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Kathryn Ross, Paralegal
Office of Complaints Examination
& Legal Administration
Office of General Counsel
Federal Election Commission
1050 First Street, NE
Washington, DC 20002

Re: MUR 7530, Response of NRCC

Dear Ms. Ross:

This response is submitted by the undersigned counsel on behalf of the NRCC in MUR 7530. The Complainant alleges that "Respondents appear to have impermissibly allocated the costs of a television advertisement, resulting in the NRCC making, and the Balderson campaign accepting, an excessive in-kind contribution."[1] The Complainant generally contends that the advertisement at issue is an improper "hybrid" advertisement that lacks a generic party reference, and therefore, must be treated as a coordinated communication. The advertisement at issue is consistent with Commission precedent on hybrid communications and its costs were allocated according to established standards. The Complaint should be dismissed.

The advertisement at issue, titled "Progressive," is available at https://www.youtube.com/watch?v=v7y1xReMejE. The costs of "Progressive" were divided evenly between Balderson for Congress and the NRCC. Balderson for Congress and the NRCC each paid for its allocable share of the advertisement according to the well-established time-space approach.[2] Accordingly, each committee paid the costs attributable to the portion of the

[1] Complaint at 1.

[2] The advertisement was allocated as follows:
0:00 – 0:01 Compliance (2 seconds)
0:02 – 0:07 Balderson for Congress (6 seconds)
0:08 – 0:11 Divided evenly (4 seconds; 2 seconds allocated to candidate; 2 seconds allocated to party)
0:12 – 0:24 NRCC (12 seconds)
0:25 – 0:30 Balderson for Congress (6 seconds)
Accordingly, 14 seconds of the advertisement were allocated to Balderson for Congress based on the above time/space calculations, and 14 seconds to the NRCC. The remaining 2 seconds of compliance material was divided evenly.

advertisement from which it could reasonably expect to derive a benefit. The content of this advertisement, and the manner in which its costs were allocated and paid, is materially indistinguishable from dozens, if not hundreds, of similar advertisements aired from 2004 to the present.

The cost allocation of the advertisement at issue is consistent with the Commission's "hybrid ad" decisions from 2007 to the present. Contrary to the Complainant's assertions, the Commission has *never* required a party/candidate hybrid advertisement to include a generic reference that explicitly identifies a political party by name. "Progressive" is consistent with the Commission's conclusions in the audit of Bush-Cheney '04, Inc. In terms of language used, the generic reference to "progressives" in "Progressive" is no different than the generic references to "liberals in Congress" and "liberal allies" included in various advertisements aired by Bush-Cheney '04 and the Republican National Committee in 2004. The term "progressives," like "liberals in Congress" and "liberal allies," refers generically to other candidates of a Federal candidate's party without clearly identifying them. Just as the Republican National Committee derived benefit from the "liberals in Congress" and "liberal allies" portions of ads in 2004, the NRCC derived benefit from the "progressives" portion of "Progressive."

I. Legal Background

The legal basis for party/candidate hybrid television advertisements was explained in 2007 as follows:

> The basic principle behind two entities sharing the cost of a mutually beneficial, single communication is expressed in 11 CFR § 106.1, which states that "[e]xpenditures, including in-kind contributions, independent expenditures, and coordinated 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. For example, in the case of a publication or broadcast communication, the attribution shall be determined by the proportion of space or time devoted to each candidate as compared to the total space or time to all candidates." Although this regulation applies specifically to communications made jointly by two or more candidates, the Commission has consistently and repeatedly applied the principle of § 106.1 to situations not explicitly captured by the language of the regulation.[3]

Since then, hybrid ads have become a firmly entrenched part of the campaign finance landscape that both parties utilize. Despite repeated complaints, the Commission has never found these communications to violate the Act or Commission regulations.

[3] Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky on Final Audit Report on Bush-Cheney '04, Inc. at 2.

A. 2004 Presidential Hybrid Advertisements and Advisory Opinion 2006-11

Hybrid television advertisements date to the 2004 Presidential election. During the Commission's subsequent audits of Bush-Cheney '04 and Kerry-Edwards 2004, the Commission considered and declined to adopt audit findings that faulted the two presidential campaigns for exceeding the applicable expenditure limitations as a result of the hybrid advertisements that each campaign paid for jointly with its respective national party committee. The party-allocated portions of these advertisements included the following generic references:

- our leaders in Congress;
- Congressional leaders;
- liberals in Congress;
- liberal allies;
- Democrats;
- Democrats in Congress;
- Republicans;
- Republicans in Congress; and
- right wing Republicans.[4]

While the 2004 audits were pending, counsel for Kerry-Edwards 2004 submitted an advisory opinion request on behalf of the Washington State Democratic Central Committee. This request sought to apply the hybrid ad rationale used by the 2004 presidential campaigns to mailers and was understood by all to be an effort to force a resolution to the outstanding hybrid issue before the Commission voted on the Final Audit Reports.[5] Advisory Opinion 2006-11 was approved by a 4-1 vote. The Commission determined that:

> [T]he State Party Committee and the PCC of the clearly identified Federal candidate – whether a House, Senate, or presidential candidate – may each pay 50 percent of the cost of the mailing so long as the space devoted to the candidate in the mailing does not exceed the space in the mailing devoted to the generically referenced candidates of the State Party Committee.[6]

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[4] *See* Report of the Audit Division on Bush-Cheney '04, Inc. and the Bush-Cheney '04 Compliance Committee, Inc., https://transition.fec.gov/audits/2004/20070322bush_cheney_compliance_04.pdf; Report of the Audit Division on Kerry-Edwards 2004, Inc. and Kerry-Edwards 2004, Inc. General Election Legal and Accounting Compliance Fund, https://transition.fec.gov/audits/2004/20070531kerry_edwards_genl_acct_fnd.pdf; Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky On Final Audit Report On Bush-Cheney '04 Inc., https://www.fec.gov/resources/about-fec/commissioners/von_Spakovsky/speeches/statement20070322.pdf.

[5] *See* Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky On Final Audit Report on Bush-Cheney '04 Inc. at 7 ("Although Advisory Opinion 2006-11 was issued in April 2006, long after the events of the Audit took place, this Advisory Opinion very clearly establishes that the attribution method of 11 CFR § 106.1 may be used by candidates and political party committees that distribute mutually beneficial, joint communications. In fact, at the time this Advisory Opinion was approved, we understood it to settle the basic legal issue surrounding the 'hybrid ads' in this Audit.").

[6] Advisory Opinion 2006-11 at 2.

The Final Audit Report of Bush-Cheney '04, Inc. received a public hearing and final vote on March 22, 2007. Prior to this hearing, the Commission divided over whether the hybrid ads at issue had caused the presidential campaign to exceed the public funding expenditure limitation. Three Commissioners voted against a finding that the campaign exceeded the expenditure limitation, while three Commissioners vote to find that the expenditure limit was exceeded. The Final Audit Report treated the hybrid ad matter as an "additional issue" rather than a "finding and recommendation" and concluded that Bush-Cheney '04 complied with the expenditure limits. The Final Audit Report was adopted on a 4-1 vote.[7]

The Commissioners issued a total of three statements on the hybrid ad issue. Two of the three Commissioners who voted against finding a violation issued a Statement that serves as the audit equivalent of a controlling statement with respect to the hybrid ad issue.[8] The three Commissioners who voted to find that the hybrid ads violated the expenditure limitation issued a Statement that accused Bush-Cheney '04 of committing an approximately $40 million violation.[9] One Commissioner from this latter group issued a separate statement as well.

The Final Audit Report of Kerry-Edwards 2004 received a public hearing and final vote over two months later, on May 31, 2007. As in the Bush-Cheney '04 audit, the Commissioners divided by the same 3-3 vote on the issue of hybrid advertisements. And as in the Bush-Cheney '04 audit, the Final Audit Report treated the hybrid ad matter as an "additional issue" rather than a "finding and recommendation" and concluded that the Kerry-Edwards 2004 hybrid ads did not cause an expenditure limit violation. The Final Audit Report in Kerry-Edwards 2004, however, was adopted without dissent. In addition, the three Commissioners who issued statements accusing the Bush-Cheney '04, Inc. of serious, eight-figure violations of the law issued no statement drawing similar attention to the alleged hybrid ad violations of Kerry-Edwards 2004.[10]

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[7] The dissenting Commissioner explained in a separate Statement that she "will not approve a Final Audit Report that contains" a finding that Bush-Cheney '04 "complied with the expenditure limit." Statement of Commissioner Ellen L. Weintraub on the Report of the Audit Division on Bush-Cheney '04, Inc. (March 22, 2017).

[8] *See* Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky On Final Audit Report on Bush-Cheney '04 Inc.

[9] *See* Statement of Chairman Robert D. Lenhard and Commissioners Steven T. Walther and Ellen L. Weintraub on the Audit of Bush-Cheney '04, Inc.

[10] This differing treatment of the two identically-situated campaigns was foreshadowed in a footnote that suggested that Kerry-Edwards 2004 had committed a lesser violation. In their Statement on the Bush-Cheney '04 audit, the three Commissioners who voted to find a violation with respect to the campaign's hybrid ads noted:

> Press reports at the time reflect that the Kerry-Edwards campaign and the Democratic National Committee made similar expenditures for hybrid ads, though the Kerry-Edwards effort began later, spent substantially less and the ads did make generic reference to other party candidates.

Statement of Chairman Robert D. Lenhard and Commissioners Steven T. Walther and Ellen L. Weintraub in the Audit of Bush-Cheney '04, Inc. at 2 n.5. Counsel for the Kerry-Edwards 2004 campaign, however, made clear the campaign's intention was to duplicate the Bush-Cheney '04 effort as quickly as possible: "'It took us – the Kerry campaign – maybe 48 hours to figure out that's what they were doing, *and then we were doing the same thing*,' said

Notwithstanding the Commission's inconsistent public treatment of the two identically-situated committees, the two audits both concluded that the hybrid advertisements aired by the national party committees and presidential campaigns did not violate any provision of the Act or Commission regulations.

The controlling Statement on hybrid ads explained that this was not the first time that Section 106.1(a) had been applied to "allocations that were not provided for in the regulations."[11] This Statement also makes clear that the Commission had never required the party-allocable "generic reference" portion to include a "specific political party reference" such as "Republican" or "Democratic."[12] The controlling Statement explains:

> [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 beneficial to a political party. If a political party believes that it is benefited most by promoting "our leaders in Congress," why should the Commission object? And while the phone bank regulation requires 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 required to avoid dictating advertising content.[13]

Three other Commissioners explained at the same time that the only difference between what they viewed as an illegal hybrid ad and a permissibly-allocated ad under Section 106.1(a) was the inclusion of a second candidate's name. These Commissioners explained:

> If the advertisement clearly identifies other candidates, the expenditure is covered under a different section of the agency's regulations. 11 C.F.R. § 106.1. When there are multiple candidates specifically mentioned, the cost can be apportioned based upon the benefit reasonably expected to be derived by each candidate. That is determined by examining the proportion of space and time devoted to each candidate as compared to the total time and space devoted to all candidates.[14]

Marc Elias, an election lawyer at Perkins Coie who represented the Kerry campaign. 'For that 48 hours, they had a competitive advantage.'" Kenneth P. Vogel, *More ads on tap with possible FEC change*, Politico (June 15, 2007), https://www.politico.com/story/2007/06/more-ads-on-tap-with-possible-fec-change-004507 (emphasis added).

[11] Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky On Final Audit Report on Bush-Cheney '04 Inc. at 3.

[12] *Id.* at 6.

[13] *Id.*

[14] Statement of Chairman Robert D. Lenhard and Commissioners Steven T. Walther and Ellen L. Weintraub in the Audit of Bush-Cheney '04, Inc. at 3 n.6.

This, of course, is the approach the DCCC took in 2016, as discussed below.

B. 2003 and 2007 Commission Rulemakings

1. 2003 Phone Bank Regulation

The Complainant asserts that the 2003 phone bank regulation "specifies that the reference *must* name the party, such as by saying 'our great Republican team' or 'our great Democratic ticket.'"[15] This is an outright misrepresentation of the 2003 rulemaking. The language to which the Complainant presumably refers reads:

> [U]nder paragraph (a)(3), the communication *must refer generically to the other candidates* of the clearly identified Federal candidate's party without clearly identifying them. Generic references to "our great Republican team" or "our great Democratic ticket" *would satisfy* the latter requirement.[16]

These two phrases are obviously examples rather than requirements. Nowhere does the 2003 Explanation & Justification "specif[y] that the reference must name the party."[17] In fact, in 2007, the Commission confirmed that this language does not require the use of the name or nickname of the political party.

2. 2007 Hybrid Communications Rulemaking

Before the 2004 presidential audits had even concluded, the Commission moved to codify the approach that divided the Commissioners in the 2004 audits. A Notice of Proposed Rulemaking (NPRM) on hybrid advertising was issued on May 10, 2007.[18] Through this NPRM, "[t]he Commission is proposing to amend current 11 CFR 106.8 to address the attribution of disbursements for hybrid communications made through all types of 'public communication' as defined in 11 CFR 100.26."[19]

The NPRM included two proposals to define "generic party reference." The first alternative, which the Complainant references, "would require the generic party reference to refer to the other candidates as candidates of a political party by using the name or nickname of

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[15] Complaint at 6 (emphasis added).

[16] Final Rule on Party Committee Phone Banks, 68 Fed. Reg. 64,517, 64,518 (Nov. 14, 2003) (emphasis added).

[17] Complaint at 6.

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

[19] *Id.* at 26,571.

the political party, such as 'our wonderful Democratic team,' or 'the great Republican ticket.'"[20] The Commission proposed new regulatory language to impose this requirement:

> (iii) Generically refers to other Federal or non-Federal candidates of a political party *by using the name or nickname of the political party*, but without clearly identifying the candidates.[21]

The second alternative, which the Complainant fails to mention, would have retained the current regulatory language. Specifically, this proposal "would retain the language of current 11 CFR 106.8, which requires a generic reference to candidates without clearly identifying them, *but does not require the candidates to be identified as candidates of a political party, or that the political party be clearly identified.*"[22]

Ultimately, no further action was taken on the NPRM and no final rule was adopted. However, the Commission's characterizations of the two proposed alternatives makes clear that the language currently in the regulations (*i.e.*, the language of current 11 C.F.R. § 106.8), which has served as the basis for the Commission's hybrid ad rulings, does *not* require "that the political party be clearly identified" in the "generic party reference."

C. 2016 DCCC Advertisements

In 2016, the DCCC and its candidates aired more than a dozen different ads that "either expressly advocate[d] against the candidate's Republican opponent and Trump, or addresse[d] the Republican opponent's support of Trump."[23] These were plainly "hybrid" ads, but the Respondents argued that Section 106.1(a) applied because the ads identified more than one federal candidate. Specifically, "Respondents assert[ed] that they applied the allocation method for broadcast communications set forth in Section 106.1(a) of the Commission's regulations and allocated the costs according to the space and time devoted to each entity as compared to the total space or time devoted to all candidates."[24]

In the DCCC ads, "[t]he portion of each ad that addressed Trump was paid for by the DCCC." *Id.* at 6. At least five of these ads "did not expressly advocate Trump's defeat, but instead focused on policy issues" or "criticize[d] Trump's policy positions."[25] The Office of General Counsel concluded, and the Commission unanimously agreed, that "[i]n the

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[20] *Id.*

[21] *Id.* at 26,575.

[22] *Id.* at 26,572 (emphasis added).

[23] MUR 7169, *et al.* (DCCC, *et al.*), First General Counsel's Report at 5.

[24] *Id.* at 5-6.

[25] *Id.* at 7, 8.

circumstances presented in these MURs, we believe it was reasonable for Respondents to allocate the costs of the advertisements on a time and space basis pursuant to Section 106.1(a)."[26]

In short, the Commission accepted the Respondents' assertions that these advertisements were not "hybrid ads" that simply ignored the generic party reference requirement altogether and replaced it with Donald Trump-specific content. The Commission concluded that it was "reasonable" to allocate these advertisements under Section 106.1(a), even though the Commission had not "explicitly addressed" this sort of advertisement before. As a result, the DCCC's "innovative" approach in 2016 was approved.

II. Analysis

As noted above, the costs of "Progressive" were as allocated as follows:

- The first two seconds (0:00 – 0:01), featuring Congressman Balderson's stand by your ad message, are compliance related;
- The next six seconds (0:02 – 0:07), featuring Danny O'Connor speaking, were allocated to Balderson for Congress;
- The next four seconds (0:08 – 0:11) were divided evenly, with two second allocated to Balderson for Congress and two seconds to the NRCC;
- The next twelve seconds (0:12 – 0:24), discussing progressives' policy views, were allocated to the NRCC; and
- The last six seconds (0:25 – 0:30), discussing Danny O'Connor, were allocated to Balderson for Congress.

Based on this allocation, Balderson for Congress and the NRCC each paid 50% of the advertisement's costs.

The Complaint alleges that "the Balderson/NRCC television advertisement clearly does not qualify as a hybrid ad because it does not include a generic party reference, which is the critical element that makes a communication allocable."[27] The Complaint observes that the advertisement does not refer to "Democrats, the Democratic Party, or the Democratic ticket (or the Republican Party)" and claims incorrectly that "the Commission has been clear that such terms do not serve as a replacement for the required generic party reference."[28] The Complainant's source for this claim is the non-controlling Statement in the Bush-Cheney '04 audit. The Final Audit Reports in the two presidential audits do not affirm this view. Advisory Opinion 2006-11 does not impose any such requirement.[29] In the 2007 Notice of Proposed

[26] *Id.* at 9.

[27] Complaint at 6.

[28] *Id.*

[29] Advisory Opinion 2006-11 specifies that "[i]n connection with the 2006 general election, the State Party Committee proposes to prepare and distribute one or more mass mailings, each of which will refer to only one clearly identified Federal candidate and will also generically refer to other candidates of the party who are not

Rulemaking, the Commission acknowledged that the standard it had applied in the 2004 audits and Advisory Opinion 2006-11 did not require a party name to be used.

The NRCC reasonably believes that use of the term "progressives" coupled with discussion of the policy preferences of "progressives" is a beneficial way for it to refer to *other* Democratic Party candidates *like* Danny O'Connor. The NRCC reasonably believes it derived a party-wide benefit from discussing the policy preferences of "progressives" in the advertisement at issue.

Since 2007, the Commission has consistently rejected a view of the law that requires micro-managing the content of hybrid advertisements. Two Commissioners explained:

> We see no reason then, why only a generic reference that includes the name of a political party should be viewed as potentially beneficial to a political party. If a political party believes that it is benefited most by promoting "our leaders in Congress," why should the Commission object? And while the phone bank regulation requires 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 required to avoid dictating advertising content.[30]

Here, the NRCC reasonably believed it was benefited most by criticizing "progressive" policy positions, and that it would be beneficial to the party as a whole to critique "progressives." Again, "why should the Commission object?" It should not, and the Commission should continue to "apply any 'generic reference' requirement with the flexibility required to avoid dictating advertising content."

This is precisely the flexible approach the Commission took in 2017 when it approved the DCCC's use of "Trump" content as the party-allocated portion of a series of advertisements. In these advertisements, "[t]he portion of each ad that addressed Trump was paid for by the DCCC" and "[t]he portion of each ad that addressed the Republican congressional candidate was either paid for in full by the corresponding Democratic congressional candidate or split between that Democratic candidate and the DCCC spending under its coordinated party expenditure limit."[31] The General Counsel explained that while the Commission "has not expressly addressed allocation" for each of the categories of ads at issue in MUR 7169, *et al.*, "it was reasonable for

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clearly identified." The Commission did not require, and the Requestor did not indicate, that *every* generic reference would include a party name. Rather, the request and response simply tracks the language of 11 C.F.R. § 106.8 regarding the allocation of phone bank communications.

[30] Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky On Final Audit Report on Bush-Cheney '04 Inc. at 6.

[31] MUR 7169, *et al.*, First General Counsel's Report at 6.

Respondents to allocate the costs of the advertisements on a time and space basis pursuant to Section 106.1(a)."[32]

In the present matter, the Respondents allocated the costs of "Progressive" in accordance with Commission precedent regarding hybrid and allocated communications. The advertisement was carefully constructed and allocated to ensure a 50/50 cost division based upon a time/space review. The language and subject matter of the party-allocated portion is comparable to past advertisements considered and approved by the Commission. Both the advertisement and the allocation of its costs are fully consistent with Commission precedent.

III. Conclusion

For the reasons set forth above, the Commission should find no reason to believe a violation occurred and dismiss the Complaint.

Sincerely,

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[32] *Id.* at 9.