 1987))), and declines to rein in regulation when the precedent erodes. *Compare California Pro-Life Council, Inc. v. Getman,* 328 F.3d 1088, 1098 (9th Cir. 2003) (holding that under *Furgatch,* "express advocacy must contain some explicit words of advocacy") *with In re Sierra Club,* Matter Under Review ("MUR") 5634, First Gen. Counsel's Report ("GCR") at 11-13 (Aug. 10, 2005) (asserting that under Section 100.22(b), the phrase "LET YOUR CONSCIENCE BE YOUR GUIDE and LET YOUR VOTE BE YOUR VOICE" is express advocacy),[5] *id.,* Factual & Legal Analysis ("F&LA") at 5-6 (Sept. 22, 2005) (same),[6] *and id.,* Certification (Sept. 20, 2005).[7] The FEC cannot have it both ways and should not try to.

● The FEC asserted in *McConnell* that the plaintiffs could assert no as-applied challenge, because *McConnell* was a facial challenge. Then in *Wisconsin Right to Life, Inc. v. FEC,* 546 U.S. 410 (2006) (*"WRTL I"*), which was an as-applied challenge, the FEC asserted no as-applied challenge was possible. The FEC should not engage in what Chief Justice John Roberts called a "a classic bait and switch."

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[5] *Available at* http://eqs.sdrdc.com/eqsdocs/00005805.pdf.

[6] *Available at* http://eqs.sdrdc.com/eqsdocs/00005807.pdf.

[7] *Available at* http://eqs.sdrdc.com/eqsdocs/00005806.pdf.

WRTL II, Appellee's Br. at 39 n.51 (citation omitted).[8] Similarly, in *WRTL I* and *II,* the FEC asserted before the election in question that the plaintiff's claims were not ripe and that afterward they were moot.

● In *WRTL II,* the FEC burdened the plaintiff with extensive discovery, which in effect – and perhaps in some quarters intentionally – discourages challenges to the law. Then came the astonishing assertion that a plaintiff has the burden of proof in an as-applied constitutional challenge. The FEC was wrong on both counts, *see* 127 S.Ct. at 2664 (citing *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 786 (1978)); *id.* at 2666 n.5, just as it was when it audaciously called the plaintiff's efforts to engage in political speech an "abuse." *WRTL II,* FEC Reply Br. at 20 (April [no date], 2007).[9]

● When a rule of law is not in FECA or in chapter 95 or 96 of Title 26, the FEC may establish it *only* through rulemaking. 2 U.S.C. § 437f(b) (1986) (citing 2 U.S.C. § 438(d) (2002)). Only statutes, FEC regulations, *id.,* and court decisions such as *WRTL II* establish rules of law. Thus, the FEC may not rely on its own precedent – *e.g.,* MURs, GCRs, F&LAs, statements of reasons ("SORs"), statements for the record, settlements, or advisory opinions ("AOs") – to establish rules of law. *See id.* Although the FEC does rely on its own precedent for points of law, sometimes instead of statutes, regulations, or court decisions, *compare* 11 C.F.R. § 9035.1(d) (2003) (stating that spending limits on presidential campaigns do not apply when a candidate does not receive government money during the matching-payment period) *with* Letter of FEC chairman to John McCain 2008, Inc. at 1 (Feb. 19, 2008) (relying on an AO to assert that a presidential campaign may withdraw from the government-financing system, which includes the spending limits, when the candidate has not received government money *or* pledged the certification of such money as security),[10] statutes,

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[8] *Available at* http://jamesmadisoncenter.org/WI/BriefforAppellee032207.pdf.

[9] *Available at* http://jamesmadisoncenter.org/WI/FECreply.pdf.

[10] *Available at* available at http://www.fec.gov/press/press2008/FECtoMcCain.PDF.

regulations, and court decisions are what provide notice to the public of what the law is. Under FECA, nothing else suffices. *See* 2 U.S.C. § 437f(b).

Commissioner Bradley Smith wrote in one matter that when parties and candidates are not on notice of the FEC's understanding of statutes and regulations, the FEC is without basis to pursue them. The public simply has "no fair warning of [c]ommission enforcement policy in such matters and traditional concepts of due process preclude ... penalties." *In re Rhode Island Republican State Cent. Comm.,* MUR 5369, SOR at 5 (Aug. 15, 2003).[11] To state the point generally, when the public has insufficient notice of the law, government may not enforce it. *See id.*

Thus, what is even worse than the FEC's relying on its own precedent, *see* 2 U.S.C. § 437f(b), is when the FEC expands enforcement in a way inconsistent with its own precedent. *See, e.g., In re The Media Fund,* MUR 5440, Resp. to the Br. of the Gen. Counsel in MUR 5440 on behalf of the Media Fund at 19-22 (Jan. 12, 2007);[12] *In re Swiftboat Veterans and POWs for Truth,* MURs 5511 & 5525, Conciliation Agreement at 11-14 (Dec. 11, 2006);[13] *id.,* Certification (Dec. 8, 2006).[14]

Just as bad is when the FEC retroactively applies law imposing greater restrictions on political speech. The FEC should never do this. *See In re Graf for Congress,* MUR 5526, SOR at 3 n.8 (Nov. 27, 2006) (collecting authorities).[15] Nevertheless, the FEC has done so. *See, e.g., Media Fund,* Resp. at 4-10; *Swiftboat Veterans,* Conciliation Agreement at 9-11.[16]

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[11] *Available at* http://eqs.sdrdc.com/eqsdocs/000001A1.pdf.

[12] *Available at* http://eqs.sdrdc.com/eqsdocs/00006687.pdf.

[13] *Available at* http://eqs.sdrdc.com/eqsdocs/00005900.pdf

[14] *Available at* http://eqs.sdrdc.com/eqsdocs/000058FB.pdf.

[15] *Available at* http://eqs.sdrdc.com/eqsdocs/0000588D.pdf.

[16] In 2003, the FEC assessed a hefty fine against a respondent via a settlement. Not until the FEC released a *subsequent* matter in 2004 did it become clear that the fine resulted from (1) referring to the "tenor" of the statutory and

On these and other points, both the commissioners and the able team of lawyers in the office of general counsel ("OGC") can help by making sure OGC lawyers function less like prosecutors seeking a conviction and more like dispassionate investigators who seek the facts and apply the law to the facts. That is, OGC should be less inclined toward expanding regulation and more inclined toward harmonizing first principles with the duty to defend FECA and FEC regulations. *See, e.g., Political Committee Status,* 72 FED. REG. 5595, 5597 (2007) (noting that under the major-purpose test, the phrase "campaign activity" means "the nomination or election of a [f]ederal candidate"). After all, "the activities that the FEC seeks to investigate differ profoundly in terms of constitutional significance from the activities that are generally the subject of investigation by other federal agencies. The sole purpose of the FEC is to regulate activities involving political expression, the same activities that are the primary object of the [F]irst [A]mendment's protection." *FEC v. Florida for*

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regulatory personal-funds definitions and (2) reading the phrase "by the candidate" into the definitions in effect during the alleged violation. *In re Robert,* MUR 5321, SOR at 4 & n.5 (July 13, 2004), *available at* http://eqs.sdrdc.com/eqsdocs/00001791.pdf. This was wrong, because it referred to the "tenor" rather than the text of the law. It was also wrong, because the alleged violation occurred in 2000, *id.* at 2, yet the statute and regulation did not include the phrase "by the candidate" until 2002 and 2003, respectively. *Id.* at 4 & nn.5-6 (quoting 2 U.S.C. § 431(26)(B)(vi) (2002) (referring to "gifts of a personal nature that had been customarily received by the candidate prior to the beginning of the election cycle")); 11 C.F.R. § 100.33(b)(6) (2003) ("Gifts of a personal nature that had been customarily received by the candidate prior to the beginning of the election cycle")). Suggesting that the concept "by the candidate" was already in the law, *id.* at 4 n.6, cannot be correct, because it renders the amendments meaningless. Thus, the fine resulted from retroactive application of the new definitions, *see id.* at 4 & n.5, which was erroneous. *See Graf,* SOR at 3 n.8 (collecting authorities).

Moreover, adding the phrase "by the candidate" to the personal-funds definition was a mistake, because it narrowed the definition of "personal funds." *See, e.g., Robert,* SOR at 2 (July 27, 2004), *available at* http://eqs.sdrdc.com/eqsdocs/00001792.pdf. The FEC should urge Congress to amend the statute to remove this phrase.

Kennedy Comm., 681 F.2d 1281, 1285 (11th Cir. 1982); *see also FEC v. Machinists Non-Partisan Political League,* 655 F.2d 380, 387 (D.C. Cir. 1981) (holding that enforcement efforts of agencies charged with regulating free speech require "extra-careful scrutiny from the court").

Follow the Law

The corollary to the principle that FEC procedures must respect first principles is that they must be faithful to FECA and the case law. For this to happen – and for the FEC to function less like a prosecutor seeking a conviction and more like a dispassionate investigator who seeks the truth – commissioners themselves should not only follow the law but also show by their actions that they follow the law.

They can start by calling a halt to the bragging about the fines the FEC collects. *See, e.g.,* FEC Annual Report 2006 at .pdf page 6 (June 30, 2007).[17] The measure of the FEC's success is the extent to which it follows the law, not how much it collects in fines. Following the law means not only pursuing those who violate the law but also not pursuing those who do not.[18]

Moreover, following the law means basing analyses on the original understanding of the law itself, *see* 2 U.S.C. 437g (2002); *cf.* THE FEDERALIST No. 78 (Alexander Hamilton),[19] and not on what someone thinks the law should be, *compare In re Lockheed Martin Employees' PAC,* MUR 5721, SOR at 5 (July 27, 2006) (attempting to limit the best-efforts affirmative defense/safe harbor to information about a contributor's occupation and employer)[20] *with* 2 U.S.C. 432(i) (2004) (containing no such limit) *and Lovely v. FEC,* 307 F. Supp.2d 294, 299 (D. Mass. 2004) (previously holding that "donor information" is only "one illustration of the application of this test" (brackets and citation omitted)), or on rules from other fields of law. *See, e.g., In re Gun Owners of Am., Inc.,* MUR 5874, SOR at 3 (Nov.

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[17] *Available at* http://www.fec.gov/pdf/ar06.pdf.

[18] *See supra* at 2-9.

[19] *See supra* at 2-9.

[20] *Available at* http://eqs.sdrdc.com/eqsdocs/0000565D.pdf.

15, 2007) (conceding that "the rule of lenity" is for criminal law but applying it to civil enforcement).[21] Nor should the FEC base analyses on negotiation among commissioners, which can descend into horse trading, *see, e.g.,* Tr. of FEC Open Session at 23:24-24:5 (Oct. 23, 2008);[22] Audio File of FEC Open Session (Oct. 23, 2008),[23] or on multifactor balancing tests that no one could have anticipated and which can descend into – and at best are little more than – result-oriented reasoning. *See, e.g., In re Kirk Shelmerdine Racing LLC*, MUR 5563, SOR at 1-2 (Oct. 16, 2006).[24]

To see the confusion that arises when the FEC does not follow the law, consider a recent episode. When FECA bans federal candidates and officeholders from soliciting nonfederal money[25] in connection with nonfederal elections, 2 U.S.C. § 441i(e)(1)(B) (2002),[26] and clarifies that such candidates and officeholder may still "attend, speak, or be a featured guest" at a state-, district-, or local-political-party fundraiser, *id.* § (e)(3), the clarification cannot mean, as a regulation and an AO concurrence assert, that such candidates and officeholders "may speak at such events without restriction or regulation." 11 C.F.R. § 300.64(b) (2002); AO 2007-11 at 2-3 (*California State Party Comms.*) (Aug. 3, 2007) (concurrence).[27] Whether federal

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[21] *Available at* http://eqs.sdrdc.com/eqsdocs/000067AA.pdf.

[22] Exh. 1.

[23] *Available at* http://www.fec.gov/audio/2008/20081023_02.mp3

[24] *Available at* http://eqs.sdrdc.com/eqsdocs/00005877.pdf.

[25] Nonfederal money is money not subject to FECA limits and bans. 11 C.F.R. § 300.2(k) (2002).

[26] Under FECA, *election* means an election for office, not a ballot measure. *See* 11 C.F.R. § 100.2 (1980).

[27] FEC AOs and related documents are at the search page http://saos.nictusa.com/saos/searchao. The FEC should revise its website so that the URL for an AO or related document brings up the AO or related document. As of this submission, the URL brings up the search page.

laws such as Section 441i(e)(1)(B) are "unambiguously related to the campaign of a particular federal candidate" and are constitutional, *Buckley,* 424 U.S. at 80; *North Carolina Right to Life, Inc. v. Leake,* 525 F.3d 274, 281 (4th Cir. 2008) ("*NCRL III*"), is of course an entirely different matter. Yet absent intervening authority such as an injunction or a statutory exception, the FEC is without authority to allow what Section 441i(e)(1)(B) prohibits. *See Shays v. FEC,* 528 F.3d 914, 933-34 (D.C. Cir. 2008); *cf.* 2 U.S.C. 437c(b)(1) (1997).

Confusion about Section 441i(e)(1)(B) is understandable given the confusing AOs on this subject. *See* AO 2003-03 at 2-9 (*Cantor*) (April 29, 2003); AO 2003-36 at 2-8 (*Republican Governors Ass'n*) (Jan. 12, 2004); AO 2003-37 at 16-19 (*Americans for a Better Country*) (Feb. 19, 2004). They are confusing in part because they are not clearly written, which leads to the next suggestion regarding FEC procedures.

Write Clearly

When one needs to read something multiple times to understand it, or when something is unclear even after multiple readings, *see, e.g., In re Tenafly Democratic Campaign 2004,* MUR 5619, SOR at 3-9 (Dec. 7, 2005),[28] something is amiss. Clear writing is not difficult, yet it does require clear thinking. While FECA's complexity can make this a challenge, it is doable. The FEC should not expect the public to understand what it does not write clearly.

Short sentences and active voice are a good way to start. Avoiding redundancy is another. There is no need to refer to "a deponent's sworn testimony at an enforcement deposition ... ,"[29] because what one says at a deposition is always sworn and is always testimony. Besides, where would a deponent speak other than at a deposition? *See also* 11 C.F.R. § 104.20(c)(7)-(8) (2007) (saying "donor who donated" three times). Moreover, there is no need for silver-dollar words when dime

[28] *Available at* http://eqs.sdrdc.com/eqsdocs/00004D22.pdf.

[29] Notice at 8.

or nickel words will do. Why say *limitation,*[30] *prohibition*,[31] *advertisement, practicable, prioritization,*[32] *methodology,*[33] or *funds*[34] when *limit, ban, ad, practical, prioritizing, method,* or *money* suffice? The FEC once used the phrase *at a point in time immediately prior to*. What was wrong with *before* or *just before*? Why use eight words when one or two suffice? And why not avoid double *he/she, his/her,* and *him/her* pronouns, which are cumbersome and unnecessary? Either write them out of the sentence or make the noun plural. Consider how much better this paragraph is without the dead wood:

> When [c]ommission attorneys take a ~~deponent's sworn testimony at an enforcement~~ deposition ~~authorized by~~ under section 437d(a)(4), only the deponent and ~~his or her~~ the deponent's counsel may attend. Under historical practice, the deponent had the right to review and sign the transcript~~,~~ but normally ~~a deponent was not allowed to obtain~~ could not have a copy of, or take notes on, ~~his or her own~~ the transcript until ~~the investigation was complete, *i. e.,* after~~ all depositions ~~had been taken~~ were complete.[35]

Or consider the introduction in the Notice:

> **SUMMARY:** The Federal Election Commission is announcing a public hearing on ~~the~~ FEC policies and procedures, ~~of the Federal Election Commission~~ including but not limited to, policy statements, advisory opinions, ~~and~~ public information, ~~as well as various elements~~ and parts of the compliance and enforcement processes such as audits, matters

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[30] *E.g., id.* at 5.

[31] *E.g., id.*

[32] *E.g., id.* at 14.

[33] *E.g., id.* at 16.

[34] *E.g., id.* at 5, 16, 19.

[35] *Id.* at 8.

under review, report analysis, administrative fines, and alternative[-] dispute resolution. The [c]ommission also seeks comment ~~from the public~~ on ~~the~~ procedures ~~contained~~ in the Federal Election Campaign Act of 1971, ~~as amended,~~ 2 U.S.C. 431 *et. seq.* ("FECA" ~~or "the Act"~~), ~~as well as the Commission's implementing~~ and FEC regulations.

DATES: Comments must be received ~~on or before~~ by January 5, 2009. ...

SUPPLEMENTARY INFORMATION:
Background and Hearing Goals
The [c]ommission is ~~currently~~ reviewing, and seeks ~~public~~ comment on, its policies, practices and procedures. The [c]ommission will use the comments ~~received~~ to determine whether ~~its~~ to adjust policies, practices or procedures ~~should be adjusted~~, ~~and~~/or ~~whether~~ conduct a rulemaking ~~in this area is advised~~.[36]

None of this is mere semantics. It impacts the law. For example, one of the *WRTL II* regulations says in unnecessarily complicated language that the FEC will consider whether a communication has "indicia of express advocacy" and whether the communication passes the appeal-to-vote test to determine whether the communication passes the appeal-to-vote test. In other words, the FEC will consider whether A is true and B is true to determine whether B is true. *See* 11 C.F.R. § 114.15(c) (2007). Quite apart from the overall merits of this *WRTL II* regulation and other law, *see generally Real Truth About Obama, Inc. v. FEC,* No. 08-cv-483 (E.D. Va.), *appeal docketed,* No. 08-1977 (4th Cir. Sept. 16, 2008),[37] this makes no sense. This is a problem that considering a clearly written version of the regulation may well have revealed.

Such poor writing leads to unclear boundaries around government authority, which leads to expansion of regulation and exacerbates the FEC's tendency to conduct itself as a prosecutor seeking a conviction rather than as an investigator

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[36] *Id.* at 1-2.

[37] Filings from this action are at http://jamesmadisoncenter.org/ObamavFEC/Index.html.

dispassionately seeking the truth. Moreover, vague law is especially dangerous when it regulates political speech. When government seeks to regulate something "so closely touching our most precious freedoms," regulations must be precise. *Buckley,* 424 U.S. at 41 (quoting *NAACP v. Button,* 371 U.S. 415, 438 (1963)). Vague laws threaten to "trap the innocent by not providing fair warning," they give reign to "arbitrary and discriminatory application," and they force citizens to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Id.* at 41 n.48 (quoting *Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972)). A vague law "puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. [This] blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim[,]" *id.* at 43 (quoting *Thomas v. Collins,* 323 U.S. 516, 535 (1945)), and increases the risk that government will violate the Supreme Court's command to assess political speech based only on its substance, *WRTL II,* 127 S.Ct. at 2666 (citing *Buckley,* 424 U.S. at 43-44), and not on such factors as intent, *id.* at 2665-66, effect, *id.* at 2665, 2666 & n.5, impact on an election, *id.* at 2667-68, what the speaker does not say, *see id.* at 2668, what the speaker said elsewhere, *id.,* timing, *id.; see also Media Fund,* Tr. of Probable Cause Hr'g at 35-37 (rejecting a commissioner's longstanding suggestion that timing determines whether "Boot Newt" is express advocacy),[38] or references to other sources, including sources the speaker prepared. *WRTL II,* 127 S.Ct. at 2669.

Vague laws compel speakers to hedge and trim in part because speakers fear FEC enforcement, a danger that is all the greater because "the substantial majority of the complaints filed with the [c]ommission are filed by political opponents of [the] respondents. These complaints are usually filed as much to harass, annoy, chill, and dissuade their opponents from speaking as to vindicate any public interest in preventing 'corruption or the appearance of corruption.'" *In re The Coalition,* MUR 4624, Statement for the Record at 2 (Nov. 6, 2001) (quoting *Buckley,* 424 U.S. at 25).[39] Even when respondents prevail, complainants may consider their endeavor a success when it has "forced their political opponents to spend hundreds of thousands, if not millions of dollars in legal fees, and to devote countless hours of staff,

[38] *Available at* http://eqs.nictusa.com/eqsdocs/0000668A.pdf.

[39] *Available at* http://eqs.sdrdc.com/eqsdocs/0000018E.pdf.

candidate, and executive time to responding to discovery and handling legal matters." *Id.* The "huge costs" of the investigation "will discourage similar participation by these and other groups in the future." *Id.*

Enforcement: Motions[40]

The Notice asks what motions the FEC should consider, how it should consider them, and what it should require of movants. Considering motions will expose commissioners, their staffs, and OGC to the perspective of respondents and thereby enable the FEC to function less as a prosecutor seeking a conviction and more as an investigator dispassionately seeking the truth. Whatever motions the FEC considers, it should consider motions to dismiss, motions to reconsider, and motions to find no reason to believe a violation has occurred ("RTB") – whether they are based on the Constitution, a statute, or a regulation – and set the motions for hearing when a respondent requests a hearing and four commissioners agree. There may also be occasions when commissioners or OGC will want to ask a respondent to appear. Respondents, especially those not from Washington or whose counsel is not from Washington, should be able to attend by telephone.

As for other questions in the Notice, it is unnecessary to require service of motions on the general counsel or commission secretary. Respondents should submit motions as they submit other items, and forward copies to others, including commissioners, at respondents' discretion. Nor is it necessary to toll the statute of limitations, because the analysis that goes into considering a motion to dismiss, reconsider, or find no RTB – *e.g.,* does the complaint state a violation of law? do the facts reveal that a respondent violated the law? – is analysis the FEC should do or should already have done anyway. If the FEC has not done this analysis already, then it may have been conducting itself as a prosecutor seeking a conviction rather than as an investigator dispassionately seeking the truth.

Commissioners should consider motions to dismiss, reconsider, or find no RTB as soon as possible because there is no need to devote (further) resources of the FEC or respondents to a matter, or parts of a matter, when the FEC may dismiss, or find no RTB as to, all or part of a matter. Delay in addressing a motion to dismiss or

[40]Notice at 7.

reconsider runs the risk of not only exposing respondents to unnecessary lawyers' fees, but also of unnecessarily extending the personal turmoil that an allegation of having violated the law, not to mention the investigation and the public release of private documents, can cause. Being cleared at the end of the day may provide little comfort to those whom the FEC has wrung through the enforcement process. For them, the process is the punishment.

Enforcement: Deposition and Document Production Practices[41]

During deposition and document production, the FEC should conduct itself, again, as an investigator dispassionately seeking the truth and not as a prosecutor seeking a conviction. It should focus on finding out what happened and whether the facts establish a violation of law, rather than focusing on proving that a violation has occurred. When the FEC does the latter rather than the former, it may well end up pursuing matters where there is no violation.

Enforcement: Extensions of Time[42]

The FEC should routinely grant extensions of time for responses to probable-cause briefs. When the FEC can take weeks or months to prepare such a brief, an extension of the 15 day deadline, 2 U.S.C. § 437g(a)(3), is hardly too much to ask. Instead of requiring a respondent to toll the statute of limitations, the FEC should factor a reasonable extension into the weeks or months it takes to prepare the probable-cause brief.

Enforcement: Appearance Before the Commission[43]

As with motions to dismiss and reconsider, the FEC should allow respondents to appear before RTB findings, and committees to appear regarding audit reports, when a respondent or committee requests a hearing and four commissioners agree.

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[41] *Id.* at 7-11.

[42] *Id.* at 11.

[43] *Id.* at 11-12.

There may also be occasions when commissioners or OGC will want to ask a respondent or committee to appear. An appearance can help commissioners and their staffs understand issues and is especially important given the enforcement nature of an audit. Again, respondents and committees, especially those not from Washington or whose counsel is not from Washington, should be able to attend by telephone.

Enforcement: Timeliness[44]

The Notice asks if the agency has too few staff. While OGC appears not to be understaffed,[45] the offices of commissioners who regularly desire their lawyers' thorough and candid advice – which has been true of most commissioners, to their credit – may be understaffed. Each commissioner's staff may include no more than two lawyers, or one lawyer and one secretary, except that the chair and vice chair may have an additional person. Under a recent change, however, there are two additional positions: One each for the commissioners of each major party. Commissioners should seek their staffs' advice about whether this addition allows the lawyers to advise commissioners fully.

As for commissioners' offices, commissioners and their staffs should cease their practice of regularly holding party caucuses before executive and open sessions. This fosters an "us against them" environment on both sides and discourages cross-party dialog. Commissioners have even held party huddles on the dais in the commission hearing room during recesses from open sessions. When this happens, the partisanship is not even subtle, and the FEC should not profess shock over questions about partisanship and result-oriented reasoning.

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[44]*Id.* at 14.

[45]On the subject of OGC staff, it is worth noting that, on occasion, OGC staff members have left the commission hearing room suppressing tears from the public berating they have just endured at the hands of a commissioner. Most commissioners never do this, and none ever should.

Enforcement: Priorities[46]

The Notice also asks whether the enforcement-priority system ("EPS") should give lesser or greater priority to matters (1) requiring complex investigations or (2) involving little consensus about the application of the law. Neither factor affects the importance of matters. Complexity and importance are independent variables. Moreover, as previously noted, only statutes, FEC regulations, *see id.* § 437f(b), and court decisions such as *WRTL II* establish rules of law. MURs do not. *See id.* Since they do not establish rules of law, they cannot establish consensus about the application of the law.

If the FEC seeks further input about the EPS, it should release the current system to the public for comment. It is difficult for the public to answer the open-ended questions in the Notice, or otherwise comment on the EPS, when the system is secret.

Enforcement: Memorandum of Understanding with the Justice Department[47]

The FEC is the agency with the best understanding of FECA, so it should not yield to the Justice Department any further than it already has.

Enforcement: Settlements and Penalties[48]

The Notice is right that settlements and penalties should be "equitable and appropriate." Yet they have not always been. Just as the EPS is secret, so is the full system the FEC uses to calculate penalties. The FEC should seek comment from the public on such a system, adopt a system, and release it to the public. *See id.* § 437g(a)(4)(C)(i)(II) (requiring that the FEC base civil penalties on "a schedule of penalties" that it establishes and publishes). While the federal sentencing guidelines are a good model, an FEC system need not be as complex. The Notice asks how

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[46] *Id.* at 14-15.

[47] *Id.* at 15.

[48] *Id.* at 15-16.

much consistency the Constitution requires, yet in this respect, the Constitution is the floor, not the ceiling. The FEC should do what is right, and the Constitution does not require everything that is right.

Another issue on settlements is their value as precedent. Although their value is zero, the FEC frequently cites them. The FEC should stop doing so. First, settlements do not establish rules of law. *See id.* § 437f(b). Second, even if they did, they would not be persuasive. Even respondents with meritorious defenses, including constitutional defenses, have given up and settled, even after defending their First Amendment rights all the way through to the probable-cause stage. *Compare Media Fund,* Tr. of Probable Cause Hr'g (March 21, 2007)[49] *with id.,* GCR # 8 (Nov. 2, 2007) (settlement)[50] *and id.,* Certification (Nov. 8, 2007).[51] While only settling respondents and their counsel may know the full reasons for settlement, in a sense it may be understandable for any one respondent – even though it believes in its cause and in *the* larger cause of free speech – to conclude, once the enforcement wringer begins, that it is simply not worth the cost for the *one* respondent to carry on the fight.

This burden – in addition to highlighting the value of pre-enforcement challenges in which plaintiffs assert they are chilled from exercising their First Amendment rights, *see, e.g., WRTL II,* 127 S.Ct. at 2658-63[52] – highlights an omission in federal civil-rights law. Those who successfully bring constitutional challenges – whether as plaintiffs or defendants – to law *other than* federal law may recover fees and costs. *See* 42 U.S.C. § 1988 (2000). The FEC should advocate amending federal law to allow those successfully challenging FECA or FEC regulations – whether as plaintiffs or defendants – to recover fees and costs as well.

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[49] *Available at* http://eqs.nictusa.com/eqsdocs/0000668A.pdf.

[50] *Available at* http://eqs.sdrdc.com/eqsdocs/0000668F.pdf.

[51] *Available at* http://eqs.sdrdc.com/eqsdocs/00006690.pdf.

[52] The term *pre-enforcement* applies before a law has been enforced. The term *chill* is a subset of *pre-enforcement* and applies in the First Amendment context before a law has even been violated. *See, e.g., New Hampshire Right to Life Political Action Comm. v. Gardner,* 99 F.3d 8, 13-14 (1st Cir. 1996) ("*NHRLPAC*").

Enforcement: Designating Respondents in a Complaint[53]

The FEC should not require that complainants designate respondents. Requiring complainants to designate respondents would focus the FEC's attention on a respondent and thereby encourage the FEC to conduct itself as a prosecutor seeking a conviction rather than as a dispassionate investigator seeking the truth. When the FEC receives a complaint, it should seek to discern what happened and whether there was a violation of law, keeping in mind that when a complaint does not state a violation of law, the FEC should find no reason to believe a violation has occurred. The FEC should not just dismiss the matter. *See Policy Regarding Comm'n Action in Matters at the Initial Stage in the Enforcement Process,* 72 FED. REG. 12545, 12546 (2007).

Other Programs[54]

To respond to two questions in the notice about other programs: Yes, respondents should be able to request to be in the alternative-dispute resolution ("ADR") program. And no, it is not sufficiently clear to the public how the FEC decides to audit particular committees, because this information, like the EPS and the full civil-penalty schedule, is secret. It should not be.

AOs[55]

To respond to several questions the Notice asks about AOs: Commenters should continue to present their views in writing but should not appear before the commission, just as *amici* may file briefs in a federal court but do not appear at a court hearing. However, the FEC should permit a requestor who asks to appear to do so if four commissioners consent. There may also be occasions when commissioners or OGC will want to ask a requestor to appear. Either way, allowing appearances would be better than the current "system" of either (1) looking to a requestor's

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[53]Notice at 16-17.

[54]*Id.* at 17-20.

[55]*Id.* at 20-21.

lawyers who are sitting in the commission hearing room and are able to answer an innocuous question during an open session by nodding or shaking their heads, or (2) taking a recess[56] to talk to the lawyers privately and then, if necessary, disclose a communication. If allowing a requestor to appear causes a problem with the 60 or 20 day deadline, *see* 2 U.S.C. § 437f(a)(1)-(2), the FEC can work that out with the requestor. Requestors, especially those not from Washington or whose counsel is not from Washington, should be able to attend by telephone.

More fundamentally, and as previously noted, the FEC may not cite AOs as precedent. *See id.* § (b). The only authority for rules of law are statutes, FEC regulations, *see id.,* and court decisions such as *WRTL II.* The only persons who may rely on an AO are the requestors, *id.* § (c)(1)(A), and others in the public involved in transactions or activities materially indistinguishable from those addressed in the AO. *Id.* § (c)(1)(B); *see also id.* § (c)(2). In other words, those who seek to engage in political speech may rely on AOs defensively, yet the government, including the FEC, may not rely on them offensively. The government may rely only on statutes, FEC regulations, and court decisions.

In addition, FECA requires that AOs issue only by a vote of four commissioners. *See id.* § 437c(c) (citing *id.* § 437d(a)(7) (1986)). Nevertheless, in AO 2008-15, the requestor heard that, per OGC's oral consultation with commissioners, one of the ads in question did not violate FECA. FECA does not allow this practice.

Another issue involves publicly released AO drafts, and other publicly released "blue drafts." They are habitually "submitted late." The FEC is supposed to release blue drafts a week before an open session. This allows the AO requestors and commenters, and the general public for other blue drafts, sufficient time to consider them carefully and offer comments. Receiving comments can constrain impulses to ratchet up regulation, or engage in horse trading or result-oriented reasoning.[57] It also

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[56]When commissioners take recesses at commission meetings, respect for the staff and the public requires announcing how long the recess will last and abiding by the schedule.

[57]*See supra* at 11.

allows the FEC to be away from the document for several days and then proofread it with fresher eyes before the open session. When the FEC releases documents late, and then unanimously adopts a motion "to suspend the rules for the timely submission of documents," it evinces disrespect and disregard for the public, just as the effective two-week deadline for comments on this Notice has.[58] Late-submitted documents on which commissioners must act – such as AOs or proposed regulations, *see, e.g.,* Agenda of FEC Open Session (Nov. 20, 2007) (containing four versions of *WRTL II* regulations, all stamped "submitted late," one on Nov. 16, one on Nov. 19, and two on Nov. 20, 2007, the day of the open session)[59] – are also more likely to be amended quickly during open sessions. *See, e.g.,* Audio File of FEC Open Session (Nov. 20, 2007) (adopting *WRTL II* regulations).[60] Such last-minute work cannot be as good as work done carefully over an extended time. *See, e.g., id.*[61] To be sure, there are times when blue drafts need to be "submitted late," but those should be the rare exception. For years, however, many blue drafts have been stamped "submitted late." Who has ever publicly objected to, much less voted against, suspending the rules? It is way past time for this to end.

Additional Items

Three additional sets of items:

● When the FEC cites documents, it often provides no page number, and when it cites a MUR, which it should not do, *see* 2 U.S.C. § 437f(b), it often cites the whole MUR without citing a document, much less a page number. A better practice is almost always to provide pinpoint cites plus the corresponding URL for the document; documents available electronically should have active hyperlinks, as these comments as submitted do. Without pinpoint cites, and perhaps without URLs, the only person who easily knows what the cite refers to is the author, who over time may not recall, and the FEC is in effect playing "hide the ball" with the public. While this

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[58] *See supra* at 2.

[59] *Available at* http://fec.gov/agenda/2007/agenda20071120.shtml.

[60] *Available at* http://fec.gov/audio/2007/20071120_00.mp3.

[61] *See supra* at 14.

may in effect assist the FEC in conducting itself as a prosecutor who seeks a conviction rather than as an investigator who dispassionately seeks the facts and dispassionately applies the law to the facts, the public deserves to know where the ball is.

● FEC documents, such as OGC briefs, frequently have a section on facts but introduce new facts in the discussion section. This should not happen. FEC documents should include all facts in a section on facts. Moreover, footnotes should be for supplemental information only. No other information should be in footnotes, especially not crucial information. In addition, footnotes should be in font the same size as the font in the text, and the FEC should follow the example of federal appellate courts by producing documents with, and requiring that submissions to the FEC be in, an easily readable 14 point font. *See* FED. R. APP. P. 32(a)(5)(A) (2005). The smaller the font, the harder it is to read.

● Finally, words matter, in no small measure because they reflect whether there is a presumption of freedom or regulation of speech.

Phrases such as *regulated community,* which habitually arises orally and in writing at the FEC,[62] reflect a presumption of regulation. Worse yet, they may embody a sense that the nice "community" dutifully obeys, sometimes yielding to infringement of its First Amendment rights. It is time to abandon such phrases.[63] The word *public* or the phrase *general public* would be a fine substitute for *regulated community.*

Furthermore, the FEC's perhaps subconscious habit of referring to what political speech FECA or FEC regulations "permit" or what political speech is "permissible," *e.g.,* 11 C.F.R. § 114.15, is offensive under a system of government where the presumption is freedom of speech. In the United States of America, persons are free to engage in political speech except when government constitutionally limits it. The presumption is not that political speech is banned except when government permits it. Nor is the presumption that political speech is

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[62] *E.g.,* Notice at 5, 6.

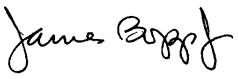
[63] *See supra* at 2-9.

regulated except when government permits it to occur without regulation. *See, e.g., Buckley,* 424 U.S. at 14-15.[64] The FEC's use of the words "permit" and "permissible" may reflect the FEC's tendency to conduct itself as a prosecutor seeking a conviction rather than as an investigator who dispassionately seeks the facts and dispassionately applies the law to the facts.

Request to Testify

The undersigned requests an opportunity to testify at the January 14, 2009, hearing.

Respectfully submitted,



JAMES MADISON CENTER FOR FREE SPEECH
James Bopp, Jr.

[64] *See supra* at 2-9.

EXHIBIT 1

AUDIOTAPE TRANSCRIPTION

from

FEC OPEN MEETING - OCTOBER 23, 2008

* * * * *

Taken for:

Bopp, Coleson & Bostrom
Kaylan Lytle Phillips
1 South Sixth Street
Terre Haute, Indiana 47807
812-232-2434

* * * * *

CROSSROADS COURT REPORTING
Renee R. Dobson, RMR
9733 Sable Ridge Lane
Terre Haute, IN 47802
812-299-0442

A P P E A R A N C E S

SPEAKERS:

Donald F. McGahn, II, Chairman

Steven T. Walther, Vice Chairman

Cynthia L. Bauerly, Commissioner

Caroline C. Hunter, Commissioner

Matthew S. Peterson, Commissioner

Ellen L. Weintraub, Commissioner

Jonathan Levin, General Counsel

Robert Knop, General Counsel

David Adkins, General Counsel

Amy Rothstein, General Counsel

P R O C E E D I N G S

CHAIRMAN MCGAHN: All right. Next up, Draft Advisory Opinion 2008-15 submitted by National Right to Life Committee, Inc.

Do we have any other late-submitted documents we need to--

UNIDENTIFIED MALE SPEAKER: Yes, Mr. Chairman. We'd move for the sustention of the attorney's--provision for the attorney's submission of documents to consider, Agenda Document Number 08-32 and Agenda Document 08-32A.

CHAIRMAN MCGAHN: Without objection, so ordered.

MR. ADKINS: Good morning, Mr. Chairman, Commissioners. The two draft advisory opinions before you, Agenda Document 08-32 and Agenda Document 08-32A, respond to an Advisory Opinion request submitted on behalf of the National Right to Life Committee, Incorporated. The NRLC is a nonstock, 501c4 nonprofit which has produced two radio advertisements. The NRLC intends to broadcast these advertisements immediately and continuously throughout the United States leading up to the November 2008 general election. The two advertisements involve a dispute between the NRLC

and Senator Barack Obama over a vote that Senator Obama cast as a member of the Illinois legislature and specifically whether Senator Obama mischaracterized that vote in subsequent statements. The only difference between the two advertisements is that the second advertisement features a concluding sentence that reads, "Barack Obama, a candidate whose words you can't believe in." The committee asks whether the NRLC'S use of general treasury funds to finance the broadcast of the advertisements would constitute prohibitive corporate expenditures or prohibitive electioneering communications.

The first draft, Agenda Document 08-32, concludes that the first advertisement does not contain express advocacy and would be a permissible corporate-funded electioneering communication. Therefore, the NRLC would be able to fund its broadcast with general treasury funds.

Regarding the second advertisement, the draft concludes that the ad does contain express advocacy, and therefore the NRLC's funding of its broadcast with treasury funds would constitute a prohibitive corporate expenditure.

By contrast, the second draft, which is

Agenda Document 08-32A, or revised Draft B, concludes that neither advertisement is an impermissible electioneering communication or contains express advocacy. Therefore, the NRLC would be able to use treasury funds to finance the broadcast of both advertisements.

However, we received two comments on the drafts, specifically the first draft, and one comment on the request. So I'm happy to address any questions you may have. Thanks.

CHAIRMAN MCGAHN: Thank you. First, I'd like to thank Mr. Adkins for his work on this. Whenever we get anywhere near the history of the agency on issues that involve interpreting Supreme Court cases is a very challenging area. And the herding of the cats here has taken up a lot of time, and I appreciate the effort and various drafts and--and helping all the commission with their thinking on this.

Two drafts and on the first ad, my sense is there's some agreement at least as to the conclusion. And then there's a difference on the--whether mentioning--whether putting that extra line in the ad changes the ad. Given that Draft B is from me, it's pretty clear where I

stand, but the thing about this is it's an AO request, and it's a rather targeted request, and it certainly is a request designed to put a tough issue in front of the commission. This is not an easy case. These were ads written in a way to probably raise a lot of issues. In a lot of ways this is a law school exam on the meaning of the Wisconsin Right to Life test. And--and, you know, it's tough as an agency to look at test cases because they always raise issues that may not otherwise be raised, but that's the beauty of the AO process. We still have to try to answer the questions as best we can. Any comments, thoughts, motions? Ms. Weintraub?

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. I support the other draft. We didn't originally have two drafts, so they're not--one of them doesn't have a letter, and the other one is just Draft B. I support the unlettered Agenda Document, 08-32. I think that it is most consistent with the Wisconsin Right to Life decision, with our regulation implementing the Wisconsin Right to Life decision, with our--with the arguments that this agency has made in court subsequent to that regulation, and the

Wisconsin Right to Life decision, and with the responses that we've gotten back from the court on--from lower courts on that regulation and on interpretations of it. I know a lot of people preferred the magic word test, and, you know, there were a lot of serious, respected people who for many years thought that was the end point of under the constitution of what could be regulated was magic words. But in the McConnell case the Supreme Court said that that test is functionally meaningless and expanded into the area of functional equivalent of express advocacy.

When we got to the Wisconsin Right to Life case, the court said, an ad is a functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. Under this test, WRTL's three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter.

And I'll just interrupt the quote at this point to point out that the ad in this case--I suppose it focuses on a legislative issue. It's a past legislative issue. It's a vote that was taken in the state senate in, I think, 2000, but it is--it does generally pertain to the issue of abortion, which clearly is an ongoing public policy concern that, you know, people get very animated about, and it's very important to a lot of people. So I'm, you know, not trying to read this too narrowly. The ad takes a position on--certainly on the vote on that issue. Doesn't really exhort the public to adopt that position or urge the public to contact public officials with respect to the matter. So it's not clear out of the four factors that the court mentioned as being consistent with that of a genuine issue ad. At least two of them are clearly missing from this ad.

Second, going back to the quote, their content lacks indicia of express advocacy: The ads do not mention an election candidacy, political party or challenger, and they do not take a position on the candidate's character, qualifications, or fitness for office.

Now, those factors, those two factors, I think, are clearly evident. The indicia of express advocacy, in the ad--in the second ad which has the tag line--let me find it--"Barack Obama, a candidate whose word you can't believe in."

A candidate, mentions that he's a candidate and says that his word can't be believed in. In the--in a recent case that we litigated, "The Real Truth About Obama,"--there were same counsel who has filed the request today--we had a couple of other ads where the tag line was in one case, "Now you know the real truth about Obama's Position on abortion. Is this the change you can believe in?" The commission took the position that that was not express advocacy.

The second ad had the tag line, "Obama's Callousness,"--and I'm going to put in a dot, dot, dot because the rest--there's a part in the middle that doesn't really go to the legal issue--Obama's callousness reveals a lack of character and compassion that should give everyone pause.

Should give everyone pause was enough for this commission to go into court and argue that that's express advocacy.

Now, the really interesting thing to me about, "The Real Truth About Obama" case is that the decision we got back from the Eastern District of Virginia, not normally a place where one finds really liberal interpretations of campaign finance laws, was that both of these ads were express advocacy; that both of them met the no-other-reasonable-interpretation test under Wisconsin Right to Life.

I was stunned and gratified by that because that actually had been my position all along, but, you know, I didn't expect them to agree with me.

But if you look at those two tag lines and say, well, that's express advocacy, I think it's really hard to come back and say a candidate whose word you can't believe in doesn't make the cut. As I said, either under the direct words of Wisconsin Right to Life or under our regulation, which the court in "Real Truth About Obama" said, you know, was a pretty close matchup to the court's opinion. It pretty much endorsed our regulation as an accurate and precise reflection of the Supreme Court's view.

Now, I recognize that the other draft does attempt to proffer some other explanations for

what was going on in that second ad. There are--
let's see. Am I on the right draft here? There
are, I think, four different proposed--let's see--
one, two, three, four--five different proposed
interpretations of the ad, none of which go to the
tag line, which is, of course, the difference
between the two ads. That's why I thought the
first draft, the unnumbered--unlettered draft that
I support was a good, narrow interpretation of
Wisconsin Right to Life and our regulation because
even though the ad, I think, does clearly go to
Senator Obama's character, without that tag line I
think it doesn't quite cross over the line that--
the very high bar that the Supreme Court set for
us in Wisconsin Right to Life. And as I said, the
alternative explanations for even the second ad in
the--in Draft B don't address that--that tag line.
What the draft does go on to say is that just
merely referencing Senator Obama as a candidate
doesn't convert the ad into an appeal to vote.
Maybe that's true, but in some hypothetical
context one could call somebody a candidate
without it being an appeal to vote for or against,
but there's no other explanation offered as to why
that word, candidate, is in there otherwise. What

else does it mean other than here's a candidate; somebody is running for election that you can't trust? What would any normal person do with that information? They would say, well, gee, I don't want to vote for somebody I can't trust, whose word I can't believe in.

The draft goes on to say that the ad, even the second ad doesn't comment on his--Senator Obama's fitness or qualifications for office.

On the contrary, it takes issue with Senator Obama's candor with respect to statements supposedly made by the senator about requester; hence, the ad does not say that Senator Obama is a candidate you can't believe in, but instead remains focused on what he supposedly said; thus stating that he's a candidate whose word you can't believe in with respect to what he said about requester. And I have to say I cannot find the legal difference or even the factual difference between those two statements; that he's a candidate you can't believe in as opposed to a candidate whose word you can't believe in because he's not doing mime out there on the campaign trail. He's using words. If you can't believe his words, what is it that you could believe about

this guy?

And it's interesting to me--and I don't know; maybe this is inadvertent--that the draft says--it doesn't comment on his fitness or qualifications for office, but it leaves out the word, character, which is in both the Supreme Court test and in our regulation. And I think character is really the key to this because when you say somebody's word can't be believed in, that's a very direct attack on character. You know, you say somebody's word can't be believed in? In some parts of the country them is fightin' words.

And certainly, when I try and teach my children about what it takes to be a person of good character, what traits they ought to be adopting, honesty and integrity and trustworthiness and having a word that people can believe in are really high on my list of good character traits. And I'm--I'm willing to bet that the other parents on this panel teach their kids the same thing. This does go directly to character. To say that a candidate is--someone who is a candidate whose word you can't believe in, I just don't think there's any reasonable interpretation of those words other than don't

vote for this guy. And it's not clear to me actually whether if the ad said don't vote for him because he's a candidate whose word you can't believe in, if that would be enough for my colleagues to say, that makes the ad express advocacy; or whether they would still say, well, there's all this issue talk in there, and that kind of outweighs the even magic words in the context of this ad. I'm not really sure what the end point is of that analysis. I just--I just don't think it's--it's reasonable. I don't think, again, if--if--again, looking to the more conservative of the two ads in, "The Real Truth About Obama," if Obama's callousness reveals a lack of character and compassion, that should give everyone pause is enough to trip the express advocacy standard, I don't see how saying that he's a candidate whose word you can't believe in could possibly be anything other than urging somebody--urging anybody who hears this to--to vote against him. And indeed, the fact that he came in here and said, I want a 20-day AO even though I'm not entitled to it, and I really wanted--my colleagues know I really did try to get an answer as quickly as possible on this. I

wanted to answer his question quickly because I always assumed that these ads were all about the election. You wouldn't need a 20-day AO if it was just an issue ad, and he wasn't seeking to affect the election. The reason that he needed to--was urging us to get him an answer quickly, I think, is because the election is coming up. And I think, you know, it would be better if we could have answered even quicker and even better if we could agree on the result; although, I'm not--I'm not optimistic.

So for all of those reasons I support the first draft, the unlettered draft, and not Draft B. And I would be happy to move Draft--Draft Unlettered--it's very confusing; sorry--Draft 08-32 at the appropriate time, or we could have further discussion, whatever my colleagues prefer.

CHAIRMAN MCGAHN: The problem I have with the unlettered draft is--well, essentially the flip side of the same coin that Commissioner Weintraub raised, page 8, lines 13 through 19, when we get into referencing Senator Obama as a candidate, significantly alters the tone of the advertisement, focussing it as much on Senator Obama's bid for the Presidency as his actions as a

state legislator.

Additionally, the advertisement manipulates Senator Obama's campaign slogan, "Change We Can Believe In" to attack his character and call into question his trustworthiness as a candidate whose word you can't believe in. The idea that the tone of the ad is now the standard to me is not a standard at all, and I think this ends up devolving into sort of an ink blot test kind of thing where you either see the vase or the two people talking to each other; and once you see one or the other, you're never going to see the other. To me the issue is whether or not you can read an ad as something other than an appeal to vote, and I think that both ads you can. Merely because you mention that someone is a candidate doesn't convert the ad into something other than--it doesn't convert that into an appeal to vote or preclude reading it as something other than an appeal to vote. Simply because they want an answer before the election that somehow we're going to read some inference into this being therefore the functional equivalent of express advocacy to me is a farfetched argument because folks who want to run issue ads tend to use the

campaign cycle as the vehicle to bring their issue to the public attention because, well, that's when the most people are paying attention. You're not necessarily going to run an issue ad on an issue of public in court, you know, the second week of January or something. I mean, you may run it during the Super Bowl; but you run it during election season, and that's when folks have the most opportunity to be heard. So, of course, they're going to use it.

And then as far as the issue being a past legislative issue, the issue that is coming up apparently constantly all across the country in state legislatures, when I first read the ad, I thought, well, okay, these folks are Right-to-Life folks who 365 days a year care about their issue set, and now they've found a vote from a current candidate that illustrates their issue; and they have been called liars, I guess, and they want to essentially defend themselves. They want to make the point that this fellow is a candidate who what he says about is you can't believe in. And that's how I read the ad originally, and that's how I still read the ad.

And it just goes back to what I said

initially. This is a tough case because these are essentially a test case. They're very carefully scripted ads. But when we get into those sorts of ads, it does become tough. And, you know, when you get into the tone of the ad and factors and that kind of thing, I just don't see that as--as something that provides a sort of bright-line rule that the Supreme Court thought they were doing in the Wisconsin Right to Life.

Since it was raised--I wasn't going to raise it, but "The Real Truth About Obama" litigation, the end of the opinion, the court says that plaintiff is free to disseminate their message and make any expenditures they wish. And so, you know, it seems--it seems like we may even disagree over what that district court said or didn't say.

With that being said, I mean, this is--I read the Wisconsin Right test as a rather simple bright-line test. And if you can--if you can read the ad as something other than an appeal to vote, that sort of begins and ends the analysis. And in fact, you can't really export the other--the other analyses without the full--the full package goods of the Wisconsin Right to Life; and in close calls the tie goes in favor of the speaker and all that

sort of thing. And to me I've tried to offer a variety of other reads of the ad. And whether or not they're reasonable or unreasonable, have that debate, that devolves into an issue of fact, and I don't read this as a fact issue. I read this as an issue of law; and hence, that's why I support Draft B.

Other comments?

COMMISSIONER PETERSEN: I'll just add briefly that I, too, interpret the Chief Justice's test that he set forth in Wisconsin Right to Life as setting a very high bar with regard to which kinds of ads may be subjected to BCRA'S prohibition against corporate or labor-funded electioneering communications. I mean, as has been said already, Chief Justice Roberts said in that case, "The Court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than in its appeal to vote for or against a specific candidate. The test contemplates that there may be close calls as we--as--and I agree with the chairman that this was crafted in a way to be a close call. And--but the tests set forth by the chief justice contemplates those close

calls; that you could have situations where two people who are reasonable, one could interpret it as being the functional equivalent of express advocacy. The other one could think of it as issue advocacy. And he said when that happens, the tie goes to the speaker and not the sensor. So the way I--again, I look at that test as setting a very high standard. And as the draft--Draft B shows, there are a number of reasonable interpretations other than as appeals to vote when you look at those ads that were proposed by the requester in this case. And for that reason I'll be supporting Draft B.

COMMISSIONER HUNTER: Mr. Chairman, thank you. I support the comments of the chairman and Commissioner Petersen. Today a non-for-profit corporation, the National Right to Life Committee, would like to exercise its First Amendment rights by running two radio ads 60 days before a general election regarding an issue that's at the core of its mission. BCRA states that a corporation may not pay for advertisements that mention a candidate within 60 days of the general election. National Right to Life can attempt to ensure that the speech doesn't cross the line by expressly

advocating the election or defeat of a specific candidate, by analyzing case law, the statute, and FEC regulations; but if they get it wrong, it's a potential federal crime.

In this case the National Right to Life Committee decided to file an advisory opinion, and we are in the unenviable position of determining whether an ad should be afforded the protection of the First Amendment. In June of '07 the Supreme Court decided the Wisconsin Right to Life decision, which we have talked about today, and held that the relevant section of BCRA unconstitutional as applied to issue ads that a not-for-profit corporation wanted to air within 30 days of a primary election. So very similar facts to the Wisconsin Right to Life decision are before us today, both non-for-profit corporations. Both would like to air ads within the relevant time period before the relevant electorate.

The Supreme Court found that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

As has been noted today, Draft B notes that

there are several other reasonable interpretations other than of an appeal to vote.

In drawing the line between campaign advocacy and issue advocacy, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it. I will support Draft B because I believe neither ad before us today is the functional equivalent of express advocacy under an analysis of the Supreme Court precedent or FEC regulations. Thank you.

CHAIRMAN MCGAHN: Ms. Weintraub again.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. I don't want to short-circuit anybody else who wants to talk. I just wanted to respond very briefly to a couple of comments that you made. It's true that the "Real Truth About Obama" decision says that the plaintiff is free to disseminate their message and make any expenditures they wish. The next sentence reads, "Their only limitation is on contributions based on constitutionally permitted restrictions." And that's always the case when we have to decide. Nobody is ever forbidden from speaking. The question is what kind of money can you use, and are there going to be any disclosure

ramifications. So I don't--

CHAIRMAN MCGAHN: Well, if I could just--

COMMISSIONER WEINTRAUB: Sure.

CHAIRMAN MCGAHN: So if a corporation--if a corporation would be banned from speaking, and this is a nonprofit entity giving us an Advisory Opinion request--they're a 501c4; they're not an MCFL accepted, so they are prohibited from speaking.

COMMISSIONER WEINTRAUB: Many organizations--I'm not--in fact, I'm pretty sure this one does, too--many 501c4's in that position have a PAC, and they fund these kinds of communications through their PAC. And I believe this one is one of those, so, again, it goes to funding.

CHAIRMAN MCGAHN: We agree that the C-4 is a separate entity from a PAC?

COMMISSIONER WEINTRAUB: Yeah.

CHAIRMAN MCGAHN: Okay. So the C-4 is banned.

COMMISSIONER WEINTRAUB: The C-4 can't do it out of their C-4 account. They can do it out of their PAC.

The only other point that I wanted to make is that I hear what you're saying about words like

"tone" and "factors," and I would be happy to strip all that language out and just go by a straight meeting of the words if that would gain any votes on the other side. I'm not optimistic that it would, but I--I'm happy to make the offer.

CHAIRMAN MCGAHN: I still struggle, though, with this. We have a requester who is a candidate--or who alleges that a candidate for national office called them a liar. And we're not going to get into what the truth or--I mean, the requester included all kinds of backup for the ad; and, you know, for purposes of this, I think you just take everybody at their word for the purposes of the AO. We don't need to get into whether or not who is winning the name-calling contest, but from a pulpit he wouldn't have had if he wasn't running for president. So my view is we shouldn't foreclose a nonprofit from defending itself in the same arena, which is his candidacy. I mean, if they want to comment at a time--and to me they throw out the word, candidate, not only--and I don't think--obviously, when you mention the word, candidacy, it has something to do with the election, right? But to me, that's not the only reason why they put in the word, candidate. It's

another reason not to believe what he's saying because here's a situation where the candidate is saying something about a grass-roots nonprofit group, and they want to say, well, is he a candidate whose words you can't believe in? And the word is that--what he said about this nonprofit is the way I read it. And I'm not so sure stripping out the tone language still changes the end result. If the tag line had said that--said a politician whose words you can't believe in, would that change your view?

COMMISSIONER WEINTRAUB: I'm not sure. That is a much closer call. I'd have to go back and look at the regulation again and see what--

CHAIRMAN MCGAHN: Okay. Well, let's take a look.

COMMISSIONER WEINTRAUB: It says, "Mentioned an election, candidacy, political party, opposing candidate or voting by the general public."

Maybe. I'd want it--I'd want to give it more than 10-seconds thought.

CHAIRMAN MCGAHN: So maybe if they changed that one word, that could--

COMMISSIONER WEINTRAUB: But you still have the--the very direct attack on character. So like

I said, I'd want to give it more than 10-seconds thought here at the table.

CHAIRMAN MCGAHN: Okay. So these are not as easy calls as some maybe would think. One word here and there can make a difference in these ads. But in any event, Vice Chair is looking at the regs as well.

VICE CHAIRMAN WALTHER: We all have looked at our regs off and on. I want to say this. I'm probably the most conservative approach on this one because I don't--to me, the added sentence in the second example doesn't make such a difference. In my own mind it makes one express advocacy, and the other one not. Everyone knows Obama is a candidate, so it's not really an issue. And even if it were an issue, I mean, even under Roberts' opinion there are minor things that can be identified and clarified, or interpretation can be developed through discovery. The whole idea, as I understand it, is that we don't want to be able to prevent free speech by engaging in protracted litigation, and then delay is what prevents it. But there is not a restriction even engaging in minor litigation which could clarify enough so that a decision could be made fairly quickly.

And I think when you look at this, then the next question is whose word you can't believe in. Well, if you read one, you can argue that perhaps Obama could redeem himself if he made an apology. But when you look at what's really the message here is the public would know about his extreme position that he opposed very defining every baby born alive after an abortion as deserving a protection; that what we're talking about is trying to convey that Senator Obama holds this position. It's unacceptable; and in addition, he's not telling the truth. And I really think at this particular point we find enough in it so that it appears an express advocacy; one is as well.

Because we're in litigation, however, I think my remarks are minor. I'm inclined to just make them as truncated as possible because in getting this interpreted in the next round of our litigation.

CHAIRMAN MCGAHN: Certainly agree. Ms. Bauerly?

COMMISSIONER BAUERLY: Thank you, Mr. Chairman. I share many of Commissioner Weintraub and a certain amount of Commissioner Walther's concerns about this draft as well. I'll

support Draft A because I believe it's consistent with our regulations and Supreme Court law.

And some of--just some of my concerns about Draft B include that I agree the Supreme Court set a very high bar, and I think that the commission went back and wrote a regulation consistent with that stringent test. And we could, you know, disagree whether that's the right test or the wrong test, but that's, you know, frankly not our role. But the Supreme Court did give us some guidance about how to interpret its tests, and in my view Draft B doesn't fully take account of what I think are important guidants--guiding factors that are directly applicable here. The Supreme Court talks about indicia of express advocacy including mentioning an election or a candidate and an attack on character. And I don't have children, but I agree with you. My mother taught me that telling the truth was an important thing.

So those are my concerns with Draft B, and so I will be supporting Draft A, or the unlettered draft as we refer to it.

COMMISSIONER WEINTRAUB: Make a motion?

CHAIRMAN MCGAHN: Time for a motion.

COMMISSIONER WEINTRAUB: All right,

Mr. Chairman. I move approval of Agenda Document Number 08-32. That's the one without the letter.

CHAIRMAN MCGAHN: That's the unlettered.

COMMISSIONER WEINTRAUB: The unlettered one.

CHAIRMAN MCGAHN: Even though we have a Draft B, we don't have a Draft A, so that would be Pseudo A. On that motion all in favor say aye.

VICE CHAIRMAN WALTHER: May I comment before we vote?

CHAIRMAN MCGAHN: Sure.

VICE CHAIRMAN WALTHER: I would just like to say I would support the portion of the motion that relates to question number 2, but not with respect to question number 1; so I'll be voting against it.

And I also do have problems with the use of the word, tone. I think that's not the message or really the appropriate one to make this decision on.

CHAIRMAN MCGAHN: Okay. All in favor of the motion say aye.

COMMISSIONER WEINTRAUB: Let me just throw in one more thought, and that is that I appreciate the vice chairman's comments. That's why I think this is the compromised draft because it says one

is, and one isn't express advocacy. I'm finished now.

CHAIRMAN MCGAHN: Okay. We can vote now?

COMMISSIONER WEINTRAUB: Yeah.

CHAIRMAN MCGAHN: We're all set?

COMMISSIONER WEINTRAUB: Yeah.

CHAIRMAN MCGAHN: Okay. I'm just looking both ways before I cross the street here. Okay. All in favor say aye.

COMMISSIONER WEINTRAUB: Aye.

CHAIRMAN MCGAHN: All opposed?

(MEMBERS VOTE NO)

CHAIRMAN MCGAHN: That motion fails 2 to 4 with Commissioners Weintraub and Bauerly voting in favor, the remainder voting in opposition for apparently different reasons.

Any other motions?

UNIDENTIFIED MALE SPEAKER: Mr. Chairman, I would move that we approve Agenda Document Number 08-32-A, otherwise known as Draft B.

CHAIRMAN MCGAHN: All in favor say aye.

(MEMBERS VOTE AYE)

CHAIRMAN MCGAHN: All opposed?

(MEMBERS VOTE NO)

CHAIRMAN MCGAHN: That motion fails 3-3 with

myself, Commissioner Petersen and Hunter voting in favor; Vice Chair, Commissioner Bauerly and Commissioner Weintraub voting in opposition. My sense is we have consensus; however, where five of us agree that the first ad--and I don't have the questions in front of me, so I don't want to say. Depending how you frame the question, do we have the okay for the c4 to run, I think, is the best way; and the second, we don't have consensus. So maybe the best thing to do at this point is ask the counsel to prepare a draft that reflects the common areas where we have in five on the first ad and then unable to reach a conclusion on the--with respect to the second ad. I think that's an accurate representation of the views up here. If it's not--yes.

COMMISSIONER WEINTRAUB: I just want to say to you what I've already said to one or two of your colleagues, and that is that I'm not--I haven't decided yet whether I would vote for that answer. In part, it depends on the legal rationale, but in part I wasn't actually kidding that I thought Draft A was a compromise. And I'm not sure that I'm willing to say, you know, just to give the permission without the complementary

restriction on the other ad. So I'm just--I'm continuing to ponder, and it will depend on the wording of the draft.

CHAIRMAN MCGAHN: Do we have any management administrative matters?

UNIDENTIFIED MALE SPEAKER: We do not.

CHAIRMAN MCGAHN: Okay. Anything else for the good of the order?

Okay. With that, we will adjourn our open session. Thank you.

(MEETING ADJOURNED)

STATE OF INDIANA)
) SS:
COUNTY OF VIGO)

I, Renee R. Dobson, a Notary Public in and for said county and state, do hereby certify that I listened to the audiotape recording of a meeting;

That said meeting was taken down in Stenograph notes and afterwards reduced to typewriting under my direction; and that the typewritten transcript is a true and accurate record of said meeting;

I do further certify that I am a disinterested person in this matter; that I am not a relative or attorney of any of the parties, or otherwise interested in the event of this matter, and am not in the employ of the parties.

IN WITNESS WHEREFORE, I have hereunto set my hand and affixed my notarial seal this 13th day of November, 2008.

Renee R. Dobson, Notary Public,
Residing in Vigo County, Indiana

My Commission Expires:
September 6, 2015